Rehabilitation or transportation – what now for 'home-grown' foreign national prisoners?

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Abstract

Deportation, and immigration control generally, are held not to enjoy the protections of article 6 ECHR (right to a fair trial in a civil or criminal matter) or article 7, which outlaws retrospective criminal penalties. However, the Immigration Act 2014 declaration that 'deportation of a foreign criminal "is" in the public interest' has opened the way to retrospective measures against foreign criminals, even long residents with leave to remain. The Act's formal limits on access to article 8 ECHR and curtailed appeal rights for foreign criminals mean that the 'effective remedy' available to 'aliens' under article 13 barely applies. This paper argues the need to consider how the current position measures up to the standards of certainty and finality formally protected by the ancient concepts of double jeopardy and *res judicata*, and consider whether a blanket exclusion of immigration issues from articles 6 and 7 can still be justified. I examine how *autrefois convict* and *autrefois acquit* may be applicable where the criminal sentence discussed but did not include a recommendation for deportation, and how *res judicata* may be applicable where a foreign criminal has already won an appeal on art 8 grounds, or, by analogy, where leave to remain has been granted subsequent to the criminal conviction. I look at whether deportation appeals for unconvicted suspects facing unsupported police evidence amount to a 'determination of a criminal charge' despite being neither a criminal or civil trial, and whether deportation as a result of such must amount to a 'penalty', so as to engage articles 6 and 7 ECHR.

1. Introduction

Life has always been harsh for foreigners who commit crimes in the UK. Historically, 'aliens' whether criminal or not could be deported by royal prerogative. The 1919 introduction of the 'conducive to the public good' test amounted to a limiting of that prerogative power, but there was little or no oversight of the Secretary of State's use of that test. Until 1969 there was no right of appeal against a decision to deport, and few benefited even from this until the later advent of legal aid. The specific issue of 'foreign criminals' attracted little judicial or political attention until the 2006 sacking of Home Secretary Charles Clarke on the discovery that over 1000 foreign national prisoners had been released at the end of their sentences without being considered for deportation[1]. Following that debacle, the UK Borders Act (UKBA) 2007 introduced 'automatic deportation' for those sentenced to at least 12 months in prison, and since then the issue of 'foreign national criminals' has driven much of the political discussion, legislative and policy changes and litigation over the role of article 8 ECHR in immigration.

What is entirely new is the political determination to root out all 'foreign criminals' regardless of circumstances, via removing or curtailing rights of appeal and reducing the application of article 8 ECHR. The declaration that deportation of a foreign criminal 'is' in the public interest leaves the Secretary of State free to make a decision to deport regardless of time elapsed since conviction or

[1] *How the deportation story emerged* BBC 9 October 2006

even any previous judicial consideration of the issue. In this paper I will be looking briefly at the history of deportation, then at legal developments since the major 9 July 2012 changes in the rules on family migration and deportation. I will look at these changes in the context of the common law principles of *res judicata*, *autrefois convict* and *autrefois acquit*, and the traditional disapproval of retrospective measures, and also, using Operation Alliance and Operation Nexus cases as examples, considering whether, in the context of these changes, the issue of deportation can continue to be considered as falling outside the protection of art 6 ECHR, or alternatively not a criminal penalty under art 7. I conclude that the recent and proposed changes in law and Home Office policy on foreign criminals amount to a more general attack on fundamental common law principles such as legal certainty, finality and clarity on burden and standard of proof.

2. The development of modern immigration law concerning foreign national prisoners

Deportation, the power to remove someone from the UK and prevent their return, historically applied to 'aliens' i.e. anyone who was not a British subject. 'Conducive' deportation has existed for nearly a hundred years, and operated most harshly.[2] Deportation could originally only be challenged, if at all, by a *habeas corpus* action. In *Venicoff*[3] the court referred to the regulations introduced in 1919 which narrowed the ambit of the unlimited wartime powers of deportation of aliens to those cases in which the Secretary of State 'deems it to be conducive to the public good'. The applicant, a Russian, had lived in the UK for over 30 years. He had convictions from when he was 'quite a lad', but had recently been accused (but not tried or found guilty) of living on immoral earnings by prostituting his wife and another woman. The court decided that the word 'deems' did not entitle him to any hearing, despite arguments that that was contrary to natural justice.

The lack of any right to be heard lasted until the Immigration Appeals Act (IAA) 1969 set up a new system of adjudicators and an Immigration Appeal Tribunal. In 1962 and 1969 the power to deport was extended to Commonwealth citizens, and it had been argued that Commonwealth citizen status merited a right of appeal.

The Immigration Act 1971, repealing all previous immigration legislation, opened the modern era of immigration control. This Act codified provisions on deportation including a power to deport family members of persons being deported for breaches of conditions and of those being deported on 'conducive' grounds.[4] Then from 2 October 2002, overstayers, those in breach of conditions and those who had obtained leave by deception, together with their families, became subject to much simpler administrative removal procedures,[5] leaving deportation to apply only to those whose character or conduct appears to merit removal.

3. The rationale for deportation

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[2] In the 1969 Lords debate on the Bill to introduce an appellate system, Baroness Gaitskell quotes Quintin Hogg, Shadow Home Secretary (later Lord Hailsham) as describing the UK immigration system since 1905 as 'one of the most illiberal, arbitrary systems of immigration law in the civilised world'. HL Deb 27 March 1969 vol 300 cc1418-55

[3] *R v Inspector of Leman St Police Station, R v Secretary of State for Home Affairs, ex p Venicoff* [1920] 3 KB 72

[4] Immigration Act 1971 unamended, ss 3(5), 3(6), s5

[5] Immigration and Asylum Act 1999 s10

In the House of Lords debate introducing the 1969 measures, Lord Brooke of Cumnor spoke against granting rights of appeal, referring to two people whose deportation orders he had signed while Home Secretary, one for a known drug addict and the other an 'avowed Nazi', who would have gained a right of appeal if the bill had been law.[6] A contemporary commentator, describing applicants like *Venicoff* as 'rightless' aliens, stated:

> 'The apparent liberality of these provisions for appeal must be measured against the difficulties which will face the adjudicators and Tribunal in deciding to interfere with the exercise of discretion (e.g. what is "conducive to the public good"?)'.[7]

Caselaw subsequently established that past criminal conduct could in principle lead to deportation, but only where there was a real public interest in removal. Donaldson LJ (as he then was) in *Santillo*[8] (concerning a deportation order made some years after a court recommendation for deportation) said this:

> **'... the existence of previous criminal convictions is not of itself a basis for making a recommendation.** This is not only the law in accordance with Article 3 of the Council Directive.[9] **It is also only common sense and fairness. No one can reasonably recommend the deportation of a foreigner solely because he has a criminal record. If he is, or will upon release from prison be, completely rehabilitated, he is a threat to no one.** But the position is quite different if the court considers that the previous record of the accused, including the offence with which the court is directly concerned, renders it likely that he will offend again'. (Writer's emphasis)

In *Florent*[10] Mr Macdonald (as he then was), representing the appellant, suggested that the Secretary of State had *'overlooked the fact that his function was not to add punishment to the punishment inflicted upon the appellant by the ... Crown Court'* but only to decide on the conducive issue, which amounted to whether the appellant was likely to reoffend. In contrast, some offences are considered to be so serious as to justify deportation even if there were no record of previous offences and no great likelihood of the individual's reoffending.[11] Offences such as rape, incest, violent robbery, arson, importing or supplying dangerous drugs, have all been so regarded.[12] In *Goremsandu*[13] the court decided that where an offence was sufficiently serious, it was open to the Secretary of State to show the public's repugnance for the offence, regardless of propensity to reoffend: such decision challengeable only on *Wednesbury* grounds.

