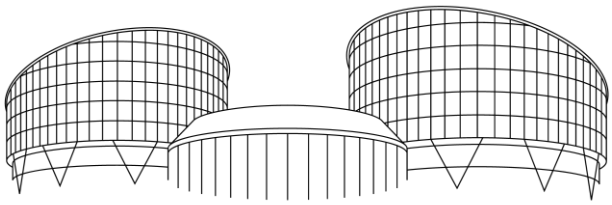

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF BALOGUN v. THE UNITED KINGDOM

(Application no. 60286/09)

JUDGMENT

This version was rectified on 17 September 2012
under Rule 81 of the Rules of Court

STRASBOURG

10 April 2012

FINAL

24/09/2012

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Balogun v. the United Kingdom**,**

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

Lech Garlicki, *President,*
David Thór Björgvinsson,
Nicolas Bratza,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić,
Vincent A. De Gaetano, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 20 March 2012,

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

PROCEDURE

1. The case originated in an application (no. 60286/09) 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 Moshood Abiola Balogun ("the applicant"), on 13 November 2009.

2. The applicant was represented by OA Solicitors, a firm of lawyers practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Ms L. Dauban of the Foreign and Commonwealth Office.

3. The applicant alleged that his deportation to Nigeria would breach Articles 3 and 8 of the Convention.

4. On 18 November 2009, the Acting President of the Fourth Section decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was in the interests of the parties and the proper conduct of the proceedings that the applicant should not be expelled to Nigeria pending the Court's decision. On 9 March 2010 the Vice-President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The facts of the case, as submitted by the applicant, may be summarised as follows.

6. The applicant, who was born in 1986, claims to have arrived in the United Kingdom at the age of three years old. However, there is no official record of his presence until 1994, when he was eight years old. He first came to the notice of the Secretary of State for the Home Department on 21 December 1994, when the family court sought clarification of the applicant's immigration status, while considering an application for a residence order in respect of the applicant by his aunt.

7. The applicant's aunt made an application for indefinite leave to remain in the United Kingdom, on the basis of her long stay, and with the applicant listed as her dependant, on 24 January 2003. While this application was under consideration, a further application for indefinite leave was made on behalf of the applicant by Southwark Social Services. This application stated that the applicant had been thrown out by his aunt on 12 January 2002 and placed in foster care. It also mentioned that the applicant claimed to have been the victim of beatings by his aunt and her boyfriend since the age of three. Indefinite leave to remain was granted to the applicant, outside the immigration rules, on 1 December 2003. The applicant lived in foster care from 2002 until he was eighteen, when he began to live alone in council accommodation.

8. The applicant was convicted on 21 February 2007, at the age of twenty, of two counts of possession of Class A drugs with intent to supply. He pleaded guilty on the basis that he had been coerced into letting his premises be used for the preparation and sale of drugs by a group of people whom he feared because of a previous attack in 2005, in which the applicant had been shot. He was sentenced to three years' imprisonment, and on 18 October 2007 was notified of the Secretary of State's intention to deport him. The Secretary of State found that there was no evidence that the applicant had been present in the United Kingdom since the age of three. His aunt had stated that he had been left with her by his mother at the age of five, and the first official record of his presence was when he was eight years old. Even allowing for his long stay in the United Kingdom, only four years had been with valid leave. It was believed that he was in contact with his mother, who remained in Nigeria, and that as he had lived alone since attaining the age of majority, the applicant was evidently independent and capable of adapting to new circumstances. It was not accepted that he had family life in the United Kingdom.

9. The applicant appealed against the decision to deport him and his appeal was dismissed by the Asylum and Immigration Tribunal on

13 March 2008. The Tribunal noted the applicant's previous criminal record: he had been convicted of possession of Class A and Class B drugs in February 2004; handling stolen goods in April 2004; and possession of Class C drugs in June 2005.

10. The Tribunal also noted his claim to be in a relationship of some years' duration, but observed that he had never mentioned his girlfriend in previous applications to the Home Office, and that he and his girlfriend had given mutually inconsistent evidence at the hearing. It was not therefore accepted that he was in a serious or permanent relationship. He had no contact with the aunt with whom he had previously lived, but had another aunt in the United Kingdom whom he claimed was a surrogate mother to him. However, the Tribunal found that he could not be as close to this aunt as he claimed, given that she had not taken him in when he had been thrown out, and that it was clear from her evidence at the hearing that she had been unaware of his criminal conviction. The applicant's relationship with his half-brother in the United Kingdom was found to have been similarly exaggerated. The Tribunal concluded that the applicant did not have any protected family life in the United Kingdom. With regard to his private life, while it was accepted that he had been in the country since a young age and had been educated there, as well as gaining some work experience, it was not considered that these ties were sufficiently strong to render his deportation an interference with his private life. It appeared that his mother still lived in Nigeria and, even if contact had been lost, as claimed by the applicant, there was no reason why it could not be re-established. Whilst the applicant would have practical difficulties in relocating to Nigeria, he could re-establish his private life there. The Tribunal took into account the case of *Üner v. the Netherlands* [GC], no. 46410/99, ECHR 2006-XII, in finding that, on balance, and having due regard to the public interest, the applicant's deportation was proportionate.

