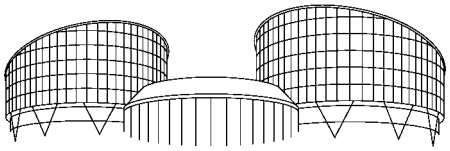

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF NDIDI v. THE UNITED KINGDOM

(Application no. 41215/14)

JUDGMENT

STRASBOURG

14 September 2017

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ndidi v. the United Kingdom,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Linos-Alexandre Sicilianos, *President,*
Kristina Pardalos,
Ksenija Turković,
Armen Harutyunyan,
Pauliine Koskelo,
Tim Eicke,
Jovan Ilievski, *judges,*

and Renata Degener, *Deputy Section Registrar,*

Having deliberated in private on 11 July 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 41215/14) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Nigerian national, Mr Ifeanyi Chukwu Ndidi ("the applicant"), on 23 May 2014.

2. The applicant, who had been granted legal aid, was born in 1987 and lives in London. He was represented before the Court by Ms E. Cohen of Bindmans Solicitors, a lawyer practising in London. The British Government ("the Government") were represented by their Agent, Ms M. Valchero of the Foreign and Commonwealth Office.

3. On 19 January 2016 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The facts of the case, as submitted by the parties, may be summarised as follows.

A. The factual background

5. The applicant and his mother entered the United Kingdom on 13 July 1989 and were granted six months' leave to enter as visitors. Following the expiry of their leave they remained in the United Kingdom as overstayers.

6. The applicant's father entered the United Kingdom in 1991.

7. The applicant's siblings were born in the United Kingdom on 20 November 1993 and 11 January 1995.

8. On 5 June 1995 the applicant's mother claimed asylum on undisclosed grounds. The applicant and his two siblings were named dependents on that claim. The Secretary of State for the Home Department refused the asylum claim on 15 April 1998. Following a reconsideration of the case in August 1999, the Secretary of State again refused the asylum claim but granted the family four years' exceptional leave to remain in the United Kingdom.

9. In March and November 1999 the applicant, who was then twelve years old, received police cautions for offences of assault occasioning actual bodily harm and robbery.

10. On 7 February 2003 he was convicted of robbery and assault occasioning grievous bodily harm.

11. On 21 August 2003 the applicant, his mother and his siblings were granted indefinite leave to remain in the United Kingdom. His mother and siblings have since become British citizens.

12. On 16 December 2003 the applicant was convicted of disorderly behaviour or using threatening/abusive/insulting words likely to cause harassment, alarm or distress. He was fined GBP 50.00.

13. On 3 March 2004 he was convicted of burglary, theft and impersonating a police officer. He was sentenced to a community punishment order of two hundred hours.

14. On 26 November 2004 the applicant was convicted of robbery and was sentenced to three years' detention in a Young Offenders' Institution.

15. In or around this time the Secretary of State considered instigating deportation proceedings against the applicant. On 30 June 2006 he decided not to pursue such proceedings owing to the length of his residence in the United Kingdom. However, he warned him that should he come to the adverse attention of the authorities through criminal offending in the future, he could be liable to deportation.

16. In 2006 the applicant's father was granted indefinite leave to remain in the United Kingdom.

17. On 11 July 2008 the applicant pleaded guilty to the supply of Class A drugs. On 20 March 2009 he was sentenced to seven years' imprisonment. The sentencing judge addressed him in the following terms:

> "this case has been a copy-book example of how people in your position are able to continue to operate outside the law by the use of interchangeable street names,

> preying upon the most vulnerable addicts and by the indiscriminate use of fear and violence to ensure that no-one informs the police of your criminal activities ... Your evidence to the jury was that you were the main man for drugs in Swindon ... Your nickname of 'Bruiser' ensured that when the 'workers' as you called those who sold drugs on your behalf, 'messed up' it was your policy, to use your own words, of 'roughing them up a little bit'. You told the jury, with some satisfaction, that this policy was successful ... I regard you as close to the source of supply and wholesaling to retailers in Swindon on a persistent and regular basis."

18. The applicant's appeal against conviction and sentence was dismissed on 19 June 2009. However, on 9 February 2010 the Court of Appeal substituted the applicant's sentence of seven years' imprisonment with one of seven years' detention in a Young Offenders' Institution. While in detention he received sixteen adjudications, which included the use of threats and abusive behaviour, disobeying lawful orders, fighting with other inmates, and attempting to commit/incite another inmate to commit assault on staff.

19. He was released on licence on 3 March 2011.

B. Automatic deportation

20. Pursuant to section 32(5) of the United Kingdom Borders Act 2007 ("the 2007 Act"), the Secretary of State was required to make a deportation order in respect of foreign criminals sentenced, *inter alia*, to a period of imprisonment of at least twelve months, unless one of the exceptions in section 33 – namely that removal would breach their rights under either the Refugee Convention or the European Convention on Human Rights – applied (see paragraphs 52 and 53 below).

C. Deportation Proceedings – 6 April 2010 to 30 October 2012

21. On 6 April 2010 the Secretary of State notified the applicant of his liability to automatic deportation and asked him to submit reasons why he should not be deported. His representatives responded to that letter; however, on 2 March 2011 he was served with both a deportation order dated 23 February 2011, and a decision that section 32(5) of the 2007 Act applied (that is, he was liable to automatic deportation and removal would not breach his rights under either the Refugee Convention or the European Convention on Human Rights).

22. In a section of the decision headed "Consideration under ECHR", the Secretary of State had regard to her obligations under Article 8 of the Convention. Although she accepted that the applicant had family ties in the United Kingdom with his mother, father, brother and sister, in the absence of further elements of dependency she found that these ties did not constitute family life. She did accept that he enjoyed private life in the United Kingdom but did not consider that his removal would be

disproportionate to the legitimate interest of preventing disorder and crime. In particular, she noted that he had an elderly grandmother in Nigeria and as an adult he could be expected to readjust to life there. Furthermore, as English was one of the official languages of Nigeria, he would not face a language barrier on return. Finally, she had regard to the seriousness of his criminal record, the sixteen adjudications he had received while in detention, and the fact that he had been warned about the risk of reoffending in 2006. She therefore concluded that his deportation would not be in breach of Article 8 of the Convention.

23. The applicant appealed against this decision. In support of his appeal, he submitted a report by Dr B., a consultant forensic psychiatrist. The report indicated that he suffered from dyslexia; that he had developed Adolescent Conduct Disorder which could manifest itself in antisocial behaviour but was not inevitably associated with continued offending in adult life; and that although he presented a medium risk of reoffending, there existed a number of positive factors which would decrease the likelihood of continued criminal involvement, including his family's abstention from criminal activity, his sustained and supportive parental relationships, his wish to improve himself, and the absence of substance misuse.

24. On 8 June 2011 the First-tier Tribunal (IAC) allowed the applicant's appeal on Article 8 grounds, having found that his deportation would be neither proportionate nor necessary in a democratic society. It found that the applicant did enjoy family life with his parents and younger siblings, his unfortunate history having resulted in a particular dependency on them, since he required their support to "help him to change from being a criminal offender to an employed adult and useful member of society". In addition, it found that he had also established a private life in the United Kingdom; that he had no experience of living in Nigeria, save for a short period as a baby and a two week holiday in 2004; that he had no close relatives in, and no ties to, Nigeria; that he had indicated his remorse and given assurances that he would not offend again; and that his working and studying whilst in detention supported those assurances.

25. The Secretary of State was granted permission to appeal on 24 June 2011.

26. On 31 October 2011 the Upper Tribunal (IAC) found there to have been a material error of law in the decision of the First-tier Tribunal. The decision was set aside in its entirety and the case submitted for a full rehearing before the Upper Tribunal.