4. The pre - 2012 regime

Following the Immigration Act 1971, the Immigration Rules on deportation provided for a consideration of factors including age, length of residence in the UK and connections with the

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[6] HL Deb 27 March 1969 (n 2)
[7] Statutes, 32 Mod. L. Rev. 668 1969
[8] *R v SSHD ex p Santillo* (1980) 2 Cr. App. R. (S.) 274
[9] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health
[10] *R v IAT ex p Florent* [1985] Imm AR 141 : the crime here being wounding with intent, arising from an attack on his wife
[11] *ibid*
[12] Macdonald's Immigration Law and Practice 5th edition 2001, chapter 15 ISBN 0 406 91274 2 para 15.14 and footnotes
[13] *Goremsandu v SSHD* [1996] Imm AR 250, CA (convicted of incest against his daughter)

community, as well as character and criminal convictions: and such consideration subsequently became bound by the Human Rights Act (HRA) 1998. Then in 2006 the Home Office revealed that over 1,000 foreign national prisoners had been released without being considered for deportation – the revelations which led to the sacking of the Home Secretary. Of these, around 144 had been convicted of 'more serious' offences and 36 people for the 'most serious' offences.[14] An earlier inspection report by HM Inspector of Prisons, notable for its orientation almost entirely towards the welfare of this then neglected group of prisoners,[15] criticised the Immigration and Nationality Directorate for failing to work coherently and efficiently on the foreign national prisoners issue. Home Office policy then adopted a presumption[16] that any non-British citizen[17] convicted of a serious crime would face deportation procedures.

Continued government frustration led in 2007 to the introduction of automatic deportation. The UK Borders Act (UKBA) 2007 s32 provided that, if a 'foreign criminal', defined as a person who was not British, had committed a crime for which he had been sentenced to a term of imprisonment of 12 months or more, or which has been declared to be a 'serious crime',[18] the Secretary of State *must* make a deportation order unless certain exceptions applied. The exceptions are set out in s33 and principally cover those with claims under the ECHR or the UN Convention on Refugees. The precise mechanism was to 'deem' the deportation of a foreign criminal (as so defined) to be conducive to the public good. The transitional provisions[19] limited the Act's retrospective application to those who were still serving their sentence, or whose sentence was still suspended, at the time the Act came into force.

After the Act was passed, the tribunal fiddled for a while with the specifics of automatic deportation. In *MK*[20] the Tribunal decided that because Parliament had made the position clear, *'the respondent's view of the public interest has no relevance to an automatic deportation'* and *'it is not open to an appellant to argue that his deportation is not conducive to the public good nor is it necessary for the respondent to argue that it is'.*

Nevertheless, caselaw on both conducive and automatic deportation continued to give weight to the UK's Convention obligations, following ECtHR decisions, demonstrated by the fact that in 2010, some three years after the Act, over 30% of appeals against deportation were successful.[21] In *Üner,*[22] the Strasbourg court had summarised the critical issues in deportation proceedings involving the right to family life:

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[14] *A thematic inspection of how the UK Border Agency manages foreign national prisoners February- May 2011* Independent Chief Inspector of Borders and Immigration.
[15] *Foreign National Prisoners: a thematic review*, HMIP July 2006, Introduction by Anne Owers
[16] The pre 2012 Immigration Rules para 364 stated: "...it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport".
[17] For EEA nationals the criteria are different, but the presumption is there nevertheless
[18] As defined in the Nationality, Immigration and Asylum Act 2002 s72
[19] UK Borders Act 2007; UK Borders Act (Commencement No. 3 and Transitional Provisions) Order 2008 2008 No. 1818 (C. 77) art.3
[20] *MK (deportation foreign criminal public interest) Gambia* [2010] UKUT 281 (IAC)
[21] *Thematic inspection on ... foreign national prisoners* (n 14) Executive Summary para 4
[22] *Üner v The Netherlands* [2006] ECHR 873

57. Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision ... In the case of *Boultif* the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. ...

58. The Court would wish to make explicit two criteria which may already be implicit in those identified in the Boultif judgment:
    a. the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
    b. the solidity of social, cultural and family ties with the host country and with the country of destination.

In *Maslov*[23] the appellant was brought from Bulgaria as a child and gained the right to remain permanently in Austria. He committed various offences, and Austria decided to expel him back to Bulgaria. The Court applied the *Üner* criteria, noting that he had lived in Austria since the age of 6, his offences were 'typical examples of juvenile delinquency', he had showed a period of good conduct, and had strong ties with Austria and none with Bulgaria. The Court decided that where a person has spent most of their life in the host country, 'very serious reasons' are required to justify expulsion, especially where the offences were commented as a juvenile, and that Article 40 of the Convention on the Rights of the Child makes reintegration an aim to be pursued by the juvenile justice system of the host state. In other words, 'home-grown criminals'[24] should be dealt with by their host State. Strasbourg also considered protection issues. *Sufi and Elmi*[25] considered the deportation of two Somali convicted criminals to Mogadishu, and found that conditions in the relevant parts of Somalia were such that their deportation would breach art 3 ECHR.

These ECtHR cases were broadly followed in the UK. In *MJ (Angola),*[26] dealing with a lawful settled migrant who had spent the major part of his childhood and youth in the UK, the court stated: '*Much of his offending was committed when he was under the age of 21. In these circumstances, very serious reasons were required to justify his deportation: see Maslov at [75]'*. The case of *AA v UK*[27] applied *Üner* and *Maslov* to the case of someone convicted of rape as a juvenile and sentenced to 4 years in a young offenders institution. Deportation was found to be a breach of art 8. And in relation to EEA nationals, the case of *Muuse*[28] quoted a Home Office policy statement that no EEA national would be removed under the automatic deportation provisions unless the prison sentence imposed was two years or more.

