Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01015/2013

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, Strand
on 6 February and 17 March 2014

signed: 24 March 2014
sent out: on 01 April 2014

Before

President of the Upper Tribunal, Mr Justice McCLOSKEY (on 6 February)
Upper Tribunal Judge John FREEMAN
Upper Tribunal Judge Mark O'CONNOR (on 17 March)

Between

AMARJIT SINGH GILL

appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

respondent

Representation:
For the appellant: *James Collins*, counsel instructed by TA Capron & Co, Grays, solicitors
For the respondent: Mr Nigel Bramble (on 6 February); Mr Steven Walker (on 17 March)

DETERMINATION AND REASONS

INTRODUCTION

What follows is the decision of the Tribunal, written by and dealing with the following:
paragraphs 1 – 29: McCloskey J, setting aside the decision of the first-tier panel for error of law;
paragraphs 30 - 73: Judge Freeman, giving our reasons for re-making it as appears below.
Though the first-tier panel made a direction for anonymity, there was no application before us for that to be continued, and, if there had been, we should have refused it. There are no children involved, except for the grandchildren, whose interests are taken care of by the initials used for them, to be followed by anyone else who refers to them. The appellant's article 2/3 case, on which the original application for anonymity was based, was withdrawn before us.

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1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*") on 13th May 2013, determining to deport the Appellant from the United Kingdom. The Appellant appealed. By its determination promulgated on 23rd October 2013, the First-Tier Tribunal (the "*FtT*") allowed his appeal on human rights grounds, giving effect to Article 8 ECHR. The Secretary of State appeals, with permission, to this Tribunal.

BACKGROUND AND CHRONOLOGY

2. The basic facts are uncontentious. The Appellant is of Indian nationality and is now aged 58 years, having been born on 3rd December 1955. The stand out fact in the appeal matrix is that he murdered his wife on 27th January 1999. On 31st January 2000, he was convicted of this murder and sentenced to life imprisonment. A tariff of 14 years was determined. This expired on 1st February 2013. The Appellant continues to be detained in closed conditions. The evidence establishes that he had become depressed and had begun drinking heavily for some time prior to the murder. During the 22 years of the marriage there were several incidents of domestic violence, with some associated police interventions. The violence perpetrated by the Appellant against his wife became progressively worse, featuring physical injuries and medical treatment.

3. At the time of the murder, the Appellant's spouse had expressed a request for a divorce and her intention to leave. She began making appropriate preparations. Three days later, during the morning, the Appellant purchased alcohol from a local retail outlet. Shortly before 2pm, he informed his neighbours that his wife was dead. The cause of death was a single stab wound to the neck. The victim also had a number of deep and substantial cuts, mainly to her left forearm and hand, consistent with defensive injuries inflicted by a knife. A receipt confirming the purchase of a lock-knife by the Appellant some weeks previously was found. The Appellant stated that he had consumed half a bottle of vodka, while denying having killed his wife. This followed a trial during which the Appellant's defence had been that he was too drunk to form the requisite murderous intent. He admitted manslaughter, pleading the defences of diminished responsibility and provocation to the murder charge. He alleged that his wife had taunted him with an affair, giving rise to morbid jealousy. He was convicted unanimously after the jury had deliberated for less than one hour. The sentencing Judge stated:

> "*Amarjit Singh Gill, last year, armed with a knife, when, I am quite satisfied, you had been drinking but were not so drunk that you did not know what you were doing, you took the life of your wife who had led a wholly blameless life looking after you and your family and you drove that knife through her neck and took her life.*"

4. In the trial Judge's report, it was recorded that the Appellant was an alcoholic. The expert evidence upon which he sought to rely provided no substance to his claim of diminished responsibility. The trial Judge commented:

> "*The Defendant was regularly violent and bullying towards his wife. It did appear that his drunken behaviour had deteriorated after a short spell in prison for driving with excess alcohol. Prior thereto he was of good character but he had lost his job and had become depressed.*"

The Judge recommended a tariff of 14 years with which the Lord Chief Justice concurred.

5. As regards the history, the following additional material facts are either proved or admitted:

   (i) Having entered the United Kingdom on 27th February 1977 with limited leave, the Appellant was granted indefinite leave to remain on 17th April 1989.

   (ii) He married his wife in April 1977 and there are three children of the marriage who are now aged 35, 32 and 24 years respectively.

   (iii) The Appellant worked as a clothing trader in London until 1996 when he was sentenced to three months imprisonment for driving with excessive alcohol.

   (iv) This was followed by a failed business venture and a conviction for common assault on his brother.

   (v) Complaints to the police of assaults upon his wife dated from January 1997.

THE CURRENT FAMILY CIRCUMSTANCES

6. None of the children is married. The oldest, a son, is single. His visits to his father in prison were irregular and infrequent. His level of telephone contact with his father is unclear. In 1999/2000, this son brought his mother's ashes to India. Paragraph 30 of the FtT determination records the following:

> "*…. His cousin approached him. This was his mother's nephew; he said it was tragic and he felt sorry for him but his side of the family had been talking about it and were looking for revenge.*"

In his witness statement, he said something rather different:

> "*I do however have a genuine fear that if my father is returned to India he is very likely to be killed in retaliation of my mother's death by her family who have expressed their intention to harm him should he return to India.*"

He suggested that it would be difficult for his father to relocate to another area of India on account of his vulnerability and severed ties. He confirmed that most of his mother's family lived in the United Kingdom.

7. The second of the two sons is in a stable relationship within which three children have been born. He claimed that his maternal aunt continues to reside in the village from where his father originated. This aunt has male and female siblings. In his statement he suggested that they "*… would be intent on revenge for the honour of their family …..*" The third of the children, the only daughter, was aged 9 years when the murder occurred. She attested to the previous violence. She has graduated and is training to be a forensic psychiatrist. She too expressed concerns about a revenge family killing. In common with her brothers, she has maintained telephone contact with her father in prison. All three children have forgiven the Appellant and plan to provide him with a home following his release from prison.

8. On behalf of the Secretary of State, there was no challenge of substance to the evidence rehearsed in the immediately preceding paragraphs. We make findings of fact accordingly. Any discrepancies in the evidence of the three children, for example in the form of inconsistencies between their written statements and their testimony to the FtT, were of minor dimensions and Mr Bramble on behalf of the Secretary of State did not seek to magnify them.