11. A deportation order against the applicant was signed on 14 October 2008. The applicant made an application to have the order revoked on human rights grounds, which was rejected by the Secretary of State on 3 June 2009 on the basis that all matters raised by the applicant had previously been considered by the Asylum and Immigration Tribunal. An application for judicial review of this decision was refused on 30 October 2009. The High Court, in refusing the application, stated that the applicant had no family life in the United Kingdom, and that the interference with his private life was proportionate. The applicant did not renew his application for judicial review.

12. The applicant was taken into immigration detention on 10 November 2009 and directions for his deportation to Nigeria were set on 12 November 2009 for 19 November 2009. On 13 November 2009 the applicant sought interim measures from this Court under Rule 39 of the Rules of Court to prevent his deportation. He submitted with his application a report from a

specialist psychiatric registrar dated 14 September 2009, which stated that the applicant had attempted suicide on 13 August 2009, after being notified of the refusal of his human rights application by the Secretary of State. He had then been held as an in-patient until 7 September 2009. The report also stated that the applicant had continued to express feelings of despair throughout his in-patient treatment. He was described as suffering from moderate depression.

13. On 18 November 2009, the Acting President of the Fourth Section decided to apply Rule 39 of the Rules of Court, indicating to the Government that it was in the interests of the parties and the proper conduct of the proceedings that the applicant should not be expelled to Nigeria pending the Court's decision. Rule 39 was initially applied by the Acting President for a period of two weeks, in order to give the Government the opportunity to comment on the applicant's mental health history and to state whether any special measures had been put in place to alleviate the risk of suicide prior to and during his proposed removal.

14. By letter dated 2 December 2009, the Government informed the Court that they had not previously been aware of the applicant's attempted suicide, but had now considered the psychiatric report of 14 September 2009. As regards the logistics of the applicant's removal, the Government stated that all appropriate measures to protect the applicant from risk were already in place at the centre at which he was detained. Trained members of staff were aware of the applicant's situation and the applicant was under constant supervision. As to the risk during removal, the contractor effecting removal would be informed and a suitable escort would be provided, including a medical escort if deemed necessary. The applicant would be escorted up until the point of arrival in Nigeria. The Government also considered that there were sufficient mental health facilities in Nigeria, which would be available to the applicant if needed. The Government therefore invited the Court to lift the interim measure which had been indicated in respect of the applicant. However, on 8 December 2009, the Acting President decided to prolong until further notice the interim measure under Rule 39.

15. The applicant notified the authorities in the immigration detention centre that he had taken an overdose of paracetamol on 29 December 2009. He was assessed by the medical team and found only to have taken a few tablets. No further concerns as to his well-being appear to have been raised and the applicant was released from immigration detention on 13 January 2010. He does not claim to have made any further attempts at suicide.

II. RELEVANT DOMESTIC LAW

A. Relevant legislation

16. 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 deems his deportation to be conducive to the public good.

17. Sections 82(1) and 84 of the Nationality, Immigration and Asylum Act 2002 provide for a right of appeal against this decision, *inter alia*, on the grounds that the decision is incompatible with the Convention.

18. 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, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

19. Sections 1(4) and 3(2) of the Immigration Act 1971 provide for the making of Immigration Rules by the Secretary of State. Paragraph 353 of the Immigration Rules provides:

> "353. When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

A fresh claim, if it is accepted as such by the Secretary of State, and if refused, gives rise to a fresh right of appeal on the merits. If submissions are not accepted as amounting to a fresh claim, their refusal will give rise only to a right to seek judicial review of the decision not to treat them as a fresh claim.

B. Relevant case-law

20. In *J. v. Secretary of State for the Home Department* [2005] EWCA Civ 629, the Court of Appeal considered the case of a Sri Lankan national suffering from depression and post-traumatic stress disorder, who had made a suicide attempt upon learning that his claim for asylum had been refused, and who claimed that he would commit suicide if it appeared that he would be removed to Sri Lanka. Lord Justice Dyson, delivering the judgment of the court, held that the correct test as to whether there was a real risk in

terms of Article 3 in a suicide case was, as in other Article 3 cases involving expulsion, whether there were strong grounds for believing that the person, if returned, would face a real risk of torture, inhuman or degrading treatment or punishment.