27. On 24 April 2012 the Upper Tribunal dismissed the applicant's appeal against the deportation order.

28. The Tribunal considered the principles established by this Court in *Boultif v. Switzerland*, no. 54273/00, ECHR 2001-IX, *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006-XII and *Maslov v. Austria*

[GC], no. 1638/03, ECHR 2008. In its view, the single most compelling factor in the applicant's favour was the length of his residence in the United Kingdom. It also had regard to his family ties. Although it did not accept that there was any additional element of dependency which would enable it to find the existence of family life for the purposes of Article 8 of the Convention, it nevertheless accepted that the applicant's parents and siblings were an important part of his private life.

29. Balanced against his long residence and established private life, the Tribunal considered the applicant's criminal record. It noted that he had a long history of offending, beginning at the age of twelve; that he had received fair warning from the Secretary of State in 2006 that any further offending would not be tolerated; that notwithstanding that warning and the subsequent assurances given to the Secretary of State that he was turning his life around, he was already engaged in drug dealing; that his criminal behaviour had not only continued but had also escalated; that whilst serving his most recent sentence, he had received sixteen adjudications, the majority of them for violence and disobedience; that his problems with dyslexia could not be used as an excuse to justify his poor behaviour and repeat offending; and that whilst the majority of his offending had occurred when he was a child, his most recent and most serious had occurred after he had attained his majority.

30. With regard to the issue of future offending and risk to the public, the Tribunal found it difficult to accept his assurances that he had had a genuine change of heart and no longer posed a risk to the public. He had made similar assurances when faced with deportation in 2006, and since his criminal associates were in prison the fact that he did not see them was not a weighty factor indicating a lifestyle change. Furthermore, there was no evidence that either of his parents would be able to exert any positive influence over him, as they had been unable to do so in the past. Although he was in employment on a probationary period, there was no evidence of a contingency plan should he not progress into more secure employment.

31. Therefore, whilst accepting that the applicant's removal would be difficult, the Tribunal concluded that he was of an age where he could be expected to "stand on his own two feet and make a life for himself". His family could visit him in Nigeria and there was evidence to suggest that he had a number of relatives living there. The Tribunal further noted that he had no girlfriend or children in the United Kingdom, he was in good health, and he would not face any language difficulties as there was a universal use of English in Nigeria. Consequently, the Tribunal concluded that in spite of his long residence and family circumstances, serious reasons (as required by this Court in *Maslov*, cited above, § 75) existed to justify the applicant's expulsion, and that the public interest in effecting deportation outweighed his Article 8 rights.

32. On 21 June 2012 the Upper Tribunal refused to grant the applicant permission to appeal. The Court of Appeal similarly refused permission to appeal on 12 September 2012, and again on 30 October 2012 following an oral hearing. It found that although the case had required a difficult and delicate balancing exercise, the Upper Tribunal had provided a thorough and careful determination, and the conclusion reached was one which had been open to it.

D. Amendment of the Immigration Rules

33. On 9 July 2012 the Secretary of State amended the Immigration Rules (see paragraphs 54-57 below). In so far as relevant, the new Rules (which have since been further amended) provided that the deportation of foreign criminals would be conducive to the public good if they were sentenced to four or more years' imprisonment. In such cases, the public interest would only be outweighed in "exceptional circumstances".

E. Further representations

34. On 9 November 2012 and 14 November 2012 the applicant submitted further representations to the Secretary of State based on his fourteen-month relationship with a British national, who had no connection to Nigeria, and the birth of their son on 1 October 2012. The Secretary of State treated those representations as an application to revoke the deportation order and refused it on 3 January 2013. She also certified the applicant's claim, which meant that he was not afforded an automatic in-country right of appeal.

35. On 14 January 2013 the applicant sought permission to apply for judicial review of the Secretary of State's decision to certify his claim. Along with his application, he provided medical evidence that his son required an operation in March 2013 to correct an umbilical hernia, and that he had been diagnosed with respiratory syncytial virus and bronchiolitis.

36. On 19 February 2013 the Secretary of State agreed to withdraw the certification decision and to issue a new decision taking account of the applicant's further representations of November 2012 and those lodged with the judicial review application in January 2013.

37. The Secretary of State considered the applicant's further representations in light of the amended Immigration Rules. In a decision dated 11 April 2013, she refused to revoke the deportation order since there were no "exceptional factors" which outweighed the public interest. In particular, she noted that the applicant had entered into a relationship in the full knowledge of the intention to deport him; that both the applicant and his partner should have been fully aware of the implications of conceiving a child in those circumstances; that no valid reason had been given to explain

the applicant's failure to make submissions regarding his relationship at either the Upper Tribunal hearing in April 2012 or the Court of Appeal hearing on 30 October 2012; that if the applicant's partner wished to continue the family unit in Nigeria, suitable medication would be available in that country to treat their son's bronchiolitis condition; that there was no evidence of any exceptional, compelling or compassionate factors; and that deportation remained a proportionate response to the applicant's serious criminal offending.

38. The applicant appealed. He submitted a number of documents in support of his case, including a further psychiatric report by Dr B. dated 17 July 2013. The report indicated that he had continued to make progress in adopting a "pro-social lifestyle", that he had addressed his tendency to violence, that he no longer had any criminal associates, that he had demonstrated a commitment to his partner and their son, that he had secured employment, and that the risk of re-offending and of harm to the public was very low.

39. The First-tier Tribunal, having heard oral evidence from the applicant, his partner, mother, father, brother and sister, and having considered the evidence before it, dismissed the applicant's appeal on 16 September 2013.

40. Using a two-stage approach, the Tribunal first considered the applicant's case under the Immigration Rules. It noted that the applicant's most recent conviction was for a serious offence which had attracted a sentence of seven years' detention; that following the amendment of the Immigration Rules, "exceptional circumstances" would be required to prevent deportation; and that those "exceptional circumstances" were inextricably bound up with the applicant's Article 8 rights.

41. In this regard, the Tribunal recalled that the applicant's family and personal circumstances had been examined with the most careful and thorough consideration by the Upper Tribunal in 2012. It had considered them in the context of the exceptionality requirements set out in *Maslov* (the requirement of "very serious reasons" to justify the expulsion of a settled migrant: see *Maslov*, cited above, § 75) and concluded that his deportation was justified. The Tribunal noted, however, that the applicant's personal circumstances had since changed. It therefore gave careful consideration to his two-and-a-half-year relationship with his partner and the birth of their child. Nevertheless, it concluded that neither the relationship nor the birth of the child amounted to an "exceptional circumstance" within the context of the Immigration Rules. Although it accepted that there would be an inevitable interference with the family life said to exist between the applicant, his partner and their child, it found there to be nothing "exceptional" about this. Consequently, the Tribunal did not consider that his family and personal circumstances amounted to the "exceptionality" required by the Immigration Rules.

42. The Tribunal moved on to consider Article 8 as a separate issue, having regard to the findings of the Upper Tribunal in 2012. It agreed with the Upper Tribunal that language would not be an obstacle for the applicant since English was widely spoken in Nigeria. It further noted that while the evidence as to the existence of family in Nigeria was somewhat confusing, it was perhaps not of fundamental importance for an adult quite capable of standing on his own two feet; that the applicant would continue to receive support from his parents following his removal to Nigeria; and that his parents could visit him there as often as they wished.

43. In respect of the applicant's relationship with his partner and their child, it observed that he had failed to disclose his immigration status to his partner until after she had fallen pregnant; that he and his partner had never lived together; that his partner and child had the full support of her family in the United Kingdom, with whom they lived, and that support would continue following the applicant's deportation; and that his child could visit him in Nigeria and maintain such a relationship as deemed appropriate. Therefore, having carefully considered the issue of proportionality, including "section 55 [of the Borders, Citizenship and Immigration Act 2009 – see paragraph 60 below] and the best interests of the Appellant's child", the Tribunal concluded that the Secretary of State had a legitimate interest in maintaining appropriate immigration control and social order within the United Kingdom, and that the interests in effecting the applicant's deportation were not outweighed by his Article 8 rights.