9. Turning to the evidence relating specifically to the Appellant, we make the following findings:

   (a) He is truly remorseful and repentant.

   (b) He has solemnly resolved to renounce alcohol for the remainder of his life. His ability to give effect to this resolution is not entirely clear.

   (c) The Appellant's limited command of the English language has hindered his progress in prison. In particular, offence focused work – which would include victim awareness and alcohol awareness courses – has been hampered and delayed.

   (d) In its most recent report, dated July 2013, the Parole Board declined to either direct the Appellant's release or recommend his transfer to open prison conditions. It recorded his behaviour throughout his sentence as "*excellent*". He was assessed as "*a model prisoner*". He had been working well in the tailoring workshop. Offence focused and avoidance of reoffending measures, in particular substance misuse avoidance, remained outstanding.

   (e) The risk of the Appellant reoffending is low. Similarly, the risk of him inflicting serious harm on the public is low. In contrast, the risk of him inflicting serious harm on a known adult, being anyone in a close relationship with him, is assessed as high.

   (f) In the words of the Parole Board, "….. *with core offending risk factors still unaddressed, it is not possible to evaluate any risk management plan and none has*

yet been prepared ….. You have not made sufficient progress in reducing your risk to a level consistent with protecting the public from harm".

10. We make certain further findings based on the report prepared by a forensic psychologist, Ms Durrant, in October 2012. This forms part of the material considered by the Parole Board subsequently, in July 2013. Based on his performance in the working memory and processing speed tests, Ms Durrant opined that the Appellant may have a "*Learning Disability*". This would account for the limited development of his reading and writing skills. A suitable referral "*will be made*" to the appropriate agency. His limited command of the English language will be a continuing challenge. The report contains advice and various recommendations to the professionals with whom the Appellant would be engaging subsequently. It is an admirably balanced, professional piece of work. Its clear tenor was that there is real scope for successful professional interventions vis-à-vis the Appellant. Its concluding message to the Appellant was the following:

> "*You are likely to find it too difficult to complete group work programmes. It is possible that you have a learning disability (a learning disability affects the way a person learns new things). It can be mild, moderate or severe. Psychological Services are going to tell In-Reach the result of this assessment and seek to find support for you and to work out the best way to work with you to reduce your risk.*"

It appears, however, that, for whatever reason, there has been no real subsequent progress.

THE DEPORTATION OF FOREIGN CRIMINALS: LEGAL FRAMEWORK

The Decision in MF (Nigeria)

11. The starting point is the relevant provisions of the Immigration Rules, namely paragraphs 398, 399 and 399A. The legal status and effect of these provisions have been determined by the Court of Appeal in **MF (Nigeria) – v – Secretary of State for the Home Department** [2013] EWCA Civ 1192, which post-dated the first instance Determination. The Court of Appeal held, firstly, that in cases where it is necessary to decide whether the deportation of a foreign criminal would breach rights under Article 8 ECHR, great weight should be given to the public interest where the offender is unable to satisfy any of the provisions of paragraphs 398, 399 and 399A. The Master of the Rolls continued:

> "*[**40**] …… It is only exceptionally that such foreign criminals will succeed in showing that their rights under Article 8(1) trump the public interest in their deportation ….*
>
> *[**42**] ….. In approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal …..*

> *[**43**] The word 'exceptional' is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the 'exceptional' circumstances.*"

The Court held, secondly, that the new Rules constitute "*a complete code*". In the balancing exercise to be performed, the Tribunal applies a proportionality test as required by the Strasbourg jurisprudence. The words "*other factors*" refer to "*all other factors which are relevant to proportionality*": paragraph [**39**]. To summarise:

(a) If a claimant's case falls within paragraph 399 or 399A, the exercise for the Tribunal involves a single stage only.

(b) If a claimant's case does not fall within either of these provisions, it is necessary to consider, and determine, whether there are exceptional circumstances outweighing the public interest in deportation: this introduces a second stage in the exercise.

<u>The decision in SS (Nigeria)</u>

12. In order to properly appreciate the potency of the public interest in play, it is necessary for Tribunals to be alert in every case to another recent decision of the Court of Appeal, **SS (Nigeria) – v – Secretary of State for the Home Department** [2013] EWCA Civ 550. The central theme of this decision is the powerful weight to be attributed to the Parliamentary intervention in this field.

13. By section 32 of the UK Borders Act 2007, a "*foreign criminal*" is any person who has received a sentence of at least 12 months imprisonment after 1st August 2008 or was in custody pursuant to such a sentence on that date and had not been served with a Notice of Deportation. It is appropriate to interpose here section 3(5) of the Immigration Act 1971:

> "(5) *A person who is not a British citizen is liable to deportation from the United Kingdom if –*
>
> *(a) the Secretary of State deems his deportation to be conducive to the public good; or*
>
> (b) *another person to whose family he belongs is or has been ordered to be deported.*"

Section 32 of the 2007 Act continues:

> "*(4) For the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good.*

(c) *The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).*"

Section 33 provides:

"*(1) Section 32(4) and (5) –*

(a) Do not apply where an exception in this section applies (subject to subsection (7) below) …..

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach -

(a) A person's Convention Rights, or

(b) *The United Kingdom's obligations under the Refugee Convention.*"

The remainder of Section 33 is not central to the present exercise. Section 55 of the Borders, Citizenship and Immigration Act 2009 is another important element in the primary legislation framework:

"*(1) The Secretary of State must make arrangements for ensuring that –*

(a) The functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom …

(2) The functions referred to in subsection (1) are –

(a) Any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer …..

(3) A person exercising any of those functions must, in considering the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)."

14. Delivering the main judgment of the Court in **SS,** Laws LJ, referring to the deportation of foreign criminals under the 2007 Act, stated:

"*[48] ... Where such potential deportees have raised claims under Article 8, seeking to resist deportation by relying on the interests of a child or children having British citizenship, I think with respect that insufficient attention has been paid to the weight to be attached, in virtue of its origin in primary legislation, to the policy of deporting foreign criminals ……*

[49] The policy's source, however, is as we have seen one of the drivers of the breadth of the decision maker's margin of discretion when the proportionality of its application in the particular case is being considered."