5. Post-2012 and the Immigration Act 2014: limits on application of art 8 ECHR and curtailed appeal rights for foreign criminals

July 2012 brought a major overhaul of the Immigration Rules, to set out clearly the Government's view of how article 8 should be applied in family and private life cases, including in deportation

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[23] *Maslov* [2008] ECHR 546

[24] The phrase 'home-grown criminal' was first used in a UK immigration case in *BK (Deportation – s 33 "exception" UKBA 2007 – public interest) Ghana* [2010] UKUT 328 (IAC) at [14]

[25] *Sufi and Elmi v UK* [2011] ECHR 1045

[26] *MJ (Angola)* [2010] EWCA Civ 557 [40]

[27] *AA v UK* 8000/08 [2011] ECHR 1345

[28] *Muuse* [2010] EWCA Civ 453 [15 (i) (b)]

appeals. There followed a series of Upper Tribunal and Court of Appeal judgments, and, showing further government dissatisfaction at what it saw as the courts' continued propensity to allow appeals against deportation on human rights grounds, the Immigration Act 2014 contained some strong statements about the public interest, especially in relation to foreign national prisoners. These have since been the subject of Court of Appeal consideration.[29]

In *SSHD v AJ (Angola) and AJ (Gambia)*,[30] the Court of Appeal emphasised the 'great weight' of the public interest in deportation. It determined that 'an official or a tribunal should seek to take account of any Convention right *through the lens of the new rules themselves'*. Further, unlike *'in other parts of the Immigration Rules, where the Secretary of State retains a general discretion outside the rules...'* the court held that in cases of deportation of foreign national prisoners there is no such general discretion (though in *Chege*[31] the Upper Tribunal has decided that para 397 of the rules did provide a residual discretion 'in exceptional circumstances where an appellant cannot succeed by invoking rights protected by Article 8 of the ECHR'). Finally, the court emphasised the need *'to ensure a uniformity of approach between different officials, tribunals and courts'* ... and to ensure that decisions [take account of] the *'considerable weight to be given to the public interest in deportation of foreign national criminals'*.

However, slim as the chance is of winning an appeal on art 8 grounds, other measures will prevent access to the tribunal at all for most foreign criminals. Section 17 IA 2014 introduces a new s94B into the Nationality and Immigration Act (NIAA) 2002. This states that where a foreign criminal appeals against deportation on human rights grounds, the Secretary of State 'may certify' the claim if she considers that removal before the appeal is heard and determined would not be a breach of that person's human rights, defined as facing 'a real risk of serious irreversible harm'. This, more stringent than the art 3 test of 'real risk of serious harm', effectively requires evidence of a risk of permanent damage to the appellant or family member's mental or physical health.[32] Most foreign criminals who are removable are unlikely to have grounds to challenge such certification,[33] while those who are not readily removable will perforce remain in the UK, subject to the 'hostile environment', unable to exercise any right of appeal.

In these circumstances it must be arguable that the access to an effective remedy 'guaranteed' by art 13 ECHR is so weak as to no longer constitute a 'guarantee' sufficient to remove the issue from the protection of art 6. This is discussed below.

6. Merely a tightening of immigration control or a more fundamental attack on the rule of law?

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[29] For a detailed and fully-referenced discussion see the writer's article *Immigration control and the place of Article 8 in the UK courts – an update,* to be published in the September 2015 edition of the Journal of Immigration, Asylum and Nationality Law

[30] *SSHD v AJ (Angola) and AJ (Gambia)* [2014] EWCA Civ 1636

[31] *Chege (section 117D - Article 8 - approach : Kenya)* [2015] UKUT 165 (IAC), headnote

[32] Home Office *Section 94B certification guidance for Non-European Economic Area deportation cases* version 3.0 29 January 2015 [3.3- 3.8] effectively says that only the existence of a seriously-ill child who has no other carer, or a partner who needs full-time care where there is no other carer, including medical professionals, would normally reach the threshold.

[33] The writer understands from ILPA that challenges have been made, which have so far been settled out of court.

The purpose, or policy aim, of deporting foreign criminals has been contested for almost 100 years. The recent changes in government policy and court rulings could be seen simply as a return to the earlier more harsh regime, when 'aliens' were 'rightless' and UK immigration law described in parliament as 'illiberal' and 'arbitrary'. However, not just the Human Rights Act 1998 but the previous 25 years of bringing 'aliens' and legislation dealing with them into the tribunal system, and, through legal aid, increasing migrants' access to higher appellate courts and judicial review, have brought migrants' status squarely within the rule of law. Arguably, the very codification of immigration law, and the facilitation of migrants' access to the tribunals and higher courts, amount to the state's relinquishing of absolute control over its borders, giving place to a formal recognition that the status of migrants in the legal system is no longer so sharply different from that of citizens. Aliens had always had access to the common law remedies of habeas corpus and judicial review. But at least until the 60's these remedies were available only to a very few, and did not, until much later, purport to provide a systematic body of clear, accessible administrative decisions which would guide the bureaucracy's operation and which were accessible to challenge. What changed following the IAA 1969 and the IA 1971 was the development of a system of official decision-making subject to a formal and widely-used appellate system as well as to the rapidly-expanding use of judicial review from the 70's onwards.[34] In addition, the availability of legal aid in immigration appeals from 1999 meant that most appellants were legally represented. This whole system has been widely theorised as a form of 'administrative justice'[35] distinct from both civil and criminal justice in being much more subject to strategic considerations of cost, turnover and throughput[36] but still giving rise to both a sense of and the reality of the application of the rule of law in immigration control. Clearly these developments have led to a reasonable expectation (if never a strictly legitimate expectation, and if often not borne out) both to migrants and to wider society that individual cases would be dealt with fairly and in accordance with principles of good administration.[37] It should no longer be enough to say 'they are aliens'.

The principal legal and procedural underpinnings of this 'reasonable expectation', in relation to immigration control, have been:

- Greater transparency: published rules and guidance; applicants' access to their own Home Office files
- Procedural fairness: giving reasons for decisions, providing rights of appeal, with legal aid for representation
- Certainty: e.g. 'routes' to settlement and family reunion

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[34] For some time now, a big majority of judicial reviews have concerned immigration. In 2013 the figure was 77% – *Immigration judicial reviews,* Robert Thomas, UK Constitutional Law Association blogpost 13 September 2013

[35] See for example *Administrative Justice and Asylum Appeals: a study of tribunal adjudication* Robert Thomas, Hart Publishing 2011 ISBN 978-1-84113-936-4

[36] For example, in 2005, Prime Minister Tony Blair took personal charge of the cabinet committee dealing with immigration and asylum, which covered the whole asylum system, from immigration officers through to the tribunal system and legal aid expenditure – see The Independent 25 May 2005

[37] This is certainly accepted by the courts: *Fayed, R (on the application of) v Secretary Of State for Home Department* [1996] EWCA Civ 946, [1997] 1 All ER 228. Certainly, citing the many reports criticising Home Office decision-making and tribunal determination gets very short shrift. See for example the Supreme Court's recent dismissal (not to say trouncing) of the appeals of failed asylum-seekers complaining about Home Office unlawful acts, in *TN & MA* [2015] UKSC 40

- Finality: treating the determination of an appeal as determinative, and not imposing retrospective measures.