44. The applicant sought permission to appeal on the ground that the Tribunal had erred in concluding that his circumstances were not "exceptional" for the purposes of the Immigration Rules. The First-tier Tribunal refused permission to appeal on 4 October 2013. The applicant made a further application for permission to appeal to the Upper Tribunal, raising the same grounds as before the First-tier Tribunal. In addition, he also submitted that the application raised an important point of principle: namely, whether the decision of the Tribunal was contrary to the principle of double jeopardy, or constituted discriminatory punishment, since a British national could not be excluded from the United Kingdom. On 23 October 2013 the Upper Tribunal refused the application for permission to appeal. Both Tribunals found that the applicant's grounds sought, in essence, to reargue the merits of the appeal and that no error of law had been disclosed.

45. The applicant then sought permission to apply for judicial review of the Upper Tribunal's refusal of the application for permission to appeal. Following the Supreme Court judgment in *R (on the application of Cart) v. The Upper Tribunal; R (on the application of MR (Pakistan)) v. The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department* [2011] UKSC 28, the Administrative Court could only review decisions of the Upper Tribunal if the "second appeal" test was

satisfied; that is, if the appeal raised an important point of principle, or there was another compelling reason to allow it to succeed. In the present case the applicant once again submitted that the "double jeopardy" argument raised an important point of principle. However, on 6 December 2013 the Administrative Court refused the application for permission to apply for judicial review. In refusing permission the judge expressly stated that while it was "apparent that different views might reasonably be taken about whether the Claimant should be permitted to remain in the UK in the light of his family ties and length of residence", that was "not the test for the grant of permission".

46. Following the refusal of the application for permission to apply for judicial review, the applicant had no right to renew the application at an oral hearing in the Administrative Court. However, it would have been possible for him to apply to the Court of Appeal for permission to appeal against the Administrative Court's decision.

F. Events subsequent to the final domestic decisions

47. Removal directions scheduled for 20 January 2015 were cancelled owing to the absence of a valid travel document.

48. On 18 March 2015 the applicant advised the Court that his relationship with his partner had broken down and that he had court-ordered direct contact with his son on alternate Saturdays.

49. On 4 August 2015 the Secretary of State advised the applicant that an application to the Nigerian authorities for a travel document, required to effect his deportation from the United Kingdom, was pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Human Rights Act 1998

50. Section 2 of the Human Rights Act 1998 provides that, in determining any question that arises in connection with a Convention right, courts and tribunals must take into account any case-law from this Court so far as it is relevant to the proceedings in which that question has arisen.

B. Deportation of a foreign national criminal

1. The Immigration Act 1971

51. Section 3(5)(a) of the Immigration Act 1971 (as amended by the Immigration and Asylum Act 1999) provides that a person who is not a British citizen shall be liable to deportation from the United Kingdom if the

Secretary of State for the Home Department deems his deportation to be conducive to the public good.

2. The United Kingdom Borders Act 2007

52. Section 32(4) and (5) of the United Kingdom Borders Act 2007 provides that, subject to section 33, the Secretary of State "must" make a deportation order in respect of a "foreign criminal", and, for the purposes of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good. A foreign criminal is defined as a person who is not a British citizen, who has been convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least twelve months.

53. According to section 33, section 32(4) and (5) does not apply where the removal of the foreign criminal in pursuance of the deportation order would breach his rights under either the Refugee Convention or the European Convention on Human Rights.

3. The amendment to the Immigration Rules

54. On 9 July 2012 the Secretary of State amended the Immigration Rules to include new rules on deportation. Paragraph A362 of those new Rules stated:

> "Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these Rules as at 9 July 2012 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served."

55. Paragraphs 398 to 399A set out the situations in which a foreign criminal's private and/or family life would be deemed to outweigh the public interest in effecting his or her deportation.

56. In the case of offenders sentenced to between twelve months and four years' imprisonment, or those sentenced to less that twelve months but who had caused "serious harm" or were persistent offenders, paragraphs 399 and 399A provided that the public interest in deportation would be deemed to be outweighed by private and/or family life factors if they (i) had twenty years' residence in the United Kingdom and no ties to the country to which they were to be deported; (ii) had fifteen years' residence in the United Kingdom with valid leave and a partner with British citizenship, settled status, refugee status of humanitarian protection, and there were insurmountable obstacles to family life continuing elsewhere; (iii) had children who were British citizens or who had lived in the United Kingdom continuously for at least seven years, who had no-one to care for them in the United Kingdom and who could not be expected to relocate abroad; or (iv) were under twenty-five, had spent at least half their lives in the United Kingdom, and had no ties to the country to which they were to

be deported. If none of these conditions were satisfied, the public interest in deportation would only be outweighed by other factors in "exceptional circumstances".

57. For more serious offenders sentenced to four or more years' imprisonment, the public interest in deportation would only be outweighed in "exceptional circumstances".

4. Judicial interpretation of paragraphs 398 to 399A of the Immigration Rules

58. In both *MF (Article 8 – new rules) Nigeria* [2012] UKUT 393 (IAC) (31 October 2012) and *Izuazu (Article 8 – new rules) Nigeria* [2013] UKUT 45 (IAC) (30 January 2013) the Upper Tribunal indicated that in cases to which the new Immigration Rules applied, judges should adopt a two-stage approach. First, they should consider whether a claimant was able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims. Where the claimant did not meet the requirements of the Rules it would then be necessary to make an assessment of Article 8 applying the criteria established by law.

59. The Upper Tribunal's decision in *MF* (cited above) was the subject of an appeal to the Court of Appeal (*MF (Nigeria) v. Secretary of State for the Home Department* [2013] EWCA Civ 1192 (08 October 2013)). The court disagreed with the Upper Tribunal's approach to and interpretation of the Immigration Rules. Rather than adopt a two-stage approach, it held that the new Rules were a complete code and the exceptional circumstances to be considered in the balancing exercise involved the application of a proportionality test as required by the Strasbourg jurisprudence. Therefore, in the case of a foreign prisoner to whom paragraphs 399 and 399A did not apply, very compelling reasons would be required to outweigh the public interest in deportation. These compelling reasons were the "exceptional circumstances".

5. Borders, Citizenship and Immigration Act 2009

60. Section 55 of the 2009 Act places the Secretary of State for the Home Department under a duty to make arrangements for ensuring that any functions in relation to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

61. The applicant complained that the requirements of paragraphs 398 and 399 of the Immigration Rules were not compatible with Article 8 of the Convention, and that his deportation from the United Kingdom would constitute a disproportionate interference with his right to respect for his family and private life in breach of Article 8.

62. Article 8 reads as follows:

> "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."

63. The Government contested the applicant's arguments.

A. Admissibility

1. Non-exhaustion of domestic remedies

(a) The parties' submissions

64. The Government submitted that the applicant had failed to exhaust domestic remedies since he could have applied to the Court of Appeal for permission to appeal against the Administrative Court's decision of 6 December 2013. The Government acknowledged that as the application for permission to apply for judicial review had been by way of a *Cart* judicial review, permission could only have been granted by the Administrative Court if the "second appeal" test was met; that is, if the appeal raised an important point of principle, or there was another compelling reason to allow it to succeed (see paragraph 45 above). The same test would have to be satisfied before the Court of Appeal would have granted permission to appeal against the Administrative Court's decision. However, according to the Government, the applicant's complaint that the Immigration Rules applied a higher standard than proportionality arguably raised an important point of principle and, as such, he should have applied to the Court of Appeal for permission to appeal.