Summarising, Laws LJ stated:

"*[55] …. Proportionality, the absence of an 'exceptionality' rule and the meaning of 'a primary consideration' are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision maker's margin of discretion: the policy's source and the policy's nature and in particular to* ***the great weight which the 2007 Act attributes to the deportation of foreign criminals****.*"

[Emphasis added.]

And in a later passage, Laws LJ refers to "*the extremely pressing public interest in the Appellant's deportation*": paragraph [58].

15. It is appropriate at this juncture to highlight the distinctive functions of the First-Tier Tribunal and the Upper Tribunal. Where an appeal against an order deporting a foreign criminal is pursued, it is incumbent on the First-Tier Tribunal to consider all relevant evidence, to make appropriate findings of fact and, finally, to make its decision in accordance with **MF (Nigeria)** and **SS (Nigeria),** together with all of the other legal rules and principles in play in the particular case. These include the guidance provided by the highest courts on the correct approach to Article 8 ECHR and section 55 of the Borders, Citizenship and Immigration Acts 2009. The Upper Tribunal, however, has a different function. Where a further appeal is brought in this forum, permission having been granted, such appeal is, pursued, per section 11(1) of the Tribunals, Courts and Enforcement Act 2007 –

"*…. on any point of law arising from a decision made by the First-Tier Tribunal ….*"

Thus the question to be determined by the Upper Tribunal is whether the First-Tier Tribunal has erred in law in making its decision. In thus deciding, the Upper Tribunal does not conduct an open - ended enquiry into or review of the first instance decision. Rather, both the appeal and the ensuing appellate tribunal's decision are circumscribed by the terms in which permission to appeal has been granted. In determining such appeals, the Upper Tribunal, in common with the First-Tier Tribunal, must give full effect to all of the legal rules and principles in play, in every case. The decisions in **MF** and **SS** will frequently have a significant influence in deciding whether the First-Tier Tribunal has erred in law in any of the respects falling within the permitted grounds of appeal. In conducting this exercise, the Upper Tribunal will scrupulously examine the substance of the decision of the First-Tier Tribunal.

ARTICLE 8 ECHR AND SECTION 55 OF THE BORDERS, CITIZENSHIP AND IMMIGRATION ACT 2009

16. While Article 8 ECHR and section 55 of the 2009 Act have separate juridical identities, they are clearly associated. Thus where the Article 8 family life equation involves children, section 55 is immediately engaged. In **ZH (Tanzania**) [2012] UKHL …… , Baroness Hale emphasised that the best interests of the child must be considered first – see paragraph [26] – while Lord Kerr stated:

> "*[46] …….. A primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.*"

As was recognised in **Mansoor – v – Secretary of State for the Home Department** [2011] EWHC 832 (Admin), the onward march of the Strasbourg jurisprudence has involved the progressive development of the best interests of the child principle under Article 8.

17. Most recently, in **Zoumbas – v – Secretary of State for the Home Department** [2013] 1 WLR 3690, the Supreme Court has considered the interplay between the best interests of the child and Article 8 ECHR, rehearsing what might be termed a code comprising seven principles:

    (1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;

    (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of a paramount consideration;

    (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

    (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

    (5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

As Lord Hodge observed, the genesis of these principles is found in the United Nations Convention on the Rights of the Child 1989, particularly Article 3(1) which, in turn, influences the interpretation of Article 8 ECHR.

18. Expanding on the seven principles set out above, Lord Hodge continued:

> "*[13] We would seek to add to the seven principles the following comments. First, the decision-maker is required to assess the proportionality of the interference with private and family life in the particular circumstances in which the decision is made. The evaluative exercise in assessing the proportionality of a measure under article 8 ECHR excludes any "hard-edged or bright-line rule to be applied to the generality of cases":* ***EB (Kosovo) v Secretary of State for the Home Department*** *[2009] AC 1159, per Lord Bingham at para 12. Secondly, as Lord Mance pointed out in* ***H(H)*** *(at para 98) the decision-maker must evaluate the child's best interests and in some cases they may point only marginally in one, rather than another, direction. Thirdly, as the case of H(H) shows in the context of extradition, there may be circumstances in which the weight of another primary consideration can tip the balance and make the interference proportionate even where it has very severe consequences for children.*"

Previously, in the case of **H(H),** the Supreme Court held, in an extradition context, that the United Kingdom's international treaty obligations prevailed over the best interests of the children in question. Lord Hodge continued:

> "*The third principle in para 10 above is subject to the first and second qualifications and may, depending on the circumstances, be subject to the third. But in our view, it is not likely that a court would reach in the context of an immigration decision what Lord Wilson described in* ***H(H)*** *(at para 172) as the "firm if bleak" conclusion in that case, which separated young children from their parents.*"

One of the obvious merits of the opinion of Lord Hodge in **Zoumbas** is that it consolidates in a single, accessible source – though not exhaustively - the principles which must be applied in cases of this nature. We would add that where, as in the present case, the context is one of deportation, it is incumbent on Tribunals to give full effect to the decisions in **MF (Nigeria)** and **SS (Nigeria)**: see paragraphs [5] – [9] *supra.*

19. We are mindful of the staged approach espoused by the House of Lords in **Razgar – v – Secretary of State for the Home Department** [2004] 2 AC 368, per Lord Bingham at paragraph [17], which has the great merit of minimising the risk of a tribunal falling into error in the generality of cases involving Article 8 ECHR. In the present case – as agreed by both parties – the relevant question is the fifth and final one, namely whether the

anticipated interference with the right to respect for the family life under scrutiny is proportionate to the legitimate public end sought to be achieved. We recall the observation of Lord Bingham, in the same case, that the fifth question is: "*more judgemental*" than the others: paragraph [24].