Of course, even at their highest, these principles have never applied so strongly in the immigration world as in other legal contexts; and all of these features are now under attack in the immigration context. But what is noticeable is how quickly these gains have been eroded in relation to 'foreign criminals'.

7. Can we use common law doctrines to protect certainty and finality, and defend against retrospective measures?

Especially in judicial discussion, the common law principles are now generally discussed in the context of the relevant ECHR articles. I take the common law doctrines in turn, and discuss how they have been applied, or not, in the immigration law context, and consider what possibilities there may be for legal challenges, including establishing access to art.s 6 and 7 for migrants.

a. Retrospective measures

Retrospective measures, though permissible in a parliamentary democracy, are generally deprecated as unfair and eroding of respect for the law. In the recent case of *Reilly (no 2),*[38] a case concerning retrospective enforcement of regulations concerning benefit sanctions, Mrs Justice Laing reviewed the issue of retrospective legislation:

> 51. Retrospective legislation may be defined as law making which alters the future legal consequences of past actions and events. The longstanding objections to retrospective legislation are described in *Bennion on Statutory Interpretation* (6th ed.) p. 291:
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> > "Dislike of *ex post facto* law is enshrined in the United States Constitution and in the constitutions of many American states, which forbid it. The true principle is that *lex prospicit non respicit* (law looks forward not back). Retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law'. **The basis of the principle against retrospectivity is 'no more than simple fairness, which ought to be the basis of every legal rule'.** (writer's emphasis)
> >
> > ...
>
> 52. ... Section 4, HRA 1998 conferred upon the courts a new power to declare that legislation is incompatible with the ECHR. ...
>
> 53. Retrospective legislation may amount to a violation of human rights. The retrospective creation of criminal offences and heavier penalties is prohibited by Art. 7 ECHR ...
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> 54. The ECHR and other human rights conventions do not prohibit retrospective legislation outside the criminal sphere. Although the courts hearing civil claims are alert to the potential dangers of retrospective legislation, it is recognised that such measures may be justified in the

[38] *Reilly (No. 2) & Anor, R (on the application of) v Secretary of State for Work and Pensions* [2014] EWHC 2182 (Admin) (04 July 2014), 2015] 2 WLR 309,

> public interest. Challenges to retrospective legislation made under Art. 6(1) and A1 P1 raise distinctly different considerations... (footnotes omitted)

It is generally accepted as settled law that immigration is not considered a civil right for the purposes of art 6(1) ECHR,[39] and that deportation is not a 'penalty' for the purposes of art 7 ECHR. For foreign criminals to challenge decisions as unlawfully retrospective, these holdings must be analysed.

The case of *AT (Pakistan),*[40] concerned with the details of the transitional provision for automatic deportation under UKBA 2007, decided in passing that 'aliens' who are 'foreign prisoners' may be subject to retrospective measures. The court referred to art 7 ECHR and then considered whether automatic deportation constituted a 'penalty' for the purposes of that article:

> 25. Although we were shown no ministerial statements explaining why automatic deportation was introduced by the 2007 Act, I presume that at least one reason was to prevent re-offending in this country by a foreign criminal. It is right to say that the Secretary of State is not required to consider the risk of re-offending (although the issue may arise when Article 8 is being considered). Nonetheless the fact that automatic deportation will prevent re-offending by a foreign criminal in this country suggests that the measure can properly be categorised as preventive rather than punitive for the purposes of Article 7.
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> 26. In any event I have little doubt that the ECtHR if faced with the issue in this case would reach the same conclusion as the Commission did in *Moustaquim*, namely that "a measure of this kind taken in pursuance, not of the criminal law but of the law on aliens is not in itself penal in character."

Both the extent and limit of the 2007 automatic deportation regime's formal retrospective effect is shown in *RU (Bangladesh).*[41] The appellant committed an offence in 1999. He was sentenced to 15 years' imprisonment and was still on licence at the time the UKBA 2007 came into force, and so was liable to automatic deportation. In contrast, the criminal convictions of the writer's client XX, discussed below, occurred too long ago for automatic deportation, and so his UKBA 2007 decision had to be withdrawn, to be promptly replaced by a 'conducive' decision.

However, with the IA 2014 declaring[42] that deportation of foreign criminals 'is' in the public interest, the retrospective nature of decision-making in respect of foreign criminals has become more stark. We now encounter clients who have been in the UK for decades, whose offences were committed long ago and which, outside the immigration context, would long since have counted as 'spent',[43] and whose leave to remain in the UK has been confirmed subsequent to the offences, finding themselves unable to establish even that they have leave to remain. Because of the IA 2014 declaration, any applicant with any criminal conviction whatever, however long ago, whose case file crosses an immigration officer's desk,[44] faces a *de novo* consideration of whether he or she should be deported. The IA 2014 declaration is framed as potentially applying to all foreign criminals with exceptions only to a *requirement* to deport[45]. Unlike s32 UKBA 2007, there is no limit on the

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[39] *MAAOUIA v. FRANCE* - 39652/98 [2000] ECHR 455, 33 EHRR 42 at [37] However, see section 8 below for discussion of this issue.
[40] *AT Pakistan & Ors* [2010] EWCA Civ 567 [25,26]
[41] *RU (Bangladesh) v Secretary of State for the Home Department* [2011] EWCA Civ 651
[42] Immigration Act 2014 s19, introducing a new s117C into the Nationality, Immigration and Asylum Act 2002
[43] *New Guidance on the Rehabilitation of Offenders Act* GOV.UK 4 March 2014
[44] For example, needing to apply for a biometric residence card to confirm indefinite leave to remain, to satisfy the updated requirements for employers to check specified documents.
[45] NIAA 2002 s117C (3)-(6)

retrospective effect of this measure. Practitioners are finding that well-founded applications for further leave to remain by those with old criminal convictions, whether 'serious' or not, simply remain undecided, again leaving the applicant without documents necessary to prove his or her status. I consider in the next section whether such could be considered as subjecting the applicant to double jeopardy.

b. *autrefois convict, autrefois acquit* and *res judicata*

The criminal pleas of *autrefois acquit* or *autrefois convict,* often collectively referred to as 'double jeopardy', protect an accused from being tried twice for the same offence.[46] However, for foreign criminals, not just a previous acquittal but also a previous conviction are becoming more important, since, from a common sense point of view, a person facing deportation now because of a criminal conviction of some years ago, not acted upon by the Home Office, is facing a second penalty for that offence – a penalty which may be far more severe than the original prison sentence.