65. While the applicant accepted that an application for permission to appeal to the Court of Appeal was theoretically possible, he argued that such an application would have offered no realistic possibility of success. The Administrative Court judge, in his decision of 6 December 2013,

clearly found that the "second appeal" test had not been met. In light of that decision, and in view of the fact that permission to appeal had only rarely been granted by the Court of Appeal in *Cart* judicial reviews, the applicant's counsel was of the opinion that a further appeal to the Court of Appeal would have offered no prospect of success.

(b) The Court's assessment

66. The applicant makes two distinct complaints under Article 8 of the Convention, which must be examined separately: first, that paragraphs 398 and 399 of the Immigration Rules, which required the existence of "exceptional circumstances" before removal would be in breach of Article 8 of the Convention, imposed a higher standard than that of "proportionality"; and secondly, that in all the circumstances of his case, the decision to deport him constituted a disproportionate interference with his Article 8 rights.

(i) The first Article 8 complaint

67. The Court is inclined to agree with the Government that the applicant's first Article 8 complaint arguably raised an important point of principle which could potentially have satisfied the "second appeals" test. That being said, it is not necessary for the Court to reach any firm conclusion in respect of this point, since the applicant did not raise it in either the preceding application for permission to appeal or the application for permission to apply for judicial review. On the contrary, the only "important point of principle" relied on in these applications was the question of whether the decision of the Tribunal had been contrary to the principle of double jeopardy (see paragraphs 44-45 above).

68. Consequently, the Court considers that the complaint that paragraphs 398 and 399 of the Immigration Rules imposed a higher standard than that of proportionality must be rejected under Article 35 § 1 of the Convention for failure to exhaust domestic remedies.

(ii) The second Article 8 complaint

69. The Court considers that the applicant's second Article 8 complaint – namely, that his deportation would constitute a disproportionate interference with his right to respect for his family and private life – primarily turned on the particular circumstances of his case. Consequently, neither the Upper Tribunal, in refusing permission to appeal, nor the Administrative Court, in refusing permission to apply for judicial review of the Upper Tribunal's decision, considered that this complaint raised "an important point of principle" capable of satisfying the "second appeal" test (see paragraphs 44-45 above). Indeed, the Administrative Court judge expressly stated that while it was "apparent that different views might reasonably be taken about whether the Claimant should be permitted to

remain in the UK in the light of his family ties and length of residence", that was "not the test for the grant of permission" (see paragraph 45 above).

70. Consequently, the Court does not consider that this complaint can be rejected under Article 35 § 1 of the Convention for failure to exhaust domestic remedies.

2. Manifestly ill-founded

71. The Government further submitted that the applicant's complaint that his deportation would constitute a disproportionate interference with his right to respect for his family and private life was manifestly ill-founded. However, the Court is of the opinion that this complaint raises sufficiently complex issues of fact and law, so that it cannot be rejected as manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It is further satisfied that it is not inadmissible on any other ground. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

72. The applicant submitted that there had been a disproportionate interference with his right to respect for his family life (with his son) and his private life, having particular regard to the fact that he had arrived in the United Kingdom just before his second birthday; he had lived there for twenty-eight years; his criminal offences were committed when he was either a minor or young adult; and he had not reoffended since his release in March 2011.

73. The Government, on the other hand, endorsed the reasoning of the domestic courts, which, in their submission, had conducted a full and proper assessment of the proportionality of the applicant's deportation. The applicant, who was now almost thirty years' old, was a single adult in good health who should readily be able to establish himself in Nigeria, where his parents still had family. While there would be a degree of interference with his relationship with his son, he had never lived with him or had primary responsibility for his care and upbringing. Having regard to the applicant's long history of sustained and serious offending, which included drug dealing and crimes of violence, the public interest in favour of deportation carried great weight.

2. The Court's assessment

74. In the present case the domestic courts accepted that the applicant's deportation would constitute an interference with his right to respect for both his family life with his son, and his private life. The Government do not appear to contest that finding. Moreover, it does not appear to be in

doubt that the deportation order was "in accordance with the law" and "in pursuit of a legitimate aim" (the prevention of disorder and crime) for the purposes of Article 8 § 2 of the Convention. Consequently, the principal issue to be determined is whether the applicant's deportation would be "necessary in a democratic society", or, in other words, whether the deportation order struck a fair balance between the applicant's Convention rights on the one hand and the community's interests on the other (see *Slivenko v. Latvia* [GC], no. 48321/99, § 113, ECHR 2003-X, and *Boultif v. Switzerland*, no. 54273/00, § 47, ECHR 2001-IX).

75. The Court has consistently held that in assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued, the Contracting States enjoy a certain margin of appreciation (see *Slivenko*, cited above, § 113, and *Boultif*, cited above, § 47). However, as the State's margin of appreciation goes hand in hand with European supervision, the Court is empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8 (see *Maslov v. Austria* [GC], no. 1638/03, § 76, ECHR 2008).

76. The requirement for "European supervision" does not mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court's task to conduct the Article 8 proportionality assessment afresh. On the contrary, in Article 8 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so (see, *mutatis mutandis*, *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 107, ECHR 2012). Consequently, in two recent cases concerning the expulsion of settled migrants, the Court declined to substitute its conclusions for those of the domestic courts, which had thoroughly assessed the applicants' personal circumstances, carefully balanced the competing interests and took into account the criteria set out in its case law, and reached conclusions which were "neither arbitrary nor manifestly unreasonable" (see *Hamesevic v. Denmark* (dec.), no. 25748/15, § 43, 16 May 2017 and *Alam v. Denmark* (dec.), no. 33809/15, § 35, 6 June 2017).

77. In the case at hand, the original deportation order and the subsequent appeals, first by the applicant and then by the Secretary of State, predated the amendment to the Immigration Rules on 9 July 2011. Consequently,

there were no Rules restricting the decision-making authorities' consideration of the applicant's rights under Article 8 of the Convention, and every decision-making body assessed the proportionality of his deportation with regard to this Court's relevant principles concerning the expulsion of settled migrants (see *Boultif*, *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006-XII and *Maslov*, all cited above).

78. First of all, in her original decision to deport the applicant, the Secretary of State had specific regard to her obligations under Article 8 of the Convention, balancing his ties to the United Kingdom and the difficulties he would face readjusting to life in Nigeria against the seriousness of his criminal offending (see paragraph 22 above). On appeal, the First-tier Tribunal conducted a similar assessment of proportionality and, having accepted that the applicant's "unfortunate history" had resulted in a particular dependency on his family, allowed his appeal on Article 8 grounds (see paragraph 24 above). However, the Upper Tribunal allowed the Secretary of State's appeal, finding that, in spite of his long residence and family circumstances, "very weighty reasons" existed to justify the applicant's deportation. The Upper Tribunal gave careful consideration to the principles established by this Court in *Boultif*, *Üner* and *Maslov*, weighing the length of the applicant's residence in the United Kingdom and the family and private life established there against his long history of offending, continuing after the Secretary of State's warning in 2006, his poor behaviour in prison, and the risk to the public from future offending. Whilst accepting that his removal would be difficult, the Upper Tribunal concluded that he was of an age where he could be expected to "stand on his own two feet and make a life for himself" (see paragraphs 28-31 above).

79. Although the applicant's further representations were made following the amendment to the Immigration Rules, the First-tier Tribunal heard his appeal against the Secretary of State's refusal to revoke the deportation order before the Court of Appeal gave judgment in *MF (Nigeria)* (see paragraph 59 above). It therefore adopted the two-stage approach required by the Upper Tribunal in both *MF* and *Izuazu (Nigeria)* (see paragraph 58 above), asking first, whether there were "exceptional circumstances" as required by the Immigration Rules, before going on to consider Article 8 as a "separate issue" (see paragraph 42 above).