20. In **Huang – v – Secretary of State for the Home Department** [2007] 2 AC 167, Lord Bingham, referring to the task of the appellate immigration authority in determining Article 8(2) issues, stated:

> "*[16] ….. The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on. In some cases much more particular reasons will be relied on to justify refusal, as in Samaroo v Secretary of State for the Home Department [2001] EWCA Civ 1139, [2002] INLR 55 where attention was paid to the Secretary of State's judgment that deportation was a valuable deterrent to actual or prospective drug traffickers, or R (Farrakhan) v Secretary of State for the Home Department[2002] EWCA Civ 606, [2002] QB 1391, an article 10 case, in which note was taken of the Home Secretary's judgment that the applicant posed a threat to community relations between Muslims and Jews and a potential threat to public order for that reason. The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed. It is to be noted that both Samaroo and Farrakhan (cases on which the Secretary of State seeks to place especial reliance as examples of the court attaching very considerable weight to decisions of his taken in an immigration context) were not merely challenges by way of judicial review rather than appeals but cases where Parliament had specifically excluded any right of appeal.*"

We have reproduced this passage in full as it invariably repays careful reading.

21. As appears above, we are alert to the more recent developments in the jurisprudence in this field, in particular the decisions of the Court of Appeal in **SS (Nigeria)** and **MF (Nigeria)**. The most important consideration is that in cases involving the deportation of foreign criminals, such as this Appellant, the public interest in play is an especially powerful one. This, in turn, will inevitably influence the primacy of importance which tribunals must accord to the best interests of any affected children. Statements such as

that of Lord Bingham in **EB (Kosovo)** [2009] 1 AC 1159, paragraph [12], must be considered in their full juridical context, as this has evolved. Furthermore, in a succession of decisions, the higher courts have emphasised the intensely fact sensitive nature of every case: see, for example, **EB,** paragraph [9], per Lord Bingham. We also bear in mind the guidance to be derived from **Huang**, paragraph [18]:

> "*Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved.*"

Furthermore, we remind ourselves that there is no legal test of exceptionality: **Huang**, paragraph [20] and **MF (Nigeria)**, paragraphs [40], [42] and [43], which we have set out at **[11] above**. Finally, there is no hard-edged or bright line rule to be applied in the evaluative exercise which Article 8 invariably requires **EB (Kosovo)**, paragraph [12].

CONSIDERATION AND CONCLUSION

22. At this juncture, it is necessary to focus on the grant of permission to appeal, which is couched in terms that it is arguable that the FtT failed to give adequate reasons for the following three matters:

    (a) Its acceptance of the claim that the Appellant's life would be at risk if deported to India.

    (b) Why it considered that the Appellant could not relocate within India simply on account of his low IQ and poor working memory.

    (c) It's finding that the three children "*…have all put their life on hold to a large extent*".

    We remind ourselves that the question for this Tribunal is whether, within the confines of the permitted grounds of appeal, a material error of law is demonstrated. In conducting this exercise, we construe the determination of the FtT as allowing the Appellant's appeal

on the grounds of both Article 3 and Article 8 ECHR. This interpretation of the first instance decision was not disputed on behalf of the Secretary of State.

23. In the relevant passages of its determination, paragraphs [71] – [80], the FtT nowhere articulated the case which it was addressing, namely the contention that the deportation of the Appellant to India would infringe his rights under Article 3 ECHR. Secondly, the FtT did not formulate the legal test to be applied. Thirdly, the FtT made no clear conclusion about this aspect of the appeal. This approach was erroneous in law. In Soering – v – United Kingdom [1989] 11 EHRR 439, the test devised by the ECTHR was whether the removal of the person concerned to a foreign state would result in him being "*… subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment ..*": paragraph [88]. The threshold is one of –

> "*….. substantial grounds* [having] *been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country.*"

See paragraph [91].

This test was repeated by the Court in Cruz Varas – v – Sweden [1992] 14 EHRR 1, paragraphs [69] – [70]. Later, in its seminal decision in Chahal – v – United Kingdom [1997] 23 EHRR 413, the Strasbourg Court formulated the test in these terms:

> "*[86] ….. As far as the Applicant's complaint under Article 3 is concerned, the crucial question is whether it has been substantiated that there is a real risk that Mr Chahal, if expelled, would be subjected to treatment prohibited by that Article. Since he has not yet been deported, the material point in time must be that of the Court's consideration of the case.*"

The FtT failed to pose, or address, this test in its determination.

24. The FtT found that credible "*threats*" (plural, erroneously so)) had been made against the Appellant and that he would be at real risk of death or serious harm at the hands of his deceased wife's family if he returned to his home village, which is close to where his wife's siblings live. It acknowledged that he would probably have the support of his stepmother and stepbrothers. It found that this would probably provide him with insufficient protection. The FtT also found that the authorities "*would be unable or unwilling to offer him effective protection*". It appears to have based this latter finding on the report of the United Nations Special Rapporteur (26 April 2013). The difficulty with this finding is that the particular passage invoked describes killings perpetrated by the security forces and armed groups. There is no mention of revenge killings or anything comparable. Furthermore, the FtT's determination contains no acknowledgement or analysis of the isolated nature of the relevant conversation, the vintage thereof or the absence of any repetition or reignition during the 13/14 years which had elapsed

subsequently. In adddition, applying a test belonging to a quite different juridical context, that of refugee law, enunciated by the House of Lords in Januzi – v – Secretary of State for the Home Department [2006] UKHL 5, viz: "*… whether it is reasonable to expect the Claimant to relocate or whether it would be unduly harsh to expect him to do so …..*" (per Lord Bingham, paragraph [21]), the FtT:

(a) found, by implication, that the Appellant **could** relocate from the very narrowly delimited area where he would be exposed to the risk in question; and

(b) failed to make satisfactory findings about why internal relocation would entail "*undue hardship*" for the Appellant.

In this latter respect, we consider that the rehearsal – in paragraphs [79] and [80] – of his childrens' subjective description of him as vulnerable and the pure speculation in which the Tribunal then engaged about the Appellant's migration history, all of which neglected entirely the facts and factors on the other side of the equation, is insufficient. Simultaneously, the Tribunal failed to engage with the fact that the Appellant had spent over one third of his life in the country of his birth, has existing family members there and has business experience.

25. We are alert that the test to be applied – in its several, interrelated formulations - is whether there is sufficient evidence to support the Tribunal's findings in this respect or whether the evidence is inconsistent with and contradictory of such findings or whether the only true and reasonable conclusion contradicts them: Edwards – v – Bairstow [1956] AC 14, per Lord Radcliffe. While acknowledging that the threshold engaged is not lightly overcome, we conclude, on the assessment elaborated above, that this aspect of the FtT's determination is infected by error of law. In thus concluding, we have addressed the first and second elements of the grant of permission to appeal together, given their close inter-relationship.