21. The Court of Appeal went on to expand upon the nature of the test. It required firstly, that the treatment that the person was at risk of suffering should reach a minimum level of severity. Secondly, there must be a causal link between the act or threatened act of removal or expulsion and the treatment relied upon as breaching Article 3. The court also found, thirdly, that because of the "foreign" nature of expulsion cases, the threshold for what would meet the threshold of Article 3 would be particularly high and higher still when the treatment did not result from the direct or indirect actions of the authorities of the receiving State but from a naturally occurring physical or mental illness. Fourthly, a risk of suicide could, in principle, form the basis of a successful claim under Article 3. Fifthly, an important factor in determining whether removal would breach Article 3 in the case of an applicant who claimed to be suicidal was whether his or her alleged fear of ill-treatment in the receiving State, if such a fear was at the root of the risk of suicide, was objectively well-founded. A fear found not to be objectively well-founded would weigh against a finding of a real risk of a violation of Article 3. Finally, the Court of Appeal also considered it to be of considerable relevance whether the removing and/or receiving States had effective mechanisms in place to reduce the risk of suicide. The existence of such mechanisms would also weigh heavily against a finding of a violation of Article 3 as a result of removal.

22. The Court of Appeal further held that the correct approach to an alleged risk of suicide in an expulsion case was to consider the risk in three stages, namely, in the United Kingdom, in transit, and in the receiving State. The threshold for Article 3 in respect of the risk in the receiving State was higher than it was in respect of the risk in the United Kingdom. In the case of the particular appellant, the Court of Appeal found that the Asylum and Immigration Tribunal had been correct to find that the risk of suicide in the United Kingdom would be adequately managed by the relevant authorities; that the Secretary of State would provide appropriately qualified escorts and as such mitigate the risk of suicide whilst in transport; and that in light of the finding that the applicant's fears of return to Sri Lanka were not objectively well-founded, and that he would have family support and access to adequate medical treatment in that State, the risk of suicide in Sri Lanka would not reach the very high threshold of Article 3.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

23. The applicant complained that his deportation to Nigeria would breach Article 3 of the Convention, which provides as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

24. The Government contested that argument.

A. The parties' submissions

1. The Government

25. The Government submitted that the applicant had failed to exhaust domestic remedies. According to the Government, the applicant could have argued that he was a suicide risk and raised Article 3 of the Convention in the context of his appeal against deportation, but did not do so, relying instead only upon Article 8. He could also have raised the fact of his risk of suicide in his application for judicial review but, again, did not do so. He also failed to renew his application for judicial review. The first time that the applicant claimed to be at risk of suicide was in his request to this Court for interim measures under Rule 39 of the Rules of Court.

26. The Government referred to their letter of 2 December 2009 to the Court, which outlined the special protective measures that had been put in place in the detention centre in respect of the applicant, once notice of his previous suicide attempt had been received. The Government stated that, on the one subsequent occasion when concerns had arisen whilst the applicant was detained, namely on 29 December 2009 when he had claimed to have taken an overdose of paracetamol, he had been assessed by a medical team and found not to be in danger. Apart from that incident, the applicant had not attempted suicide in detention or following his release. However, the Government would put in place precautionary measures should the applicant be detained again prior to deportation, and the contractor responsible for his removal would be made aware of the applicant's circumstances. Special measures would be taken, including a medical escort if necessary, to mitigate any risk of suicide during the removal process and the applicant would be accompanied until the point of arrival in Nigeria. There was sufficient psychiatric treatment available in Nigeria, should the applicant require it. The Government therefore submitted that, given that all reasonable steps had been and would be taken to eliminate or reduce the risk of suicide, the applicant had not been subjected to inhuman or degrading treatment under Article 3, and nor would his deportation amount to such treatment.

2. The applicant

27. The applicant, on the other hand, contended that the risk of suicide had only arisen after his application to revoke the deportation order was refused, and that there had been no right of appeal against this decision. The applicant's first suicide attempt had taken place on 13 August 2009, which was the same day on which his application for judicial review had been lodged by his representatives. Although no mention of the applicant being at risk of suicide had been made in the judicial review application, he claimed that his representatives had raised this matter in letters to both the Secretary of State and the High Court dated 18 September 2009, but that the letter to the Secretary of State had received no response, and that the High Court, in refusing his judicial review application on 30 October 2009, had not addressed the matter either. As regards the applicant's failure to renew his application for judicial review, he submitted that he had been apprehended on 10 November 2009 and served with removal directions before he was able to renew the application.

28. The applicant contended that the Government had been made aware of his attempted suicide on 13 August 2009. He also submitted that he made a further suicide attempt on 11 December 2009 or 29 December 2009 whilst detained in the immigration detention centre. He claimed that his deportation to Nigeria would breach Article 3.

B. The Court's assessment

29. The Court notes the Government's preliminary objection and also recalls its finding in *NA. v. the United Kingdom*, no. 25904/07, § 90, 17 July 2008 that in expulsion cases judicial review is in principle an effective remedy which applicants should be required to exhaust before applying to this Court. However, the Court considers it unnecessary to rule on whether the present applicant has failed to exhaust domestic remedies in respect of this complaint since, in any event, it considers the complaint to be manifestly ill-founded.