80. In its assessment of proportionality under Article 8, it had regard to the Upper Tribunal's decision of 24 April 2012 (see paragraph 42 above), which had in turn given careful consideration to the principles established by this Court in *Boultif*, *Üner* and *Maslov* (see paragraphs 28-31 and 78 above). In addition, the First-tier Tribunal also had regard to the new evidence concerning the applicant's relationship with his (then) partner and their child. However, it considered it significant that he had failed to disclose his immigration status to his partner until after she had fallen pregnant; that he and his partner had never lived together; that his partner

had the support of her family in the United Kingdom; and that his child could visit him in Nigeria and maintain such a relationship as deemed appropriate. Having weighed everything in the balance, including the best interests of the applicant's child, it reached the same conclusion as the Upper Tribunal; namely, that the interests in effecting the applicant's deportation were not outweighed by his Article 8 rights (see paragraph 43 above).

81. Therefore, regardless of whether or not paragraphs 398 and 399 of the Immigration Rules could be said to impose a higher standard than that of proportionality, there is no doubt that in the present case the First-tier Tribunal – and, in fact, all the domestic decision-makers – gave thorough and careful consideration to the proportionality test required by Article 8 of the Convention, including the relevant criteria set out in this Court's case-law, and, having balanced the applicant's Article 8 rights against the public interest in deportation, concluded that his deportation would not constitute a disproportionate interference with his right to respect for his family and private life. The facts of the applicant's case undoubtedly require careful scrutiny, given the length of his residence in the United Kingdom, his ongoing relationship with his son and other family members there, and his limited ties to his home country. Nevertheless, having regard to his long and escalating history of offending, continuing after the Secretary of State's warning in 2006, and beyond his attaining the age of majority, the Court sees no grounds upon which the decision of the domestic authorities can be impugned. Furthermore, there has been no change in the applicant's circumstances since the date of the last domestic decision which would provide the Court with strong reasons to substitute its own assessment of proportionality for that of the domestic authorities. In fact, following the last domestic decision, the applicant's relationship with his partner has ended, and his contact with his son has been restricted to alternate Saturdays.

82. Accordingly, the Court considers that the applicant's deportation would not be in breach of Article 8 of the Convention.

2. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ TOGETHER WITH ARTICLE 8

83. The applicant complained under Article 14 of the Convention, read together with Article 8, that he had been treated differently, without justification, from both a foreign criminal sentenced to less than four years' imprisonment, who could benefit from the exceptions in paragraphs 399 and 399A of the Immigration Rules, and a British national sentenced to more than four years' imprisonment, who could not be deported.

84. Article 14 provides as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language,

religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

85. The Court recalls that the applicant did not expressly invoke Article 14 at any stage of the domestic proceedings, although in his application for permission to appeal to the Upper Tribunal, and in his application for permission to apply for judicial review of the Upper Tribunal's decision, he contended that the decision of the Tribunal was contrary to the principle of double jeopardy, or constituted discriminatory punishment, since a British national could not be excluded from the United Kingdom (see paragraphs 44 and 45 above). Therefore, insofar as he now seeks to argue that he has been treated differently from a foreign national offender sentenced to less than four years' imprisonment, he cannot be said to have exhausted domestic remedies within the meaning of Article 35 § 1 of the Convention, since he did not raise this argument either expressly or in substance before the domestic courts.

86. The complaint that he was treated differently from a British national sentenced to more than four years' imprisonment was raised in substance in his application for permission to appeal and his application for judicial review. As the human rights and fundamental freedoms defined in the Convention are now part of the law of the United Kingdom, there is no doubt that he could have expressly invoked his rights under Article 14 in these applications (see, for example, *Peacock v. the United Kingdom* (dec.), no. 52335/12, 5 January 2016). However, it is not necessary for the Court to decide whether he has nevertheless exhausted domestic remedies within the meaning of Article 35 § 1 of the Convention, since it has found that in expulsion cases non-nationals cannot be compared to nationals who have a right of abode in their own country and cannot be expelled from it (see *Moustaquim v. Belgium*, 18 February 1991, § 49, Series A no. 193 and *C. v. Belgium*, 7 August 1996, §37-38, Reports of Judgments and Decisions 1996 III). Accordingly, the Court considers that the Article 14 complaint based on this ground must be rejected as manifestly ill-founded pursuant to Article 35 § 3(a) of the Convention.

FOR THESE REASONS, THE COURT, BY SIX VOTES TO ONE,

1. *Declares* the complaint concerning the proportionality of the applicant's deportation admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 8 of the Convention;

Done in English, and notified in writing on 14 September 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener
Deputy Registrar

Linos-Alexandre Sicilianos
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Turković is annexed to this judgment.

L.A.S.
R.D.

DISSENTING OPINION OF JUDGE TURKOVIĆ

1. To my great regret, I am unable to subscribe to the majority's conclusion that the applicant's deportation would not be in breach of Article 8 of the Convention.

2. The Court recognized in *A.A. v. the United Kingdom* (no. 8000/08, 20 September 2011) that in cases in which the applicant has not been yet expelled at the time of the Court's decision, the Court itself must assess the compatibility with the Convention of the applicant's actual expulsion with reference to the facts known to the ECHR at the time of the proceedings before it, but post-dating the domestic proceedings. Relying on its well-established case-law, the Court indicated that in cases where deportation is intended to satisfy the aim of preventing disorder or crime, the period of time which has passed since the offence was committed and the applicant's conduct throughout that period are particularly significant. The Court further specified that in cases in which the applicant has not committed further offences, and where he or she made efforts to rehabilitate himself or herself and to reintegrate into society, and where his risk of reoffending was assessed to be low, the Government are required to provide further support for their contention that the applicant can reasonably be expected to cause disorder or to engage in criminal activities such as to render his or her deportation necessary in a democratic society (see *A.A. v. the United Kingdom,* cited above, §§ 63 and 68).

3. In the present case, the majority took the position that there was "no change in the applicant's circumstances since the date of the last domestic decision which would provide the Court with strong reasons to substitute its own assessment of proportionality for that of the domestic authorities" (see paragraph 81 of the judgment). The majority completely disregarded the fact that a considerable period of time (10 years) has elapsed since the offence was committed, since the applicant was released from the Young Offenders' Institution under licence (6 and a half years) and since the licence expired (4 and a half years), and that during that period the applicant has not committed any further offences and has demonstrated serious efforts to rehabilitate himself and to reintegrate into society. His conduct shows genuine dissociation from his crime. All these factors have an important impact on the assessment of the risk which the applicant poses to society.[1]

[1] The research has shown that for those who do not reoffend within three years of release the likelihood of re-incarceration at a later point is greatly diminished. The risk of reoffending decreases over time. See Langan PA, Levin DJ. *Recidivism of prisoners released in 1994*.Washington, DC: Bureau of Justice Statistics; 2002. (Bureau of Justice Statistics Publication No. NCJ 193427).

Thus, I cannot agree with the majority that there has been no change in the applicant's circumstances since the date of the last domestic decision which should prompt the Court to substitute its own assessment of proportionality for that of the domestic authorities. This does not mean that the Court would necessarily take a different position from the domestic authorities; in such circumstances, however, as was established in *A.A. v. the United Kingdom*, the Government should be required to provide further support for their contention that the applicant can reasonably be expected to cause disorder or to engage in criminal activities such as to render his or her deportation necessary in a democratic society. Indeed, any other approach, as was emphasised in the same case (cited above, § 67), "would render the protection of the Convention theoretical and illusory by allowing Contracting States to expel applicants months, even years, after a final order had been made notwithstanding the fact that such expulsion would be disproportionate having regard to subsequent developments" (ibid.).