26. The third, and final, element of the grant of permission to appeal focuses on the FtT's assessment and determination of the Appellant's case under Article 8 ECHR. In this respect, the relevant passages of the determination are contained in paragraphs [81] – [105]. As a perusal of these passages demonstrates, the FtT:

(a) Failed to acknowledge the manifestly limited and impoverished nature of the family life of the protagonists concerned during a period of some 14 years duration.

(b) Erroneously took into account section 55 of the 2009 Act, in circumstances where all of the children are adults.

(c) Failed to properly explore the adult children's claims of emotional dependency on their long imprisoned father.

(d) Contains the frankly bizarre finding that the three children "…. *have all put their life on hold to a large extent until such time as they could be reunited with their father*" – in circumstances where there is an abundance of evidence that they have made substantial advances in their personal, business and professional lives.

(e) Fails to explain the assessment that all of these adult children: "*…. rely heavily on the prospect of* [their father's] *return to the family home at an indeterminate point*" – [paragraph 95].

27. Having regard to the legal principles to be applied, each of these aspects of the FtT's determination must be closely scrutinised. We conclude that they simply do not withstand analysis. They lack the necessary quality of sufficient and persuasive reasoning. These are critical ingredients of an omnibus conclusion under Article 8 ECHR which no reasonable Tribunal, properly directing itself on the law and the facts, could have made. There is an associated demonstrable failure to properly appreciate and give effect to the powerful public interest in favour of deportation of this Appellant. We conclude that this ground of appeal must, therefore, succeed.

DECISION ON HOME OFFICE APPEAL

28. Cases of the present kind frequently throw up complex and acutely challenging questions for tribunals. Their determination requires the most careful judicial scrutiny and consideration. Easy answers and solutions are a rare species. The arduous nature of the judicial task in this sphere must never be underestimated. Having said that, we consider that the application of the legal framework to the present matrix points to a clear outcome.

29. We allow the appeal to the extent that the decision of the FtT is set aside. Having regard to the nature of the errors of law which we have found, the appropriate forum for remaking the decision is the Upper Tribunal. The parties will have an opportunity to address argument on the question of preserved findings.

RE-HEARING

30. This came before the present panel (McCloskey J having expressly not reserved it to the previous one) on 17 March, when the appellant and his sons Hardip and Sukhjinder Singh Gill, and his daughter Kulvinder Kaur Gill all gave oral evidence before us, in addition to their commendably short statements, the effect of which we shall set out below. There was no controversy about the first-tier panel's findings of primary fact; but, as all those involved were clear, questions of judgment and evaluation were for us to consider, in the light of the evidence and argument before us.

31. The previous Upper Tribunal hearing was held, with Mr Collins's consent, in the absence of the appellant, who through reasons beyond our control had not been brought. In those circumstances, nothing in the previous Upper Tribunal panel's decision was intended as a final finding of fact, and we were prepared to make up our own minds on any primary or secondary question of fact before us. To make this entirely clear, we have re-visited both the evidence and the authorities where this seemed appropriate.

APPELLANT

32. The appellant is now 57, and has been in prison for the murder of his wife since 1999: he says in his statement that he very much regrets that crime. Since then, he says he has had almost daily contact with his children, though he has not wished to distress them by seeing their father in prison, and wants to make amends for the wrong he did their mother. He would have nowhere to live in India, as one of his brothers has emigrated to Canada, and another to Essex, near where the appellant's children live. The appellant expresses fears for his own safety, if he returned to India; but Mr Collins expressly, and realistically disclaimed in his skeleton argument any reliance on the article 2/3 case previously put forward. The appellant says the statement has been read over to him in Hindi, as his English is poor; but, as one would expect with a Sikh from the Punjab, he gave oral evidence before us in Punjabi.

33. Giving details of his contact with the children, the appellant told us he used to ask after their welfare, and whether they had eaten properly. If released, he would never marry again, but would live for them, and for his grandchildren. He had never taken drink or drugs in prison, as he realized that it was through his abuse of drink that he had lost his wife, and his children their mother: if he went back to it, they would abandon him. It would be hard for them to visit him, if he were returned to India, as they had their own children: so far this only concerned Sukhjinder, who was waiting on his release to marry, so he could give him his blessing. It had been hard for any of his children to get on with their lives while he was in prison: although they had been outwardly successful, they couldn't help comparing their own situation with that of others who still had both parents.

34. On the appellant's prospects of release, if allowed to stay in this country, Mr Collins referred us to a letter from the Parole Board, following a hearing on 16 July 2013. The appellant's representative had made it clear that he was not seeking release at this stage, but only a progressive move to open conditions. This too however had been refused by the panel. After reviewing the appellant's history, they said this (under s. 4 'Risk factors'):

> It appeared to the Panel that you minimised your violent behaviour, blamed your wife for boasting about an affair, suggested she was happier than she clearly was and put all of the blame for the offence upon depression-fuelled alcoholism.

35. The panel went on to say (at 5 'Evidence of progress during sentence') that the appellant's behaviour had been excellent throughout, with no disciplinary adjudications or positive drug tests. He was described as polite, and a 'model prisoner', and had been working well in the tailoring shop for some time. However there had been little progress in addressing his offending behaviour, because his English was limited, and he had made little effort to improve it since he arrived here in 1977. He had only been able to do a couple of courses, one in 2004, and one in 2009, thanks to a Punjabi-speaking friend who had gone through the material with him. This was the aspect which concerned those responsible for him; but he had been assessed as unsuitable for the Healthy Relationships Programme, which should have been the way forward. There was a reference to a report by a trainee psychologist, Sharon Durrant, who had mentioned the appellant's "… early learning problems … current difficulties in processing and remembering new information, and the need for educational and risk reduction work to proceed on an individual level. It is most unfortunate that only now is action to be taken in this area."

