



Fernandes v He Lt Governor
Royal Court
23rd September 2016

JUDGMENT
39/2016

Refusal of application for leave to apply for judicial review of deportation recommendation.

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

Between:

JOSE MARIA SEBASTIAO FERNANDES

Applicant

-and-

**HIS EXCELLENCY
THE LIEUTENANT-GOVERNOR
OF GUERNSEY**

Respondent

Oral hearing dates: 10th - 12th August 2016
Written submissions: 15th August 2016

Judgment delivered: 23rd September 2016

Before: Lieutenant Bailiff Patrick John Talbot QC

Counsel for the Applicant: Advocate P F Cobb

Counsel for the Respondent: HM Comptroller

Cases and legislation referred to:

The Immigration Act, 1971

The Immigration (Guernsey) Order 1993

The Immigration (Bailiwick of Guernsey) Rules of 2008

The Immigration (Bailiwick of Guernsey) (Amendment) Rules 2015

The Human Rights (Bailiwick of Guernsey) Law, 2000

The Nationality, Immigration and Asylum Act, 2002

O'Dette v Law Officers of the Crown [2007-08] GLR 16

De Sousa v Law Officers of the Crown [2014] GLR 107

Pinto, Loreto and Almeida v Law Officers of the Crown [2013-14] GLR 83

De Gouveia v Lieutenant Governor of Jersey [2012 (1) JLR 291]

Üner v Netherlands [2006] ECHR 873

E v Secretary of State for the Home Department [2004] QB 1044

R v Independent Television Commission [1996] EMLR 318

R (Daly) v Home Secretary [2001] 2 AC 532

Edore v Secretary of State for the Home Department [2003] 1 WLR 2979

R (Ala) v Secretary of State for the Home Department [2003] All E R (D) 283

R (Samaroo) v Secretary of State for the Home Department [2001] UKHRR 1150

SS (Nigeria) v Secretary of State for the Home Department [2014] 1 WLR 998

J U D G M E N T

Introduction

1. On the 2nd August 2016, the Applicant applied to the Royal Court for permission to apply for judicial review of the decision made by His Excellency The Lieutenant-Governor (“the Lieutenant-Governor”), the Respondent, on 24th June 2016 to make a Deportation Order against the Applicant. By the application, the Applicant sought an order quashing the decision on the ground that:

“it was so unreasonable no other reasonable public body could have come to the decision and/or it was a breach of the Applicant’s Convention rights.”

2. The application was supported by an affidavit made by the Applicant himself on 2nd August 2016; the affidavit was of a formal nature, exhibiting the Cause, verifying the facts set out there and exhibiting the material documents.
3. The statutory basis for the making of a deportation order in Guernsey originates in The Immigration Act 1971, a UK Statute, (“the 1971 Act”), which was extended to Guernsey by The Immigration (Guernsey) Order 1993, (“the 1993 Order”).
4. By paragraph 3(1) of the 1993 Order, it was provided that sections 1 to 9 of the 1971 Act should extend to Guernsey. Accordingly, section 3(5) of the 1971 Act applies to Guernsey in the following form:

“(5) A person who is not a British citizen shall be liable to deportation from Guernsey –

(a) ...; or

(b) if the Lieutenant-Governor deems his deportation to be conducive to the public good; ...

- (6) Without prejudice to the operation of sub-section (5) above, a person who is not a British citizen shall also be liable to deportation from the Bailiwick of Guernsey if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.”*

5. By section 5 of the 1971 Act, as applicable in Guernsey, it is provided, so far as is material, as follows:

“(1) Where a person is, under section 3(5) or (6) above, liable to deportation, then subject to the following provisions of this Act the Lieutenant-Governor may make a deportation order against him, that is to say, an order requiring him to leave and prohibiting him from entering the Bailiwick of Guernsey; and a deportation order against a person shall invalidate any leave to enter or remain in the Bailiwick of Guernsey given him before the order is made or while it is in force.

...

(5) The provisions of Schedule 3 to this Act shall have effect with respect to the removal from the Bailiwick of Guernsey of persons against whom deportation orders are in force and with respect to the detention or control of persons in connection with deportation.

...”

6. By section 6 of the 1971 Act, as applicable in Guernsey, it is provided, so far as is material, as follows:

“Where under section 3(6) above a person convicted of an offence is liable to deportation on the recommendation of a court, he may be recommended for deportation by any court having power to sentence him for the offence ...”