30. It is well-established that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case, Article 3 implies an obligation not to deport the person in question to that country. Article 3 is absolute and it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion (*Saadi v. Italy* [GC], no. 37201/06, §§ 125 and 138, ECHR 2008-...).

31. The Court further recalls that it has reserved to itself sufficient flexibility to find a violation of Article 3 even where the treatment in

question arises not from the intentional acts of public authorities or non-State actors in the receiving State, but from the applicant's own physical or mental health (see *Bensaid v. the United Kingdom*, no. 44599/98, § 34, ECHR 2001-I). However, the Court reiterates that, according to its established case-law (see *D. v. the United Kingdom*, 2 May 1997, § 54, *Reports of Judgments and Decisions* 1997-III), aliens who are subject to expulsion cannot in principle claim any right to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance provided by that State, unless such exceptional circumstances pertain as to render the implementation of a decision to remove an alien incompatible with Article 3 of the Convention. Finally, the Court recalls that in order to violate Article 3, treatment must attain a minimum level of severity. This applies regardless of whether the risk of harm emanates from deliberate acts of State authorities or third parties; from a naturally occurring illness (see *N.*, cited above, § 29); or even from the applicant himself (see *Kharsa v. Sweden*, no. 28419/95, Commission's decision of 26 October 1995, Decisions and Reports (DR)). The Court recalls that in previous cases involving a risk of suicide, it has found not only that the high threshold for Article 3 applies to the same extent as it does in other types of cases, but that appropriate and adequate steps taken by the relevant authorities to mitigate a risk of suicide will weigh against a conclusion that the high threshold of Article 3 has been reached (see *Nikovic v. Sweden*, no. 28285/95, Commission decision of 7 December 1995, (DR)).

32. The Court notes that it is the risk to the applicant at the time of the proceedings before the Court that is relevant for the purposes of determining whether his deportation would amount to a violation of Article 3 (see *Saadi*, cited above). The Court must therefore examine the situation as it would be were the applicant to be deported at this point in time. In this regard, the Court observes that the Government have set out, in their letter to the Court of 2 December 2009, the precautionary measures that would be taken should the applicant be re-admitted to immigration detention and the deportation order against him enforced. The Government addressed the risk that might arise at three stages: i) when the applicant is notified of the decision to remove him to Nigeria; ii) during his actual removal; and iii) after he has arrived in Nigeria. The Court notes that this is the approach espoused by the Court of Appeal in *J. v. Secretary of State for the Home Department*, cited above, and which the Court considers is entirely consistent with the requirements of Article 3.

33. As to the first stage, the Government state that, if detained and if assessed as being at risk of suicide, the applicant would be put under constant watch and that trained staff, aware of the applicant's circumstances, would be on hand at the detention centre. As regards the second stage, the Government state that the contractor responsible for executing the applicant's removal from the United Kingdom to Nigeria

would be informed of the risk of suicide, as well as the applicant's medical history and previous suicide attempts. Suitable escorts trained in suicide and self-harm awareness and prevention and, if necessary, medical escorts, would be provided for the applicant's flight. The applicant would be accompanied up until the point of arrival in Nigeria. As to the third stage, the Government point out that adequate psychiatric treatment would be available to the applicant, should he require it, in Nigeria. The Government refer in this regard to a fact-finding mission to Nigeria conducted jointly by the United Kingdom Border Agency and the Danish Immigration Service in 2008, the findings of which were, *inter alia*, that there was psychiatric treatment available throughout the country and that psychiatric hospitals were able to treat all illnesses, including depression and suicidal tendencies. Hospitals were apparently well-staffed and staff well-trained.

34. The Court finds that, whatever concerns there may be as to the previous handling of the applicant's case by the Government, the Government are now fully aware of the risk posed by the applicant to himself and can be relied upon to take the steps outlined in paragraph 33. The Court emphasises the high threshold for Article 3, as described in *N.*, cited above, and which applies with equal force in cases involving a risk of suicide as in other cases (see *Kharsa*, cited above). In the light of the precautions to be taken by the Government and the existence of adequate psychiatric care in Nigeria, should the applicant require it, the Court is unable to find that the applicant's deportation would result in a real and imminent risk of treatment of such a severity as to reach this threshold. It therefore follows that the applicant's complaint under Article 3 is manifestly ill-founded and thus inadmissible, pursuant to Article 35 §§ 3 and 4 of the Convention.

II. RULE 39 OF THE RULES OF COURT

35. In view of the above, it is appropriate to discontinue the application of Rule 39 of the Rules of Court.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

36. The applicant further complained that his deportation would breach Article 8 of the Convention, which in so far as relevant provides:

> "1. Everyone has the right to respect for his private and family life...
>
> 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 necessary in a democratic society...for the prevention of disorder or crime...or for the protection of the rights and freedoms of others."