4. In the present case, the majority has considerably limited the possibility for the Court to take subsequent developments into consideration in cases in which the applicant has not been yet expelled at the time of the decision of the Court. It seems that, as opposed to the criteria laid down in *A.A. v. the United Kingdom*, the Court is now requiring the applicant to demonstrate that there has been some change in his or her circumstances over and above the fact that he or she did not commit further offences for a significant period of time after being released and assessed as posing a low risk of re-offending. It seems that the applicant is required to demonstrate some "exceptional" change in his or her circumstances post-dating the last decision of the domestic authorities in order for the Court even to engage in the assessment of proportionality. The approach the Court has taken in the present case is especially problematic in cases of expulsion of settled migrants who have lawfully spent all or the major part of their childhood and youth in the host country. This is all the more so where the person concerned is a settled migrant who was a juvenile (minor/young adult) at the time that the underlying offence(s) was committed, as is the case in respect of the applicant in the present case. Very serious reasons are required to justify their expulsion and the burden of proof is on the Government (see *Maslov v. Austria* [GC], no. 1638/03, § 76, ECHR 2008).

5. In view of the above considerations and of the Court's conclusions in A.*W. Khan v. the United Kingdom*, where "having particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the United Kingdom, and the fact that the applicant has not reoffended following his release from prison in 2006, the Court has found that the applicant's deportation from the United Kingdom would not be proportionate to the legitimate aim pursued and

would therefore not be necessary in a democratic society" (see *A.W. Khan v. the United Kingdom*, no. 47486/06, § 50, 12 January 2010)[1], I cannot, without further support by the Government for their contention that the applicant can reasonably be expected to cause disorder or to engage in criminal activities at the present time, conclude that the applicant's deportation would be a proportionate measure.

6. I am fully aware that the assessment of proportionality is and always will be fact-sensitive. I could not agree more with Lord Bingham that "there is in general no alternative to making a careful and informed evaluation of the facts of the particular case" and that "[t]he search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which Article 8 requires" (see Lord Bingham in EB (Kosovo) [2008] UKHL 41, [2009] 1 AC 1159 at [12]). However, an overly casuistic approach to the matter fails to achieve consistency in decision making and to bring certainty to the decision-making process, both at the national and European level. The new Immigration Rules were in part intended to bring greater clarity in this respect domestically (see MF (Nigeria) [2013] UKHL 41, [2009] EWCA Civ.1192 at para 34, citing the document produced by Ms Giovanetti QC).

7. The inconsistences in application of the *Üner*, *Maslov* and *A.A.* principles, some of which were identified above by way of example, may warrant their further clarification and/or elaboration. At a time when Europe is coping with the serious problems which partially originate in a poor record in terms of integration efforts, especially with regard to second-generation migrants, it is of utmost importance to balance wisely society's impulse to attach greater weight to the public interest than to private and family life claims under Article 8 of the Convention. After all, it is impossible to make a sharp distinction between the two. It is in the public interest to protect the private- and family-life claims of long-term migrants.

8. In addition and separately from the above arguments, I cannot agree with the majority that in the present case the First-Tier Tribunal properly addressed the best interests of the child. The Tribunal indeed referred to the

[1] In both cases the applicants were sentenced for drug-related offences. In the present case, the applicant – who committed an offence when he had just turned 19 – was sentenced to seven years' detention in a 'Young Offenders' Institution' and in *A.W. Khan* the applicant – who was an adult when he committed an offence – was sentenced to seven years' imprisonment. Both were released before serving the full term. Both applicants came to the UK at a very young age; in the present case the applicant was almost two and in *A.W. Khan* the applicant was three years old. Neither applicant reoffended following their release; in *A.W. Khan* this amounted to period of around three and a half years, and in the present case to a period of more than six years. Neither have any continuing ties to their native lands. Both fathered a child after committing an offence.

best interests of the child, but it failed to explain what was considered to be in the child's best interests, what criteria this was based on and how the child's interests were weighed against other considerations. The Tribunal failed to indicate clearly whether primary importance was accorded to the child's interest[1]. Rather, it seems that the best interests of the child were treated merely as one of the considerations that weighs in the balance alongside other competing factors, and not as a factor that must rank higher than any other. All this does not necessarily mean that a proportionality test which included adequate treatment of the child's best interest would ultimately have had a different conclusion from that at which the First-Tier Tribunal arrived. Nonetheless, failure to address the best interests of the child adequately should in itself constitute a procedural violation of Article 8.

[1] The right of the child to have his or her best interests taken as primary consideration means that the child's interests may not be considered on the same level as all other considerations; they have higher priority and thus a greater weight must be attached to what serves the child best than to other competing considerations. See General Comment No. 14, adopted by the UN Committee on the Rights of the Children at its 62nd session, 14 January-1 February 2013, p. 10. There are, however, circumstances in which the community or other parties might have superior interests (e.g. religious or economic) so that a child's interests may not prevail.

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1. Het is niet voor het eerst dat in een *dissenting opinion* vraagtekens worden geplaatst bij de consistentie van het Straatsburgse Hof in zaken waarin een gevestigde migrant wegens het plegen van delicten wordt uitgezet. In de onderhavige zaak, *Ndidi t. Verenigd Koninkrijk*, gaat het om een man die op twee-jarige leeftijd met zijn moeder naar het Verenigd Koninkrijk kwam en 19 jaar later wordt uitgezet wegens het plegen van delicten. Rechter Turković stelt in zijn opinie dat zaken met vergelijkbare omstandigheden eerder wel tot een schending van artikel 8 EVRM hebben geleid. Hij betoogt dat het Hof in *Ndidi* geen consistente toepassing geeft aan de uitgangspunten die voor dit soort gevallen zijn geformuleerd in de zaken *Üner*[1], *Maslov*[2] en *A.A*[3]. De kritiek van Turković richt zich met name op het feit dat geen doorslaggevende betekenis is toegekend aan de omstandigheid dat betrokkene al sinds jonge leeftijd in het Verenigd Koninkrijk verblijft en daar een gezinsleven heeft ontwikkeld; en dat geen acht is geslagen op het feit dat inmiddels een periode van tien jaar is verstreken sinds betrokkene voor het laatst een delict pleegde.
In een eerdere noot, bij de zaak *El-Ghatet*,[4] heb ik aandacht besteed aan het beslissingsmodel dat ik heb ontdekt in Straatsburgse artikel 8 EVRM-zaken waarin zogenoemde immigratiespecifieke criteria aan de orde zijn.[5] In deze zaken komt het Hof alleen tot een schending van artikel 8 EVRM, als de staat zich incorrect of inconsistent toont in de toepassing van de betreffende immigratiespecifieke criteria, of als het niet voldoen aan het betreffende criterium betrokkene niet kan worden aangerekend. Opgemerkt zij dat het hier gaat om een empirische correlatie in de Straatsburgse rechtspraak. Er is dus geen sprake van een stappenplan dat bewust door het Hof zou worden gehanteerd. Dat de uitkomst in deze zaken 'bepaald wordt' aan de hand van de vraag of het immigratiespecifieke criterium correct en consistent is toegepast en of het gedrag van betrokkene in dit opzicht verontschuldigbaar is, betekent dan ook niet dat het Hof in deze zaken geen aandacht besteedt aan andere aspecten. Integendeel, volgens het Hof zelf zijn in deze zaken ook aspecten als de ernst van de gepleegde delicten, de kans op recidive, en de consequenties van uitzetting voor betrokkenen van betekenis voor de vraag of artikel 8 EVRM is geschonden.
Ook in de zaak *Ndidi* is een immigratiespecifiek criterium aan de orde, en ook hier is de uitkomst van de zaak in lijn met voornoemd beslissingsmodel. In deze noot zal ik eerst toelichten hoe de zaak *Ndidi* past in het beslissingsmodel dat in de Straatsburgse rechtspraak geldt wanneer immigratiespecifieke criteria aan de orde zijn (punt 2). Vervolgens zal ik onder punt 3 bespreken hoe de Straatsburgse benadering zich verhoudt tot de eisen die het HvJEU stelt aan de onderbouwing van uitzettingsbeslissingen wegens openbare orde aspecten. Tenslotte zal ik onder punt 4 betogen dat toepassing van het Straatsburgse beslissingsmodel niet verenigbaar is met de Gezinsherenigingsrichtlijn.