We have seen above that the ECtHR and the domestic courts have confirmed that deportation does not count as a 'penalty' for the purposes of art 7 ECHR, and so it would seem straightforward that the doctrine of *autrefois convict* cannot be advanced. However, given that a recommendation for deportation can always be made as part of the criminal sentence of a foreign criminal, it must be considered whether the making of such a recommendation, or not making it, has some bearing on whether a later decision to deport should be considered to be a 'penalty'.

The consideration of whether to make a recommendation for deportation is part of the criminal sentencing procedure, and a decision on that is part of the judicial finding of the court. The CPS Guidelines[47] make it clear that, although the final decision on deportation is for the Secretary of State (so the sentencing court is not required to carry out a full human rights assessment) reasons must be given, 'in fairness to the defendant and to assist the Secretary of State'.[48] The guidelines state:

> In deciding whether to recommend deportation, the court must consider whether the accused's continued presence in the United Kingdom is to its detriment, on the basis that the country has no use for criminals of other nationalities, particularly if they have committed serious crimes or have long criminal records; and the more serious the crime and the longer the record, the more obvious it is that there should be a recommendation for deportation: *R v Nazari 71 Cr. App. R. 87 CA*...
>
> In the case of non-EU citizens, the only question to be addressed is whether the offender's continued presence in the UK is contrary to the public interest. ...
>
> Prosecutors should be ready to assist the court by making submissions as to the appropriateness of a recommendation for deportation (see *Nazari*, above).

Given the seriousness and thoroughness with which the sentencing court are expected to approach making a recommendation for deportation, and given that the issue to be decided is, precisely,

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[46] (No longer absolute: and a person can be tried more than once for different offences arising out of the same facts)

[47] CPS – sentencing and ancillary orders http://www.cps.gov.uk/legal/s_to_u/sentencing_and_ancillary_orders_applications/ Visited 22/8/2015

[48] *R v Bozat* 1997 1 Cr. App. R. (S.) 270

whether the person's continued presence in the UK is conducive to the public interest, it may be felt that, in cases where no such recommendation is made, that should be the end of the matter. In such cases, it could be argued that the IA 2014 declaration that 'deportation of a foreign criminal 'is' in the public interest' is tantamount to imposing double jeopardy, at least for those whose convictions are too old to bring them within the automatic deportation scheme. The Secretary of State may well argue that, especially before the 2006 foreign national prisoners debacle, in many criminal trials there was either no consideration of whether to make a recommendation, or that such consideration as did take place would now be regarded as insufficient. However, it must be considered oppressive to rely on such asserted past failings to justify pursuing such offenders, especially where, were the offender a British citizen, the offence (whether defined as 'serious' in s72 NIAA 2002 or not) would count as 'spent': and certainly where there have been subsequent positive immigration decisions concerning that offender.

In the legal textbook *Res Judicata*[49] the authors' discussion of *autrefois convict* notes that on conviction 'the criminal liability of the prisoner merges in his conviction and his liability to be punished is discharged by the punishment that is imposed': and that what is barred by *autrefois convict* is not the harassment of a second prosecution. What is *res judicata* is the offence itself, and a person may lawfully be prosecuted for other offences arising out of the same or some of the same set of facts. But the text makes clear that, in doing so, the punishments on any further convictions must carefully reflect the harm done and not punish twice for the same conduct.[50] Using this as a model, a later decision to deport where a recommendation was not made must amount to the imposition of a further punishment for the same offence – since that punishment must formally have been contemplated and could have been imposed as part of the original sentence.

There is some judicial support for this proposition. In his concurring opinion in *Maaouia v France,*[51] suggesting that there are circumstances in which deportation would involve 'the determination of a criminal charge' for the purposes of art 6 ECHR, Sir Nicholas Bratza wrote:

> I can further accept that an administrative decision to deport an alien, even if taken on the grounds that the continued presence of the alien was undesirable because of his suspected involvement in criminal activities, would not in general involve "the determination of a criminal charge" for the purposes of Article 6.
>
> However, the situation would be different if the order for deportation were made by a court following a conviction for a criminal offence and formed an integral part of the proceedings resulting in the conviction. In such a case, the procedural guarantees of Article 6 would clearly apply to the criminal proceedings as a whole, whether or not the deportation order which resulted was to be regarded as a penalty or as having an exclusively preventative function. The same is true of the making of an exclusion order following the applicant's conviction for refusing to comply with the deportation order made against him: the proceedings leading to imposition of the order were required to comply with Article 6 of the Convention, whether the order is to be regarded as a penalty or as essentially a preventive measure.

Importantly, the court in *Maaouia v France*[52] found that a person facing deportation cannot have recourse to art 6 because, in their view, the protection of art 6 was not needed, since a person facing deportation had recourse to other protections under the ECHR – the *'guarantees specifically*

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[49] *Res Judicata,* Spencer, Bower and Handley, 4th edition, Lexis Nexis 23.01
[50] Ibid 23.10
[51] *Maaouia v France* (n 39)
[52] *ibid* [37]

concerning proceedings for the expulsion of aliens' contained in Article 1 of Protocol No. 7. These 'guarantees' were the protections given in art.s 3 and 8 ECHR and the art 13 right to an effective remedy. Arguably, the IA 2014 limitations on the application of art 8 to foreign criminals, and the restrictions on their rights of appeal, have reduced these 'guarantees' to such an extent that excluding foreign criminals' claims from art 6 can no longer be justified.

Alternatively, relying on the different doctrine of *autrefois acquit,* I consider how the absence of a recommendation for deportation as part of the criminal sentence could be treated as analogous to an acquittal. In *Res Judicata*[53] the authors note that the plea is a defence against a second prosecution for the same offence, and note as in relation to *autrefois convict* that there has to be an acquittal on the merits, not simply a withdrawal of prosecution. By analogy as above, it could be argued that where a sentencing judge has set out consideration of a recommendation for deportation, including reference to the public interest, and decided not to impose such, it must be tantamount to double jeopardy for the Secretary of State subsequently to make a decision to deport. And where significant time has elapsed and/or when the crime is too old for the person to be liable to automatic deportation, then such a decision certainly smacks of retrospective action.