36. We have Miss Durrant's report in the appellant's bundle, though Mr Collins did not refer us to anything specific in it, beyond the general assessment of his (the appellant's) 'Full Scale' IQ as 'extremely low'. We note however at her paragraph 8.1 that she takes the view that this "… cannot be meaningfully interpreted due [*sic*] to the differences between his Verbal Comprehension Index score, which falls within the *Extremely Low* range, and his Perceptual Reasoning Index score, which falls between the *Borderline* to *Average* range. The four index scores are the most helpful and meaningful measures of [the appellant's] intelligence, however his Verbal Comprehension Index Score should be viewed with extreme caution due to his difficulties with the English language". The other indices seem to be Working Memory (*Extremely Low to Borderline*) and Processing Speed (*Extremely Low to Borderline*). We shall give our own views on the evidence about the appellant's mental state, so far as it is relevant for our purposes, when discussing our conclusions.

37. Giving (at 6 – 8), the panel's own assessment of the continuing risk posed by the appellant, they confirmed the OASys assessment of 2012 that it was low, so far as re-offending was concerned; but, if that did happen, then the risk of serious harm to a known adult was high. There was no risk of absconding; "However with core offending risk factors still unaddressed it is not possible to evaluate any risk management plan and none has yet been prepared." The appellant's decision not to apply for release had been realistic, as he hadn't made the necessary progress to a point where this would be safe for the public, and "further tailor-made work" would be required before he was able to understand why this was so, and to address the problems he posed. Despite the support from two of his children, the panel were unable to recommend his transfer to open conditions.

HARDIP

38. Hardip is 35: he was born on 30 June 1978, so was already 20 when the appellant murdered his mother on 27 January 1999. In his statement he says he has spoken to the appellant almost every day in prison since, and visited him from time to time. He has set up his own cleaning company; but he doesn't want to get married, though he has no-one special in mind at present, till the appellant is released and able to come to his wedding and give his blessing. He would like the appellant to stay here, so he and his siblings and any family he might have of his own could all enjoy life together in this country.

39. In oral evidence Hardip told us he hadn't been able to see his father in prison to start with: he had been too young at the time to understand why, but the police hadn't let any of them visit him till the trial was over. As the eldest, he had had to look after the family home (in Grays, Essex), and his siblings, especially his sister Kulvinder, who was only nine at the time, with help from the appellant's brother and sister-in-law and his sisters. However they were a strong family, and "pulled together": they stood by the appellant, though it had been "very raw" and "a roller-coaster" to start with, and Hardip now had a good relationship with him again.

40. Hardip said it had been in 2008 that he first heard of the possibility that the appellant could be deported: we have seen correspondence between his solicitors and the Home Office, dating from 2007, which mentions that possibility, but there is nothing to show that any notice of intention to deport had been served at that time. It follows that the notice of liability to automatic deportation of 16 November 2008 was the first live shot in this campaign.

41. Hardip said they had all thought the appellant would simply have to serve the 14-year tariff period, and then would be able to come home to them: finding out that this was not necessarily so was "a bit of a kick in the teeth" for them, and like going back to the bad days of 1999. As for "putting his life on hold", in the words of the first-tier panel, he had felt unable to get married or move on in his personal life without his father there. So far as visiting him in India was concerned, Hardip had only been there twice in his life, once in 1991, and then again in 1999 or 2000 to scatter his mother's ashes. He didn't believe the appellant would return to drink, and took the view that he had genuinely changed, and would stay that way, with his own help and that of the family as a whole.

42. *Cross-examined*, Hardip said he had gone out to work, where he didn't remember, shortly after the appellant went to prison: Sukhjinder was studying, and Kulvinder still at school, so he had been the main breadwinner, with some help from his uncle at first. *Re-examined* about why he shouldn't be able to visit the appellant in India, Hardip said he wouldn't be able to afford it, and there would be "nothing there" for his father. Dealing with his own attitude to the country, he said this, though recognizing that he would need to go there if his father were sent back:

> I couldn't adapt to it: I know people who've come from there themselves, and find it very hard to adapt when they go back.
> It's the environment, a dusty, dirty, busy big place, not comfortable, not safe to go out on your own, a different way of living

<u>SUKHJINDER</u>

43. Sukhjinder, now just 33 (born 9 March 1981), unlike his siblings, is no longer living all the time at the family home, but splits it between them and his own family at his baby-mother Gurmit's in north London. He works as a transport manager, and they have two daughters, S1, now 12 (born 9 November 2001), and S2, only just five (14 March 2009), but have delayed getting married, so as to have the appellant's blessing in person. Sukhjinder recounts the appellant telling him to save his money for his family, rather than spend it on coming to see him in prison. They went to see him about three or four times a year, with Gurmit and S2; but they didn't take S1, as the prison environment would be too upsetting at her age.

44. While Sukhjinder didn't condone what the appellant had done, he took the view that he had already been punished by the law, and keeping in touch with him was what he needed to stabilize his life emotionally: returning the appellant to India would be like a prison sentence for the rest of the family; but if he stayed here, then Sukhjinder hoped for "inner peace, a bit of closure". His children too were anxious for a normal relationship with their grandfather. Nothing could replace a blood tie, and the appellant was anxious for them all to avoid his bad example.

45. *Cross-examined*, Sukhjinder said he had only been to India once, on a family holiday in 1990; but of course he would go and see the appellant, if he were returned there. That would be a major financial burden, and he couldn't do it every time he had a holiday from work. Sukhjinder said England was his country, and having to go to India and see his father would be "asking me to step out of my comfort zone".

46. Sukhjinder had been at college when the murder happened, and "it ruined my education": he had had to go out and do agency work to help pay the bills. His uncles had provided a safety-net, but they had their own families to look after. There had been arrears on the mortgage on the family home; but Hardip had taken charge and dealt with them. Though the two of them had had their difficulties from time to time, they had relied on each other.

<u>KULVINDER</u>

47. Kulvinder (now 24, born 15 June 1989) was only 9 when the appellant murdered her mother: at that age, her brothers and extended family did their best to shield her from what had happened, by not talking about it in front of her. She is now training to be a forensic psychologist, building up her practical experience before starting a two-year training course; but she would also like to get married some day, preferably with her father's personal blessing: a professional qualification and appointment were one thing,

but there was also the emotional side of life. Kulvinder told us about the happy relationship she had had with her father before the murder: he had always been there for her when she got back from school. She too described the shock of hearing he was liable to deportation.