37. The Government contested that argument.

A. Admissibility

38. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a) The applicant

39. The applicant contended that he had been in the United Kingdom continuously since the age of three, with indefinite leave to remain from 2003 until the order for his deportation was signed. He was without home or person to return to in Nigeria. The applicant claimed to enjoy family life in the United Kingdom with his half-brother, with whom he had been living since his release from detention; his aunt, whom he claimed was like a mother to him; and his girlfriend, a British citizen with whom he had been in a relationship since 2005. He also claimed to enjoy private life in the United Kingdom, given his length of residence there, comprising, *inter alia*, his relationship with his girlfriend and other friendships; his previous studies and employment; and the fact that all of his links were with the United Kingdom rather than with Nigeria. In the light of the young age at which he entered the United Kingdom, his lack of ties to Nigeria and the strength of his ties to the United Kingdom, the applicant contended that his deportation would gravely interfere with both his private and family life.

40. Furthermore, the applicant submitted that the nature and seriousness of his offending history were not sufficiently grave as to render this interference proportionate for the purposes of Article 8. He pointed in particular to the fact that all of his offences had been committed before his twenty-first birthday and that he had not offended since his release from prison. He had also tested negative for drugs whilst in prison and claimed no longer to be abusing drugs. As regards the risk he posed to the public in terms of future offending, he stated that the Government had not conducted any risk assessment to determine the level of risk of recidivism. However, the applicant claimed to have learnt his lesson and to be determined not to commit further criminal offences in future but to establish a law-abiding life for himself with his girlfriend and resume his studies.

b) The Government

41. The Government submitted that the applicant did not enjoy family life in the United Kingdom, being a single adult and not part of any family unit. The Government referred to the findings of the Asylum and

Immigration Tribunal (see paragraph 10 above) with regard to the applicant's relationship with his girlfriend, namely that it was not sufficiently settled, serious or long-term to amount to family life.

42. The Government accepted, on the other hand, that the applicant enjoyed private life in the United Kingdom and that his deportation would represent an interference with that private life. However, that interference would be justified under paragraph 2 of Article 8, being in accordance with law and taken in pursuit of the legitimate aims of protecting public safety, the prevention of crime, and the protection of the rights and freedoms of others. The Government also contended that the interference was proportionate given the nature and seriousness of the applicant's offences, which were, for the most part, drugs offences, which the Government considered to be particularly grave given the issues of public protection that they raised. The Government pointed in particular to the fact that the applicant's last offence had been of sufficient gravity to attract a sentence of three years' imprisonment. The applicant had committed his offences when he was already an adult and his case could therefore be distinguished from that of the applicant in *Maslov v. Austria* [GC], no. 1638/03, 23 June 2008, whose offences by contrast could be characterised as "juvenile delinquency". The Government considered the young age at which the applicant had entered the United Kingdom and the fact that he had stronger ties with that country than with Nigeria to be relevant factors, but maintained that his deportation would have a relatively minor impact on the applicant given that he did not have family life in the United Kingdom and could re-establish private life in Nigeria. In this regard, the Government pointed to the applicant's good health, high intelligence and the fact that he had lived alone since the age of eighteen with little support. As such, and having regard to the importance of protecting the public from drugs-related crime, the Government were of the view that the applicant's deportation to Nigeria would represent a proportionate interference with his private life in terms of Article 8.

2. The Court's assessment

a) General principles

43. The Court recalls that, as Article 8 protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants such as the applicant and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Indeed it will be a rare case where a settled migrant will be unable to demonstrate that his or her deportation would interfere with his or her private life as guaranteed by Article 8 (see *Miah v. the United Kingdom* (dec.), no. 53080/07, § 17,

27 April 2010). Not all settled migrants will have equally strong family or social ties in the Contracting State where they reside but the comparative strength or weakness of those ties is, in the majority of cases, more appropriately considered in assessing the proportionality of the applicant's deportation under Article 8 § 2. It will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect (see *Maslov*, cited above, § 63). However, the Court has previously held that there will be no family life between parents and adult children or between adult siblings unless they can demonstrate additional elements of dependence (*Slivenko v. Latvia* [GC], no. 48321/99, § 97, ECHR 2003 X; *Kwakye-Nti and Dufie v. the Netherlands* (dec.), no. 31519/96, 7 November 2000).