The IA 2014 declaration clearly intends that a decision to deport on conducive grounds could now be made at any time after a conviction and sentence, however long ago that occurred, and whether or not there was any consideration of a recommendation to deport as part of the sentencing procedure. Where the offender has subsequently applied for and been granted leave to remain by the Home Office, it must be arguable as above that a decision to deport made now is tantamount to double jeopardy. Otherwise, the Home Office would be relying on its own failure previously to consider the public interest to justify imposing what is clearly a penalty in the everyday meaning of the word, or, alternatively, seeking to apply retrospectively some new view of the public interest.

c. *Res judicata*

A *res judicata* is a decision pronounced by a judicial or other tribunal with jurisdiction over the causes of action and the parties, which disposes once and for all of the fundamental matters decided, so that, except on appeal, they cannot be re-litigated between persons bound by the judgment. The decision must be on the merits.[54] The doctrine itself arises from the principle *Interest reipublicae ut sit finis litium* (It is important to the state that lawsuits be not protracted). The doctrine has barely been considered in the immigration context except to reject it. In *Cheema*[55] the court considered the deportation of the applicants on the basis that they had contracted marriages of convenience. Mr Cheema argued that since a previous tribunal had found that his marriage was not one of convenience, the issue was *res judicata.* The Court of Appeal (Lord Lane) decided that the earlier tribunal had not in fact so decided, and the real issue was whether Mr Cheema's departure from the UK was conducive to the public good. In passing he stated that 'in this field of administrative action on questions of immigration, the specialised doctrine of *res judicata* has no place'.[56] However, no reasons or references are given, and without such, with respect to the LJJ, it is

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[53] *Res Judicata* (n 49) 14.01
[54] *ibid* 1.01
[55] *R v IAT ex p Cheema* [1982] Imm AR 124
[56] *Ibid* [page 9]

difficult to see why. The textbook *Res Judicata* shows that statutory tribunals covering legal areas including planning, social security, employment, and also the Boundary Commissioners, medical tribunals and others have been considered 'judicial' for the purposes of *res judicata*. Departments of State are subject to the doctrine. The textbook makes no substantive reference to immigration,[57] whether to exclude immigration law and proceedings from the doctrine or otherwise.

In the judicial review hearing in the case of *V*,[58] concerning the admission of unsupported evidence in the immigration tribunal, Hickinbottom J briefly discussed the application of *res judicata.* Mr V had been tried and acquitted of murder, and had applied for judicial review of the immigration tribunal's refusal to rule out reference to the murder on the grounds that his acquittal was *res judicata.* The judge relied on *DPP v Humphreys*[59] which states that *res judicata* has no place in respect of a verdict made in criminal proceedings. He quotes Lord Salmon:

> 'Take the not infrequent case in which a jury decides an issue in the defendant's favour not because they are satisfied that the solution is correct but because they are left in doubt as to whether the contrary has been proved. In such a case, it would be artificial and unjust if the defendant... should be given the added bonus that that issue should be left thereafter to be presumed for ever to have been irrevocably decided in his favour as between himself and the Crown'

However, in Mr V's case, the issue had indeed been irrevocably decided, as discussed in Section 8 below. Hickinbottom J also decides that the parties are not the same ('in the criminal proceedings, the parties were the Crown Prosecution Service and the claimant: before the AIT, they are the claimant and the Secretary of State'.) However, the authors of *Res Judicata* assure us that all departments of State are emanations of the Crown and so are to be considered as the same party.[60]

Going back, then, to first principles, I would seek to apply the doctrine of *res judicata* to relevant immigration decisions. Consider a foreign national settled or otherwise lawfully present in the UK, who subsequently commits an offence, serves his sentence, receives a decision to deport, and for whom his appeal was allowed on the basis that deportation would breach his art 8 rights to family and private life. If a new decision to deport were to be made on the basis that 'deportation of a foreign criminal 'is' in the public interest', that previous judicial determination must constitute *res judicata* in respect of the issue at stake, namely that deportation of that person, convicted of such an offence, sentenced with such a length of sentence, and with family and private life as found by that tribunal, with the public interest in deportation of foreign criminals considered as stated in the determination, would have been a breach of his art 8 rights. There is no element of the doctrine of *res judicata* not present. The Secretary of State must surely be estopped from making any subsequent decisions to deport that person.[61] It could not be sustained that a new decision could be justified on the basis that the previous tribunal did not properly consider the public interest – especially if the earlier tribunal determination was appealed. It can hardly be argued, either, that the public interest in deportation of foreign criminals has significantly changed, as can be seen from the

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[57] while citing an immigration case without comment as part of a discussion about interlocutory injunctions (*Res Judicata (*n 49) 5.32 n11

[58] *V (*n 64)

[59] *DPP v Humphreys* [1976] 2 WLR 857 [1977] A.C. 1

[60] *Res Judicata* (n 49) 9.24-9.26

[61] (Unless there are subsequent offences or other relevant changes in circumstances, obviously).

earlier cases referred to above. What has changed is the Home Office determination to pursue all foreign criminals – but that cannot displace a final judgement of a tribunal.

This is not a fanciful or rhetorical example. A client of the writer was convicted of obtaining false documents in order to get work so he could get his family out of asylum support accommodation. The sentencing judge clearly tried as hard as he could to justify awarding a sentence of under 12 months. The client won his appeal on family and private life grounds and was given discretionary leave by the Home Office. His application for further leave has been outstanding for over a year, despite every issue relating to his leave to remain being either the same or more favourable than it was three years previously. A new decision to deport could well be contemplated, however wrong in law, and then the client would face having to show that he would suffer 'serious irreversible harm' if forced to leave the country before his appeal was heard (and not be permitted to return to give evidence, of course).

Certainly *res judicata* is contemplated in the US immigration context. The case of *Mendoza v A-G*[62] sets out the US legal authority for applying *res judicata* in immigration cases, and analyses the application of *res judicata* to an appeal against deportation in which an older offence was not relied on in an earlier set of proceedings and then brought up subsequently.

8. blurring of burden and standard of proof; unsupported evidence; Operation Nexus

A decision to deport on conducive grounds has always been able to rely on issues of 'bad character' even where there are few or no criminal convictions. However the question of what evidence can be relied on raises basic issues of fairness. Relying on the Bratza Opinion in *Maaouia v France* already referred to, it has been argued that art 6 ECHR must be engaged where a decision to deport relies on evidence of criminal involvement short of conviction, since the tribunal is effectively determining a criminal matter.[63] The reported cases on this issue are *V*[64] (referred to above), *Bah*[65] and *Farquharson.*[66] Mr V was a young man brought to the UK as a child, and was the only member of his family not to have become a British citizen or have gained indefinite leave to remain. At his trial for murder, the identity of the perpetrator had become clear to the criminal court – it was one of the prosecution witnesses – so Mr V's acquittal must be regarded as 'irrevocably decided' as clearly an acquittal on the merits. Mr V had a small juvenile crime record. He had applied for indefinite leave to remain, which was refused with a decision to deport on conducive grounds. The grounds were 'his gang membership' and 'his involvement with a murder'. The murder victim's family's victim impact statement was also relied on. A preliminary tribunal hearing discussed the issue of whether any of the Home Office allegations (hearsay, tendentious, prejudicial) were admissible at all. The tribunal decided to admit the evidence. Judicial review was refused, and the Court of Appeal decided that the tribunal cannot be barred from receiving e.g. unsupported evidence from the police about a person's criminal activity, since the tribunal is a specialised judicial body, competent to determine what weight to give to such evidence. (The Secretary of State then withdrew her decision, later