2. Het immigratiespecifieke aspect in de onderhavige zaak betreft het feit dat betrokkene delicten heeft gepleegd na een formele waarschuwing dat hij daarmee zijn verblijfsstatus op het spel zou zetten. Met de waarschuwing dat een toekomstige misstap verblijfsrechtelijke consequenties heeft, stelt de staat een voorwaarde aan het behoud van iemands verblijfsstatus. Deze voorwaarde is immigratiespecifiek, omdat de enkele recidive redengevend

1 EHRM 18 oktober 2006, *Üner t. Nederland*, *JV* 2006/417 m.nt. Boeles, ve06001382.
2 EHRM 23 juni 2008, *Maslov t. Oostenrijk*, *JV* 2008/267 m. nt. Boeles, ve08001098.
3 EHRM 20 september 2011, *A.A. t. Verenigd Koninkrijk*, *JV* 2011/484 m.nt. van Walsum, ve11002239.
4 EHRM 8 november 2016, *El Ghatet t. Zwitserland*, *JV* 2017/2 m.nt. Hilbrink, ve16002215.
5 Immigratiespecifieke criteria bepalen uitsluitend in de context van migratie of iemand van overheidswege fysiek mag worden verwijderd uit de maatschappij als geheel. Een voorbeeld is het niet hebben van voldoende bestaansmiddelen: buiten de migratiecontext geldt deze omstandigheid niet als een formele reden om iemand fysiek uit de maatschappij als geheel te verwijderen. Het plegen van misdrijven, daarentegen, is niet immigratiespecifiek. Naast uitzetting is ook het opleggen van gevangenisstraf een mogelijke formele reactie.

is voor de verblijfsrechtelijke consequenties, en niet de aard en ernst van het gepleegde delict, of het gevaar dat van betrokkene uitgaat.[6]
De Straatsburgse rechtspraak laat zien dat als uitzetting plaatsvindt vanwege delicten die zijn gepleegd terwijl de verblijfsrechtelijke consequenties hiervan voor betrokkene kenbaar waren, het Hof in de regel geen schending van artikel 8 EVRM aanneemt.[7] De enkele uitzonderingen op deze regel beantwoorden aan voornoemd beslissingsmodel. Een schending komt in dit type zaken slechts voor als betrokkene in de gegeven omstandigheden niet hoefde te verwachten dat zijn handelen verblijfsrechtelijke consequenties zou hebben en het immigratiespecifieke criterium dus ten onrechte is tegengeworpen, of wanneer betrokkene niet kan worden aangerekend dat hij zijn verblijfsstatus op het spel heeft gezet. In de zaak *Omojudi* correleert de schending van artikel 8 EVRM met een inconsistentie in de waardering van de door betrokkene gepleegde delicten.[8] In deze zaak was aan betrokkene, aan wie in het verleden een permanente verblijfsvergunning was toegekend, een uitzettingsbevel opgelegd wegens een strafbaar feit. Terwijl betrokkene in procedure was over dit uitzettingsbevel, pleegde hij een verkeersdelict door bij een verkeerscontrole te weigeren lichaamsmateriaal af te staan voor nadere analyse. Er was dus sprake van 'immigratiespecifieke recidive'. Toch concludeerde het Hof dat uitzetting in strijd was met artikel 8 EVRM. De staat had namelijk het uitzettingsbevel in belangrijke mate gebaseerd op delicten die betrokkene gepleegd had voordat aan hem een permanente verblijfsstatus was toegekend. Het Hof accepteerde echter niet dat delicten die eerder geen beletsel hadden gevormd voor het verlenen van een permanente verblijfsstatus aan betrokkene, op een later moment werden aangemerkt als redengevend voor diens uitzetting: *In the present case the applicant was granted Indefinite Leave to Remain following his conviction for relatively serious crimes involving deception and dishonesty. The Court attaches considerable weight to the fact that the Secretary of State for the Home Department, who was fully aware of his offending history, granted the applicant Indefinite Leave to Remain in the United Kingdom in 2005. […] the Court finds that for the purposes of assessing whether the interference with the applicant's family and private life was necessary in a democratic society, the only relevant offences are those committed after the applicant was granted Indefinite Leave to Remain*.[9] De toekenning van een stabiele verblijfsstatus maakt dus dat iemand er vanuit mag gaan dat wat de autoriteiten betreft, zijn lei is schoongeveegd.
Een andere zaak waarin het Hof ondanks een 'immigratiespecifieke recidive' een schending van artikel 8 aannam, is *Jakupovic*.[10] In deze zaak ging het om een minderjarige die de fout in ging, terwijl hij in procedure was over een inreisverbod dat was opgelegd naar aanleiding van eerdere delicten. In *Jakupovic* overwoog het EHRM niet expliciet dat betrokkene het op het spel zetten van zijn toch al precaire verblijfsstatus niet kon worden aangerekend. Veelzeggend is wel, dat dit de enige zaak is waarin een 'immigratiespecifieke recidivist' een minderjarige betrof. Bovendien geldt minderjarigheid ook ten aanzien van andere immigratiespecifieke aspecten als een verontschuldigende omstandigheid die in de regel correleert met het aannemen van een schending van artikel 8 EVRM.[11]

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6 Buiten de migratiecontext kan fysieke verwijdering uit de maatschappij (het opleggen van detentie) wegens gepleegde delicten niet losstaan van de aard en ernst van de gepleegde feiten.
7 Zie onder meer EHRM 18 september 2012, *Abdi Ibrahim t. Verenigd Koninkrijk*; EHRM 22 januari 2013, *El Habachi t. Duitsland*; en EHRM 15 november 2012, *Shala t. Duitsland, JV* 2013/2, ve12002287. Een uitgebreid overzicht van zaken is op te vragen bij de auteur.
8 EHRM 24 november 2009, *Omojudi t. Verenigd Koninkrijk*, *JV* 2010/27 m.nt M.A.C. Reurs, ve09001647.
9 *Omojudi*, paras 42-43.
10 EHRM 6 februari 2003, *Jakupovic t. Oostenrijk*, *JV* 2003/102, ve03000212.
11 Dit is goed te zien in zaken waarin betrokkene in het verleden de mogelijkheid had om de nationaliteit van het gastland te verwerven en daarmee onuitzetbaar zou zijn geworden. In die zaken correleert de uitkomst van de zaak met de vraag of het niet gebruik hebben gemaakt van de mogelijkheid om de nationaliteit van het gastland te verwerven betrokkene kan worden aangerekend. In de gevallen waarin de daartoe vereiste administratieve handelingen de

Terug naar de zaak *Ndidi*. Van een inconsistente waardering van de gepleegde delicten is in deze zaak geen sprake: het besluit tot uitzetting volgde op delicten, gepleegd na een formele waarschuwing dat verdere strafbare feiten verblijfsrechtelijke consequenties zouden hebben. Hoewel net als in de zaak *Omojudi*, aan betrokkene een permanente verblijfsstatus was verleend terwijl de autoriteiten bekend waren met zijn criminele verleden, zijn in *Ndidi* door betrokkene ook *na* de toekenning van de permanente verblijfsstatus nog een aantal ernstige delicten gepleegd. De uitzetting berust in deze zaak dus niet in belangrijke mate op strafbare feiten die eerder geen beletsel voor een permanent verblijfsrecht vormden. Verder zijn er volgens het Hof in deze zaak geen omstandigheden waardoor betrokkene de 'immigratiespecifieke recidive' niet kan worden aangerekend. Het feit dat betrokkene dyslectisch is acht het Hof geen excuus voor zijn gedrag; bovendien was betrokkene meerderjarig toen de autoriteiten hem waarschuwden voor de verblijfsrechtelijke consequenties van toekomstige delicten: *having regard to his long and escalating history of offending, continuing after the Secretary of State's warning in 2006, and beyond his attaining the age of majority, the Court sees no grounds upon which the decision of the domestic authorities can be impugned*.[12] Dat het Hof in *Ndidi* uitzetting niet in strijd acht met artikel 8 EVRM is dus in overeenstemming met het beslissingsmodel dat typerend is voor dit soort zaken: zonder inconsistent optreden van overheidswege of verontschuldigbaar handelen door betrokkene ten aanzien van het immigratiespecifieke criterium, geen schending van artikel 8 EVRM.