44. An interference with a person's private or family life will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of that Article as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein, and as being "necessary in a democratic society" in order to achieve the aim or aims concerned. The Grand Chamber has summarised the relevant criteria to be applied, in determining whether an interference is necessary in a democratic society, at §§ 57-58 of *Üner*, cited above:

> "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 (see, for example, the judgments in *Moustaquim v. Belgium*, *Beldjoudi v. France* and *Boultif v. Switzerland*, cited above; see also *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002; *Yılmaz v. Germany*, no. 52853/99, 17 April 2003; and *Keles v. Germany*, 32231/02, 27 October 2005). 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. These criteria, as reproduced in paragraph 40 of the Chamber judgment in the present case, are the following:
>
> - the nature and seriousness of the offence committed by the applicant;
>
> - the length of the applicant's stay in the country from which he or she is to be expelled;
>
> - the time elapsed since the offence was committed and the applicant's conduct during that period;
>
> - the nationalities of the various persons concerned;
>
> - the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
>
> - whether the spouse knew about the offence at the time when he or she entered into a family relationship;
>
> - whether there are children of the marriage, and if so, their age; and
>
> - the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

> 58. The Court would wish to make explicit two criteria which may already be implicit in those identified in the *Boultif* judgment:
>
> - 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
>
> - the solidity of social, cultural and family ties with the host country and with the country of destination."

45. These criteria are relevant, where applicable, regardless of the age of the person concerned or their length of residence in the expelling State, as the Grand Chamber also confirmed in *Üner*, cited above:

> "55. The Court considers that these principles apply regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there. In this context the Court refers to Recommendation 1504 (2001) on the non-expulsion of long-term immigrants, in which the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers invite member States, *inter alia*, to guarantee that long-term migrants who were born or raised in the host country cannot be expelled under any circumstances (see paragraph 37 above). While a number of Contracting States have enacted legislation or adopted policy rules to the effect that long-term immigrants who were born in those States or who arrived there during early childhood cannot be expelled on the basis of their criminal record (see paragraph 39 above), such an absolute right not to be expelled cannot, however, be derived from Article 8 of the Convention, couched, as paragraph 2 of that provision is, in terms which clearly allow for exceptions to be made to the general rights guaranteed in the first paragraph."

46. However, the age of the person is of significant relevance when applying certain of the criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult. The age at which the person entered the host country is also of relevance, as is the question of whether they spent a large part or even all of their childhood in that country (see *Maslov*, cited above, §§ 72-73). The Court has previously found that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion (ibid, § 75).

b) Application to the facts of the case

47. The Court notes that the applicant claims that he enjoys family life in the United Kingdom, whilst the Government deny that assertion. The Court is of the view, having had regard to the findings of the Asylum and Immigration Tribunal which heard the applicant's appeal against deportation, that the applicant's relationships with his girlfriend and relatives in the United Kingdom do not amount to family life. However, it is clear, and not disputed by the Government, that the applicant enjoys private life in the United Kingdom and that his various relationships form part of, and strengthen, that private life. The Court will therefore consider whether

the interference with his private life which would be caused by the applicant's deportation would infringe Article 8.

48. The Court further notes that it is not in dispute between the parties that the applicant's deportation would be "in accordance with law" and in pursuit of a legitimate aim, namely the prevention of crime. It only remains for the Court to determine, therefore, whether the deportation would be "necessary in a democratic society". Having regard to the criteria expressed by the Grand Chamber in *Üner*, cited above, and set out at paragraph 44, the Court finds that the following criteria are of relevance in the applicant's case: i) the nature and seriousness of the offence committed by the applicant; ii) the length of the applicant's stay in the country from which he is to be expelled; iii) the time that has elapsed since the offence was committed and the applicant's conduct during that period; and iv) the solidity of social, cultural and family ties with the host country and with the country of destination.

49. Having regard to the first of the relevant criteria, the Court observes that the offence which gave rise to deportation proceedings against the applicant, namely possession of Class A drugs with intent to supply, was undoubtedly very serious, as evidenced by the fact that it gave rise to a sentence of three years' imprisonment. The Court notes that the Secretary of State takes an especially grave view of offences involving drugs, and accepts that she is entitled to do so, particularly given the destructive effects of such offences on society as a whole (see *Dalia v. France*, 19 February 1998, § 54, *Reports of Judgments and Decisions* 1998-I). It is also noted that the deportation offence was not the applicant's first; he had several previous convictions, some of which were also for drug-related offences. The nature of the applicant's offending and the fact that, with the exception of the conviction for possession of drugs in February 2004, all of his offences appear to have been committed when he was over the age of eighteen and hence, an adult, mean that his case can clearly be distinguished from that of the applicant in *Maslov*, cited above. In that case, the applicant's offences could be characterised as "juvenile delinquency", but Mr Balogun's offences merit far more serious characterisation. The Court does, however, observe, with regard to the third of the relevant criteria listed above, that the applicant does not appear to have committed any further offences since his release from prison.