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[62] *Mendoza v A-G* US Court of Appeals 9th Circuit 08-71007 2 June 2010
[63] *Strategic Legal Fund: Operation Nexus: Briefing paper* Luqmani Thompson & Partners 1 September 2014
[64] *V (R on the application of) v Asylum and Immigration Tribunal & Anor* [2009] EWHC 1902 (Admin); *R (V) v AIT* [2010] EWCA Civ 491
[65] *Bah (EO Turkey) – liability to deport* [2012] UKUT 00196 (IAC)
[66] *Farquharson (removal – proof of conduct)* [2013] UKUT 00146 (IAC)

found to have been on advice from her Counsel that to win in the tribunal would have required revelation of the workings of Operation Alliance, a Metropolitan Police operation against London gang activity: Mr V was granted 3 years' discretionary leave to remain).[67]

At that time the writer also represented XX, someone else who had lived in the UK since childhood, and who, with his family, was settled in the UK. His deportation decision contained a long list of allegations including gang membership. He too had a couple of small previous convictions. We obtained his CRIS reports,[68] which amounted to 2 lever arch files containing 26 summary descriptions of incidents such as: *'murder: a large gang of [foreign] young men were seen outside premises in X street. A fight broke out. AA, BB and CC (etc) were arrested. DD and EE (etc) were taken to hospital. ... [6 months later] we interviewed XX at his home. He knew nothing about the incident.'* Apart from the fact that no one had died, there was absolutely no connection, actual or alleged, between our client and any of the participants, or any link whether of time or place. No further evidence was forthcoming: and at the appeal hearing the police witness stated only that 'the police had lots more evidence but he could not reveal it'. The appeal was allowed.

Legal aid was then available for deportation appeals, and so those particular clients benefited from legal representation from such as S Chelvan and Geoffrey Robinson QC. More importantly, those cases shows that even where there has been a previous determination in a criminal court, a person facing deportation proceedings is effectively facing a trial on criminal matters, but where the standard of proof is the civil standard of balance of probabilities, and where, even though the burden of proof in relation to past acts rests on the Secretary of State, there is not the same protection for the accused as in a criminal trial. The baleful effect of this can be seen in *Bah,* where it was accepted on the basis of police evidence from anonymous witnesses that he probably had committed the offences for which he had not been tried, and his appeal dismissed. On the standard and burden of proof, the tribunal said this:[69]

> '....However, relying upon the judgments of Lords Slynn and Steyn, [in *Rehman*, SY] we consider that any specific acts that have already occurred in the past must be proven by the Secretary of State, and proven to the civil standard of a balance of probability. **The civil standard is flexible according to the nature of the allegations made**, see House of Lords in Re B [2008] UKHL 35, and a Tribunal judge should be astute to ensure that proof of a proposition is not degraded into speculation of the possibility of its accuracy. (writer's emphasis)
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> 64. As to the assessment of future risk based on past conduct, we conclude the panel was right to apply a standard of reasonable degree of likelihood.

The headnote of *Farquharson,*[70] a case concerning removal, states:

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[67] The writer had conduct of V's case until the 2011 collapse of the Immigration Advisory Service, and had issued a further JR of the decision not to grant him indefinite leave, and was glad to find out from our Counsel S Chelvan (No 5 Chambers) that the client was eventually granted indefinite leave backdated to the date of that grant of discretionary leave.

[68] Summary police reports detailing every contact with the police, whether accused, victim, suspect, etc

[69] *Bah* (n 64) [63,64]

[70] *Farquharson* (n 65)

(1) Where the respondent relies on allegations of conduct in proceedings for removal, the same principles apply as to proof of conduct and the assessment of risk to the public, as in deportation cases: Bah [2012] UKUT 196 (IAC) etc applicable.

(2) A criminal charge that has not resulted in a conviction is not a criminal record; but the acts that led to the charge may be established as conduct.

(3) If the respondent seeks to establish the conduct by reference to the contents of police CRIS reports, the relevant documents should be produced, rather than a bare witness statement referring to them.

(4) The material relied on must be supplied to the appellant in good time to prepare for the appeal.

(5) The judge has a duty to ensure a fair hearing is obtained by affording the appellant sufficient time to study the documents and respond.

(6) Where the appellant is in detention and faces a serious allegation of conduct, it is in the interests of justice that legal aid is made available.

These are important and unexceptionable principles, but the Determination does also raise concerns about the quality of the evidence. Mr Farquharson's appeal was dismissed on the basis of a Home Office view that he was 'a danger to women', arising from 6 separate complaints of rape being laid against him, one of which went to trial. Unlike in the writer's case of XX, (in which the allegations were also serious) the tribunal had access to the very detailed statements of the separate complainants, (in respect of some of which there was corroborating evidence) and found in respect of 4 of them that the appellant's denials could not be accepted. *On the basis of the balance of probabilities*, the findings look irreproachable. However it remains the case that Mr Farquharson was effectively found guilty of those assaults without any chance to look at witness statements or cross-examine witnesses, and will be deported because of that. In the detailed conclusions at [88] onwards the tribunal's concern about the justice of the proceedings is evident, and in the writer's view not truly reflected in the headnote. On evidence, the tribunal stated:

> 91. ... In the present case we have searched for data relating to the incidents independent of the complainant's narrative. The CRIS extracts might have been supported by witness statements made by forensic medical examiners or eye-witnesses. This will not always be necessary, and the Tribunal is not conducting a re-trial, but it may well prove helpful. We anticipate that the CPS should be able to assist the UKBA and indeed the Tribunal and, where material is sensitive, appropriate directions as to its return and use can be made if requested in advance.

From a practitioner's point of view this concern is more than reasonable. For example, at [28] the tribunal notes that 'the information loaded on to the CRIS reports is by and large accurate as to the data it purports to contain: details of a complaint, arrest, response, actions taken and conclusions'. But accuracy did not prevent assertions of guilt by association in XX's case, and Home Office allegations of an applicant's criminal involvement, whether in decision letters, bail summaries or otherwise, are often not accurate. The writer is currently dealing with a vulnerable young Afghan failed asylum-seeker whom the Kent police referred to Operation Nexus, a joint operation launched in 2012[71] between the immigration authorities and the police to identify and remove from the UK 'high harm' foreign national offenders.