48. *Cross-examined*, Kulvinder agreed she had been aware of that possibility since 2008; but before that she had thought her father might be able just to come home. She would visit him in India, though she didn't know how often she would be able to afford it. she had been away from home at university, and in the early days had stayed with her uncle Ranjit; but the appellant had always offered her as much support as he could with her studies over the phone, bearing in mind his own lack of education.

LAW

49. The ground-rules for cases of this kind are by now so well known as not to require any extensive discussion. Since Mr Collins cited it extensively himself, the writer makes no apology for referring to the judicial head-note in *Masih* [2012] UKUT (IAC) 46:

(a) In a case of automatic deportation, full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place.
(b) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them.
(c) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge.
(d) The appeal has to be dealt with on the basis of the situation at the date of the hearing.
(e) Full account should also be taken of any developments since sentence was passed, for example the result of any disciplinary adjudications in prison or detention, or any OASys or licence report.

50. A more recent pronouncement by the Court of Appeal came in *SS (Nigeria)* [2013] EWCA Civ 550, inevitably by way of a re-statement of principle, rather than any startling new *aperçu*: while it may be news to some that the principle involved in automatic deportation is Parliament's will, and not the Secretary of State's, that should have been clear enough since the 2007 Act. Also well-established are the principles where children are concerned: as Lady Hale said in *ZH (Tanzania)* [2011] UKSC 4, their best interests are neither paramount, nor *the* primary, but *a* primary consideration. If explanation of that were required, at paragraph 44 in *SS (Nigeria)* it is given as meaning 'a consideration of substantial importance'.

51. The Court of Appeal's summary of general considerations comes at paragraph 47 of *SS (Nigeria)*:

    (1) The principle of minimal interference is the essence of proportionality: it ensures that the ECHR right in question is never treated as a token or a ritual, and thus guarantees its force.
    (2) In a child case the right in question (the child's best interests) is always a consideration of substantial importance.
    (3) Article 8 contains no rule of "exceptionality", but the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail.
    (4) Upon the question whether the principle of minimal interference is fulfilled, the primary decision-maker enjoys a variable margin of discretion, at its broadest where the decision applies general policy created by primary legislation.

    In plain English, 'minimal interference' means that article 8 rights should be interfered with as little as is necessary to fulfil the public purpose in hand.

52. The Court of Appeal had already referred specifically to deportation cases at 46; what was said there is repeated, with added emphasis, at 55:

    > … while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed.

53. These authorities now have to be read in the light of *MF (Nigeria)* [2013] EWCA Civ 1192: as Mr Collins conceded in his skeleton argument, this appellant does not fall within paragraphs 399 or 399A of the 'new Rules' (in force from 9 July 2012), which made it necessary for cases which did not satisfy them to present 'exceptional' or 'compelling' circumstances which required unfettered consideration of article 8, for that to be undertaken. It follows that this is the first, and may be the only point for us to consider.

CONCLUSIONS

(a) Appellant

54. As deportation appeals go, this is certainly an unusual one, both in terms of the gravity of the crime involved, and the degree of support offered by those who may be considered continuing victims of it. The appellant brutally murdered his wife, the mother of his three children, of whom their daughter Kulvinder was only nine at the time. He still puts that down to drink: no doubt human nature requires some excuse for so serious a crime.

55. Clearly the appellant did have a drink problem: after nearly 20 years living in this country, during which he worked as a clothing trader and he and his wife brought up both his sons, it became evident when in 1996 he was sent to prison for three months for driving a motor vehicle with excess alcohol. Either his record or the amount involved must have been worse than usual for such a sentence to be passed. Then in 1997 he was convicted of common assault, following a business dispute with his brother (with whom it seems he is

now reconciled). From the beginning of that year till September 1998 the appellant's wife made a number of complaints of assault against him, and finally on 27 January 1999 he lost control and murdered her; but not, as Moses J made clear in his sentencing remarks, when so drunk as not to know what he was doing.

56. We note the view of the Parole Board that there is a good deal more work to be done before this appellant could safely be released, if he were to be allowed to stay in this country. Just as we must take the sentencing judge's remarks as the starting-point for the view we take of the gravity of the appellant's crime, so we have to take the Parole Board's decision as the starting-point for our view of what continuing risk he poses to the public. We are prepared to accept that he has not drunk strong liquor during his last 15 years in prison, and, provided he never touched a drop again, would be unlikely to take to drinking too much again if released. We also accept that, at 58 and with what may euphemistically be called his unfortunate history, he is likely to content himself in future with family life as a father and grandfather, and not seek matrimony, or any equivalent relationship again.

57. However we share the Parole Board's reservations as to what might happen if the appellant did form another matrimonial, or quasi-matrimonial relationship. The reason is that he has never so far been able to work through what they describe, adopting the words of his 'offender manager' and 'offender supervisor' (see their s. 5), as "the underlying attitudes and beliefs that led to [his] violence and abuse within marriage". The main reason has been his lack of English; but, as the panel also point out there, he had made little attempt to improve that over all the years since his arrival in this country.

58. While this appellant has certainly been a model prisoner in other respects, and ready enough to comply with what has been required of him in the restricted environment of the gaols where he has been confined, it is hard to avoid the conclusion that he has never really committed himself to life in this country. His failure to seek citizenship at any time during the period of nearly 20 years before he acquired any criminal conviction that might have prevented it goes together with his failure to take any opportunity to learn English.

59. Mr Collins's answer to that on the appellant's behalf lies in what is said to be his low intelligence. While of course we do not seek to replace Miss Durrant's conclusions (see 35 – 36 above) with any we might be tempted to form ourselves, we note what she says about the difficulty of interpreting any overall figure, in the light of her (clearly correct) opinion that "his Verbal Comprehension Index Score should be viewed with extreme caution due to his difficulties with the English language". Inevitably intelligence tests are language-based to a considerable extent, and the lack of any useful common language between tester and subject is bound considerably to reduce their value, as Miss Durrant points out herself.