Dat de uitkomst van dit type zaken bepaald wordt door de vraag of betrokkene inderdaad wist of kon weten dat hij met zijn handelen zijn verblijfsvergunning op het spel zette en of hij hiervoor verontschuldigd kon worden, heeft implicaties voor de relevantie van de overige aspecten die het Hof bespreekt. Zo kunnen de tijd die verstreken is sinds het laatste delict en de vraag in hoeverre betrokkene nog steeds een bedreiging vormt voor de openbare orde, niet van invloed zijn in zaken waarin het beslissingsmodel de uitkomst dicteert. Ook komt in zaken waarin het beslissingsmodel geldt geen betekenis toe aan de duur van het verblijf in de gastlidstaat of de consequenties van uitzetting voor de kinderen die in het spel zijn. Dergelijke aspecten bespreekt het Hof in alle zaken waarin een gevestigde migrant wordt uitgezet, maar kunnen alleen beslissend zijn in zaken waarin geen sprake is van 'immigratiespecifieke recidive'. Wie, zoals rechter Turković, Straatsburgse zaken met elkaar vergelijkt in het licht van deze aspecten, zonder rekening te houden met de vraag of er sprake is van 'immigratiespecifieke recidive', komt dan ook onherroepelijk tot de conclusie dat het Hof inconsistent is.

Dat het Hof in zaken waarin sprake is van 'immigratiespecifieke recidive' geen doorslaggevende betekenis toekent aan de vraag in hoeverre betrokkene een bedreiging vormt voor de openbare orde en aan de consequenties van uitzetting voor het gezinsleven, vloeit voort uit het uitgangspunt van het Hof dat staten het recht hebben om migratie te reguleren. Op grond van dit recht is het in eerste instantie aan staten om te bepalen onder welke voorwaarden migranten worden toegelaten en mogen verblijven. Als het Hof in zijn uitspraken voorbij zou gaan aan het gegeven dat iemand een waarschuwing heeft genegeerd over de verblijfsrechtelijke consequenties van toekomstige delicten, zou het daarmee voorbij gaan aan een uitdrukkelijk door de staat gestelde voorwaarde aan (voortgezet) verblijf. Het zou daarmee dus afbreuk doen aan het recht van staten om migratie te reguleren. Het is precies dit punt, dat maakt dat een beslissingsmodel als hierboven beschreven, ondenkbaar is in zaken waarin niet de Straatsburgse interpretatie van artikel 8 EVRM, maar de Luxemburgse interpretatie van het EU-recht de uitkomst bepaalt.

3. In de Luxemburgse jurisprudentie inzake vrij verkeer van Unieburgers en gezinshereniging op grond van de Gezinsherenigingsrichtlijn komt aan het recht van staten om migratie te

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verantwoordelijkheid van de ouders betrof omdat betrokkene destijds minderjarig was (EHRM 26 maart 1992, *Beldjoudi t. Frankrijk*, ve03000756, *RV*1992, 55; en EHRM 26 september 1997, *Mehemi t. Frankrijk, ve03000760*), concludeerde het Hof dat uitzetting in strijd was met artikel 8 EVRM.

12 *Ndidi*, par. 81.

reguleren geen zelfstandige betekenis toe. Het gaat daarin juist om het stimuleren van het recht van vrij verkeer van Unieburgers en hun gezinsleden, en om het bevorderen van gezinshereniging door derdelanders. Het HvJEU ziet er streng op toe dat staten aan deze doelstellingen geen afbreuk doen. Een staat kan dus niet eenzijdig, door middel van een waarschuwing, een niet door het EU-recht voorziene beperking verbinden aan het behoud van iemands verblijfsrecht.
Het HvJEU benadrukt sinds jaar en dag dat maatregelen in het kader van openbare orde of veiligheid slechts gerechtvaardigd zijn wanneer, na een beoordeling per geval door de bevoegde nationale autoriteiten, blijkt dat het persoonlijke gedrag van de betrokkene een actuele, reële en voldoende ernstige bedreiging voor een fundamenteel belang van de samenleving vormt.[13]Dergelijke maatregelen kunnen dus niet na een strafrechtelijke veroordeling automatisch worden gelast ter algemene preventie, en ook het bestaan van een veelvoud van strafrechtelijke veroordelingen kan op zichzelf niet doorslaggevend zijn.[14] Hoewel in het kader van de Gezinsherenigingsrichtlijn nog geen openbare orde zaken zijn gewezen, is op voorhand duidelijk dat ook in deze context geen betekenis kan toekomen aan de vraag of betrokkene delicten heeft gepleegd terwijl hij wist dat dit verblijfsrechtelijke consequenties zou hebben. In de eerste plaats omdat dit, als gezegd, ruimte zou laten aan staten om eenzijdig, door middel van het geven van een waarschuwing, een niet door de Richtlijn voorziene beperking te verbinden aan het behoud van iemands verblijfsrecht. Daarnaast bepaalt artikel 17 van de Richtlijn dat in geval van afwijzing van een verzoek, intrekking of niet-verlenging van een verblijfstitel, alsmede in geval van een verwijderingsmaatregel tegen de gezinshereniger of leden van diens gezin, de lidstaten terdege rekening met de aard en de hechtheid van de gezinsband van de betrokken persoon en met de duur van zijn verblijf in de lidstaat, alsmede met het bestaan van familiebanden of culturele of sociale banden met zijn land van herkomst. Artikel 6, tweede lid van de Richtlijn bepaalt dat de lidstaat bij zijn besluitvorming naast artikel 17 ook de ernst van de inbreuk of het soort van inbreuk van het gezinslid op de openbare orde of de openbare veiligheid in overweging neemt, of het risico dat van die persoon uitgaat. Het moge duidelijk zijn dat het enkel opnemen van dergelijke overwegingen in de besluitvorming zonder daaraan doorslaggevende betekenis toe te kennen niet volstaat.

4. De vraag of betrokkene zich bewust was van de consequenties van zijn gedrag voor zijn verblijfsstatus kan alleen relevant zijn in een juridische context waarin het recht van staten om voorwaarden te stellen aan toegang en verblijf centraal staat, en waarin de rechter de staat hierbij niet voor de voeten wil lopen. Of betrokkene zich bewust was van de consequenties van zijn gedrag voor zijn verblijfsstatus zegt niks over de aard of de ernst van de inbreuk op de openbare orde of de openbare veiligheid, of het risico dat van die persoon uitgaat. Ook zegt deze omstandigheid niks over de aard en de hechtheid van de gezinsband van de betrokken persoon, de duur van zijn verblijf in de lidstaat, of over het bestaan van familiebanden of culturele of sociale banden met zijn land van herkomst. Het tegenwerpen van deze omstandigheid zou dus zonder meer in strijd zijn met bovengenoemde bepalingen van de Gezinsherenigingsrichtlijn.

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13 Zie onder meer C-371/08, zaak *Ziebell*, para. 82, ve11001061.
14 C-349/06, zaak *Polat*, para. 36, *JV* 2007/524 m.nt. C.A. Groenendijk, ve07001973.