50. Turning now to the second of the criteria listed above, namely the applicant's length of stay in the United Kingdom, the Court observes that this is a matter of some dispute. Whilst the applicant has always maintained that he was brought to the United Kingdom at the age of three and has remained there since, the Government reject this claim, stating that there is no record of the applicant being present in the United Kingdom until he was eight years old. The Court notes that even the application for leave to remain made on behalf of the applicant by social services stated that he had

arrived at the age of three. This was long before the issue of the applicant's deportation arose. The Court therefore takes the view that the applicant's consistency as to the age at which he entered the country outweighs the lack of documentary evidence of his presence, and therefore accepts that he has been in the United Kingdom since he was three. Furthermore, while the Court notes the Government's point that regardless of how long the applicant has been in the United Kingdom, only four years of his stay were with valid leave, the Court is of the view that the applicant, given the young age at which he was brought into the country and the unfortunate circumstances of his childhood, should not be penalised for his guardians' failure to regularise his status earlier. Given that the applicant can be classed as a settled migrant who has spent virtually the whole of his childhood in the host country, the Court finds that very serious reasons would be required to justify his expulsion (see *Maslov,* cited above, § 75).

51. Finally, the Court has given close scrutiny to the fourth of the criteria listed above, namely the respective solidity of the applicant's ties to the host country and the destination country. The main tie to Nigeria that the applicant may have, given the young age at which he left the country and consequent lack of memories or cultural experience, is the fact that his mother appears to reside there. The applicant claims not to be in contact with his mother or to have any knowledge of her whereabouts, and given that he does not appear to have lived with her since his arrival in the United Kingdom, the Court accepts that this is not a strong familial tie. However, it is one that could be pursued and strengthened by the applicant if he chose. The remainder of the applicant's relatives, namely, his half brother, the aunt with whom he lived as a child – and from whom it is presumed the applicant is now estranged – and a second aunt and her family, reside in the United Kingdom and have settled immigration status. His father is deceased. The applicant's family ties in both the United Kingdom and Nigeria can therefore be characterised as limited. The Court is, however, of the view that his social and cultural ties to his host country are undoubtedly stronger than those to Nigeria, given his length of residence in the United Kingdom, the fact that he has both studied and worked there and his relationship, now of several years' duration, with his girlfriend.

52. The Court has taken note, in assessing the applicant's respective ties to the United Kingdom and Nigeria, of the specific circumstances of his upbringing. He was left at the age of three with an aunt who, according to the applicant and to social services, ill-treated the applicant. He was thrown out by this aunt at the age of fifteen and was thereafter taken into foster care. He has therefore not only spent by far the greater part of his childhood in the United Kingdom and been entirely educated in that country, but has been partly brought up in the care of the United Kingdom's social services. These elements of the applicant's background contribute significantly to the Court's finding that his ties to the United Kingdom are stronger than those

to Nigeria. However, while the Court views with sympathy the circumstances of the applicant's formative years, the fact remains that he is responsible for his own actions. Particularly in light of the fact that the majority of the applicant's offences were committed when he was already an adult, the Court finds that the applicant cannot excuse his past criminal conduct by reference to his upbringing.

53. As previously stated, very strong reasons are required to justify the deportation of settled migrants. In the case of this particular applicant, moreover, it is not in doubt that his deportation to Nigeria will have a very serious impact on his private life, given his length of residence in the United Kingdom and his limited ties to his country of origin. However, the Court has paid specific regard to the applicant's history of repeated, drugs-related offending and the fact that the majority of his offending was committed when he was an adult, and also to the careful and appropriate consideration that has been given to the applicant's case by the domestic authorities. With these factors in mind, the Court finds that the interference with the applicant's private life caused by his deportation would not be disproportionate in all the circumstances of the case. It therefore follows that his deportation to Nigeria would not amount to a violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible;
2. *Holds* by five votes to two[1] that there would be no violation of Article 8 of the Convention if the applicant were to be deported to Nigeria.

[1] Rectified on 17 September 2012: the text was "by a majority".

Done in English, and notified in writing on 10 April 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early	Lech Garlicki
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge De Gaetano and the joint dissenting opinion of Judges Garlicki and David Thór Björgvinsson are annexed to this judgment.

L.G.
T.L.E.

SEPARATE OPINION OF JUDGE DE GAETANO

1. I have voted, not without some misgivings, with the majority in this case. The reason for my initial hesitation is that the instant case is not easily reconcilable with, and not convincingly distinguishable from, cases like *Nunez v. Norway* (28 June 2011, no. 55597/09) and *A.A. v. the United Kingdom* (20 September 2011, no. 8000/08) *if these cases are viewed solely from the perspective of the doctrine of the margin of appreciation.* In *Nunez* all the facts were before the Norwegian judicial authorities who gave relevant and sufficient reasons for their decision to uphold Mrs Nunez's expulsion. Likewise in *A.A.* all the facts were before the Immigration Tribunals and the Court of Appeal, and it was not for a moment suggested that these had erred in law or in fact (although in *A.A.* the UK Border Agency dragged its feet for more than two and a half years after the decision of the Court of Appeal).