[71] Operation Nexus Launches 10 November 2012, Metropolitan Police

Even if Operation Nexus did, successfully, concentrate on identifying and removing foreign nationals involved in 'murder, attempted murder, GBH, rape, other sexual offences, possession of firearms, knives and other offensive weapons and robbery',[72] it is clear from the above that there are not sufficient safeguards to protect an appellant from hearsay or untested evidence. And the reach of Operation Nexus is not confined to such candidates. Neither at the launch of Operation Nexus nor the Chief Inspector's 2014 inspection report give any definition of 'high harm',[73] but the press release includes those who are 'victims or witness to violent crimes but refused to cooperate with the police'. The writer's Operation Nexus client's criminal record consists of travelling on a train without a ticket and driving without a licence or insurance, all while a juvenile. But, additionally, he was tried and acquitted for allegedly taking part in an affray, and has also been the victim of two serious crimes and a witness of another, all unrelated incidents, and has given formal witness statements in all those and given evidence in court in 2 cases. The decision to remove, the Detention Reviews and bail summaries each contained different sets of allegations, all failing to mention the acquittal or the crimes of which he was a victim. Pressed to explain the reasons for considering him a 'high harm' individual, the immigration officer mentioned 'known associates' – (difficult to avoid as an unaccompanied child asylum-seeker placed in shared accommodation in Kent) but, so far, despite subject access requests and references to *Farquharson*, no evidence has yet been provided. He is currently protected by an injunction against removal - without representation he would have been removed back to Kabul some months ago.

In the light of the above, it must be right to describe appeals based on such unsupported and unverified allegations as effectively criminal trials, and the ensuing deportation is certainly a penalty. But the issue now is that future subjects of such decisions may not be able to exercise any right of appeal from within the UK. In such cases we must seek to argue that art 6 and art 7 ECHR could be engaged.

9. The issue of rehabilitation

The Rt Hon Michael Gove MP, Minister of Justice, spoke on 17 July last on 'the treasure in the heart of man - making prisons work'. He says:[74]

> As Winston Churchill argued, there should be "a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes **and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man**."

This is clearly not considered to apply to a foreign criminal. A Ministry of Justice note on foreign national prisoners refers to rehabilitation only in the context of the Early Removal scheme, aimed at

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[72] Mayor of London/Metropolitan Police Total Policing: *High Harm offenders removed* 4 December 2014

[73] *An inspection of Immigration enforcement activity in London and the West Midlands ('Operation Nexus') March-June 2014* Chief Inspector of Borders and Immigration, December 2014. One of the main recommendations is that a single definition of 'high harm' is arrived at (Summary of recommendations no.5).

[74] Gov.UK 17 July 2015 https://www.gov.uk/government/speeches/the-treasure-in-the-heart-of-man-making-prisons-work visited 20/8/2015

repatriating individuals to serve their sentence in their home country.[75] The note says nothing about rehabilitation of foreign criminals who will be remaining in the UK.

The case of *Danso,*[76] concerning an appeal against deportation for a man with convictions for rape and sexual assault , said at [20] that 'rehabilitation of the kind exhibited by the appellant in this case is not uncommon and cannot in my view contribute greatly to the existence of the very compelling circumstances required to outweigh the public interest in deportation'.

The position in relation to EEA nationals is different. The case of *Essa,*[77] a case principally concerned with the effect of prison sentences on permanent residence rights of EEA nationals, says this:

> 3. *For those who at the time of determination are or remain a present threat to public policy but where the factors relevant to integration suggest that there are reasonable prospects of rehabilitation, those prospects can be a substantial relevant factor in the proportionality balance as to whether deportation is justified. If the claimant cannot constitute a present threat when rehabilitated, and is well-advanced in rehabilitation in a host state where there is a substantial degree of integration, it may well very well be disproportionate to proceed to deportation.*
> 4. ...
> 5. *What is likely to be valuable to a judge in the immigration jurisdiction who is considering risk factors is the extent of any progress made by a person during the sentence and licence period, and any material shift in OASys assessment of that person.*

The Home Office view on rehabilitation is shown in the following case. A recent client of the writer, part of a long-settled family, committed drugs offences as a juvenile, was sentenced to 4 years in a young offenders' institution, was subject to automatic deportation, appealed and won his appeal on family and private life grounds. Part of his case was the bundle of truly excellent reports from within the prison on his remorse, his diligent work and his determination to study and learn. Following that appeal the Secretary of state decided to revoke his indefinite leave to remain, on the basis that 'he was not yet fully rehabilitated'. By the time this second appeal came before the tribunal he had a confirmed place at university. Placing him on discretionary leave to remain would have prevented him from taking up that place.[78] It was successfully argued, relying on academic reports on rehabilitation published by the Ministry of Justice, that there was no support for a view that reducing someone's access to education would further their rehabilitation.

10. Conclusion

One hundred years ago 'aliens' in the UK were 'rightless', and immigration control was regarded as 'illiberal' and 'arbitrary'. Foreigners whether offenders or otherwise had virtually no protection against deportation: until 1969 there was no right of appeal. Since then, and especially since the 1971 Act, an entire structure of rules, guidance, tribunal determinations and court judgments has

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[75] Ministry of Justice *Foreign national prisoners* https://www.justice.gov.uk/offenders/types-of-offender/foreign updated 24 January 2013, visited 20 August 2015

[76] *Danso v SSHD* [2015] EWCA Civ 596

[77] *Essa (EEA: rehabilitation/integration)* [2013] UKUT 00316 (IAC)

[78] Since he would no longer be entitled to home student fees or student loan (this has been successfully challenged since then)

grown up, facilitated by the provision of legal aid and a concomitant rapid increase in access to legal advice, so that immigration control could now be said to constitute one of the major arms of 'administrative justice' in the UK. Certainly there has developed a wide, and reasonable, expectation that migrants as well as British citizens have access to justice and the rule of law: and it is this, especially in relation to foreign criminals, which the government is rapidly demolishing. While the public interest in deporting foreign criminals, as set out in legislation, rules and caselaw, has barely changed over 50 years, aiming not only to deport those who might reoffend, but also to show society's revulsion about particularly serious crimes, the extent to which a foreign criminal may argue breach of art 8 ECHR is now extremely limited, and access to a tribunal more so. Additionally, the Immigration Act 2014's declaration that deportation of a foreign criminal 'is' in the public interest poses no limit in time, nor in seriousness of offence, on who may be affected, nor does length of residence, previous grant of leave, previous court decision or quality of rehabilitation provide any protection. Finally, without the protection provided by a criminal trial, such programmes as Operation Nexus will inevitably lead to summary removals based on anonymous and unsupported evidence. It is time to assert the need for the protections of art 6 and art 7 ECHR in the immigration context: to argue that deportation in such cases amounts to 'the determination of a criminal matter' and is most certainly a penalty: and to challenge sweeping and superficial views that double jeopardy and *res judicata* do not apply in immigration cases. The fundamental common law principles of fairness, finality and certainty must surely be brought to bear.

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