60. We have to take an overall view of the appellant's practical capabilities, without restricting ourselves to the IQ assessment before us. He arrived in a strange country at the age of 21, and for nearly the next 20 years supported himself, a wife and three children, as well as getting them on the road to buying a house. No doubt his wife played a

considerable part in all that; but at the same time, we cannot accept that the appellant is by nature so practically incapable as Mr Collins sought to present him. We do accept of course that his capabilities will not have been improved by 15 years in prison; but we do not think he is incapable of learning, or of adjusting to the realities of life outside, either in this country or, if it came to it, in India.

61. The result of our consideration of the evidence involving the appellant himself is that, while we do not think he is likely to present a risk to the general public here in any circumstances under which the Parole Board might decide to release him, his continuing lack of insight into his own actions makes any such possibility less than immediate. It is not our business to punish him, which the sentencing judge did by imposing a term whose custodial period has now expired, but which will continue in force till he can safely be released.

62. On the other hand, the appellant's own interests are of limited weight, following his very grave crime: no doubt it would not be easy for him to re-adjust to life in India, but he has never adjusted to speaking English in the first place, and Punjabi presents no problem for him. While we accept that his two brothers have now emigrated from the Punjab, one to Canada and one to this country, we were not asked to accept, and should have had difficulty doing so if we had been, that none of his own extended family are left there.

63. Whatever difficulties there might have been with his wife's family, it is now recognized on his behalf that they could not reasonably lead to his successfully resisting deportation on the basis of any article 2/3 risk, and we do not consider that there is anything in them which could make his removal disproportionate to the legitimate purpose of immigration control. Looking at the case for the moment simply on the evidence involving the appellant, we do not see anything in it which could lead to our finding circumstances so 'exceptional' or 'compelling' as to justify an open-ended consideration of proportionality.

(b) <u>Family life</u>

64. We do not see any useful purpose in abstract legal analysis of the quality of the appellant's family life, actual or aspired to. It is quite clear from *Ghising* (family life - adults - Gurkha policy) Nepal [2012] UKUT 160 (IAC), approved without comment in *Gurung & others* [2013] EWCA Civ 8, that any actual or prospective family life between grown-up people needs to be taken into account for article 8 purposes, and the proportionality of removal assessed in the light of findings of fact on the situation in the individual case.

65. The questions posed in *Razgar* [2004] UKHL 27 are too well known to need setting out for anything but ease of reference, which we shall now do:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
> (3) If so, is such interference in accordance with the law?

(4) If so, is such interference 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?
(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

66. As usual, the short answer to questions (1), (2) and (3) is yes. As for (4), it is well recognized that deportation of non-citizens guilty of serious crimes is a necessary part of a government's responsibility towards its own people: the real question, again as usual, is whether it would be proportionate in the individual case in hand. We cannot however go on to an open-ended discussion of that, without first finding some exceptional or compelling features which would justify it.

67. The clearly exceptional positive feature of this case, as we have already noted at 53, is the extent to which the appellant's children have not only forgiven him for murdering their mother, but are prepared to support him in future. We accept that the views they have expressed are entirely genuine, and we are full of admiration for the love which has inspired them. If this case had involved only the appellant and his family, then that might have been enough for us to find the necessary 'exceptional' or 'compelling' circumstances for us to go on to an open-ended consideration of the proportionality of his removal; but unfortunately for them, that is far from being so.

68. Any serious crime of violence, and particularly the ultimate one of murder, is a subject of the strongest possible public interest. While the main victims of this appellant's crime were his wife herself, and their children, it was not something which could be expiated by their forgiveness alone. Society as a whole has both the right and the duty (see *Masih*, cited at 49) not only to prevent further offences on the part of the individual concerned, but to deter others from committing them in the first place, to condemn serious crime, and to promote public confidence that foreigners guilty of it will not be allowed to stay, unless there is some exceptionally good reason in the case in hand for that to happen.

69. In this case, there are no children involved, except for Sukhjinder's two daughters. We accept that it would be preferable for them to have a paternal grandfather living in this country, even one who had murdered their grandmother. However, S1 does not see him at present, for entirely understandable family reasons; and S2 is only five, and could undoubtedly adjust to his being in another continent. Even accepting that their best interests would on the whole be in favour of the appellant's being allowed to stay, we do not see that they could have any decisive weight on this appeal.

70. As for the appellant's own children, now grown-up, while we accept that they are still traditionally-minded enough for them not to want to get married in his absence if they can help it, they have not gone so far as (in the perhaps over-graphic phrase of the first-tier panel: see their paragraph 92) to "all put their life on hold to a large extent until such time as they could be reunited with their father".

71. While Hardip has reached 35 without forming any permanent relationship with a woman, and, in accordance with custom, is still living in the family home, he has been able, despite the difficulties caused by having to take charge after the murder, and very much to his credit, to start his own cleaning business. Sukhjinder, now 33, may not have felt able to go through any ceremony of marriage; but he has, at least in part, moved out of the family house, and begotten children now 12 and five. He also has, again to his credit, a highly responsible job as a transport manager. Kulvinder is still only 24, and preparing for a significant course of training as a forensic psychologist, having already been away to university: it is hard to see that her father's absence has caused any significant hiatus in her life so far, or that she could not adjust to it in the future.

72. So far as visiting the appellant in India is concerned, of course it would cost his children money, though it might well be less expensive for them to support him there than here. We have no doubt that they would make the effort to go and see him whenever they could, though of course this would not be the same as having him here with them. Probably the expense would be less significant for them than the fact that visiting their father in an Indian village environment where they have no close relations would represent, as both Hardip and Sukhjinder put it, a step outside their comfort zone. The reason for that is that they and Kulvinder, unlike the appellant himself, have fully identified themselves with this country as British citizens. While the country is certainly all the better for that, it is no more our business to reward them (or Gurmit, who has loyally stood by Sukhjinder when they have visited the appellant in prison with S2) for being good citizens than to punish the appellant for murdering his wife.

73. The result is that we cannot find any such 'exceptional' or 'compelling' circumstances in this case, either involving the appellant himself or his family as a whole or individually, as would in our view justify us in going on to an open-ended consideration of article 8 proportionality. However, if we were entitled to do that, then for the reasons we have given, we should regard this appellant's removal as proportionate to the legitimate purposes of immigration control and prevention of crime.

Home Office appeal allowed: decision re-made
Appellant's appeal dismissed

(a judge of the Upper Tribunal)