2. The reality is, however, that no one case is identical to another. When applying the principle of proportionality, in order to decide whether the impugned (expulsion) measure is "necessary in a democratic society", the various criteria set out in *Üner v. the Netherlands* ([GC] 18 October 2006, no 46410/99, at §§ 54-58) and *Maslov v. Austria* ([GC] 23 June 2008, no 1638/03, at § 71) all exert a different gravitational pull such that it is often difficult to decide on which side the scales should tip. Factor in also the "best interests of the child" (as was the case in *Nunez*) and the case can spiral out of orbit (see also the joint dissenting opinion in *Antwi and Others v. Norway* (14 February 2012, no. 26940/10)).

3. In my view the decisive factor in the instant case is the seriousness of the offences committed after the applicant had become an adult. The applicant knew perfectly well that, although he could be considered as a settled migrant, as an alien he had no "absolute right" to stay in the United Kingdom, and he must have known that in the event of serious brushes with the law, he risked being expelled. As was pointed out in *Maslov* "...Article 8 provides no absolute protection against expulsion for any category of aliens...including those who were born in the host country or moved there in their early childhood..." (§ 74). The applicant simply brought the expulsion upon himself – *imputet sibi.* Article 8 should not be construed as an automatic safety valve for overriding immigration control on general (as opposed to specific and compelling) compassionate grounds or where there would be some harshness resulting from removal.

JOINT DISSENTING OPINION OF JUDGES GARLICKI AND DAVID THÓR BJÖRGVINSSON

We have voted with the majority as concerns the inadmissibility of the applicant's complaint under Article 3 of the Convention. Moreover, we agree, like the majority, with the findings of the Asylum and Immigration Tribunal that his relationship with his girlfriend and the presence of his relatives in the United Kingdom do not amount to family life within the meaning of Article 8 of the Convention (see § 47). However, we disagree with the majority's finding that there would be no violation of the applicant's right to respect for his private life if he were to be deported to Nigeria.

It is pointed out in §48 of the judgment that the following represent the relevant criteria to be applied to the case: i) the nature and seriousness of the offences committed by the applicant; ii) the length of the applicant's stay in the United Kingdom; iii) the time that has elapsed since the date of the applicant's last offence and his conduct during that period; and iv) the solidity of social, cultural and family ties with the host country and with the country of destination.

As regards the first point it is clear that the applicant has a history of offending. This is an important element justifying his deportation from the United Kingdom. However, according to the case file the applicant's date of birth is 5 April 1986, which means that he turned 18 on 5 April 2004. Two of the convictions were in 2004, one - possession of Class A and C drugs - occurred in February 2004, before he was 18, and the other - handling stolen goods - two days after he turned 18. However, from the record of his convictions it transpires that both offences were actually committed in 2003, when he was still a minor. As regards the dates on which the offences were committed and for which he was convicted in 2005 and 2007, we can only assume they were committed after he had turned 18, especially the 2007 conviction. Whatever the exact dates, it clearly transpires that all offences were in any event committed when the applicant was still a very young man and three of them when he was still a minor.

As regards the second point we simply emphasise that the applicant entered the United Kingdom at the age of three. We agree with the majority's finding in § 50 that the applicant is a settled migrant who has spent virtually all his childhood and adult life in the United Kingdom. We agree, moreover, with the majority that under these circumstances very serious reasons would be required to justify his expulsion from the United Kingdom.

As regards the third point we simply point out that at least five years have elapsed since the applicant last offended. Moreover, there is nothing in the file to indicate that his conduct has not been good since then, both

during the three-year period he spent in prison and the two years that have elapsed after he completed his sentence.

As regards the fourth point we believe that there can be little doubt that the applicant's ties with the United Kingdom are much stronger than with Nigeria. Indeed, we believe that the applicant, having spent virtually all his life in the United Kingdom and with little recollection of time spent in Nigeria, has no meaningful social, cultural or familial ties with that country. In this regard we find the arguments advanced in § 51 as regards the applicant's possibilities to pursue and strengthen "familial ties" with his mother, with whom he has not been in any contact from the age of three, if not longer, to be highly speculative and artificial. Moreover, we would like to add that we find it somewhat contradictory to suggest as relevant possible limited "familial ties" with his mother in Nigeria, since such ties would not be accepted as relevant "familial ties" under Article 8 of the Convention had his mother been living in the United Kingdom. These ties, if they existed, could not be used by the applicant to support his claim to be allowed to stay in that country, unless some additional elements of dependence could be established (see § 43 of the judgment). Therefore, we fully agree with what is said in § 53 of the judgment, namely that there is no doubt that the applicant's deportation to Nigeria will have a very serious impact on his private life.

In sum we believe, having in mind the young age at which the offences were committed, the strong ties the applicant has with the United Kingdom and the corresponding lack of ties with Nigeria, and the overall and very serious impact deportation will have on the applicant, that his right to respect for his private life under Article 8 of the Convention would be breached if he were to be deported to Nigeria.