7. By the operation of section 33(1) of the 1971 Act, as applicable in Guernsey, “the Lieutenant-Governor” is defined as:

“... the person for the time being holding the office of Lieutenant-Governor and Commander-in-Chief of the Island of Guernsey and its Dependencies ...”

8. Schedule 3 to the 1971 Act, so far as is applicable to Guernsey, contains supplementary provisions as to deportation in the following terms:

“(1) Where a deportation order is in force against any person, the Lieutenant-Governor may give directions for his removal to a country or territory specified in the directions being either –

(a) A country of which he is an national or citizen; or ...

(2)(1) Where a recommendation for deportation made by a court is in force in respect of any person, and that person is neither detained in pursuance of the sentence or order of any court nor for the time being released on bail by any court having power so to release him, he shall, unless the court by which the recommendation is made otherwise directs, ... be detained pending the making of a deportation order in pursuance of the recommendation, unless the Lieutenant-Governor directs him to be released pending further consideration of his case.

...

(3) Where a deportation order is in force against any person, he may be detained under the authority of the Lieutenant-Governor pending his removal or departure from the Bailiwick of Guernsey (and if already detained by virtue of sub-paragraph (1) above when the order is made, shall continue to be detained unless the Lieutenant-Governor directs otherwise).

...”

9. Section 3(2) of the 1971 Act, as applicable in Guernsey, may from time to time make rules as to the practice to be followed in the administration of the 1971 Act. The principal rules in force in Guernsey are The Immigration (Bailiwick of Guernsey) Rules of 2008, (“the Principal Rules”), which came into force on 25th April 2008. The Principal Rules were amended by The Immigration (Bailiwick of Guernsey) (Amendment) Rules 2015, (“the 2015 Amendment Rules”), which were made on 30th March 2015 and came into force on 1st June 2015.
10. Part 13 of the Principal Rules deals with deportation and administrative removal. Material amendments were made to Part 13 by the 2015 Amendment Rules.
11. The following definitions contained in paragraph 6 of the Principal Rules apply in the present case:

“EEA national” means a national of a State other than the United Kingdom which is a Contracting Party to the European Economic Area Agreement ...

“Family members” in relation to an EEA national means:

(a) his spouse

(b) a descendant of his or his spouse who is under 21 years of age or is their dependant;

...

“Human Rights Convention” means the Convention for the Protection of Human Rights and Fundamental Freedoms, ... as it has effect for the time being in relation to the Bailiwick of Guernsey.

“Immigration Act 1971” ... shall mean [those Acts] as extended to the Bailiwick of Guernsey by [the 1993 Order]; and any reference to any provision of [those Acts] is (unless the context requires otherwise) a reference thereto as so extended.

...

“A parent” includes:

...

(c) the father as well as the mother of an illegitimate child where he is proved to be the father;

...”

12. The material parts of Part 13 of the Principal Rules provided as follows:

“A deportation order

362. *A deportation order requires the subject to leave the Bailiwick of Guernsey and authorises his detention until he is removed. It also prohibits him from re-entering the Bailiwick of Guernsey for as long as it is in force and invalidates any leave to enter or remain in the Bailiwick of Guernsey given him before the order was made or while it is in force.*

363. *The circumstances in which a person, including an EEA national ..., is liable to deportation include:*

(i) *where the Lieutenant-Governor deems the person's deportation to be conducive to the public good;*

...

(iii) *where a court recommends deportation in the case of a person over the age of 17 who has been convicted of an offence punishable with imprisonment.*

364. *While each case will be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Lieutenant-Governor will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although 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. The aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects.*

...

A deportation order made on the recommendation of a Court

373. *Although there is no appeal against the making of a deportation order, where a deportation order is made on the recommendation of a court there is a right of appeal to a higher court against the recommendation itself. An order may not be made while it is still open to the person to appeal against the relevant conviction, sentence or recommendation, or while an appeal is pending.*

Arrangements for removal

385. *A person against whom a deportation order has been made will normally be removed from the Bailiwick of Guernsey. The power is to be exercised so as to secure the person's return to the country of which he is a national, ... unless he can show that another country will receive him. In considering any departure from the normal arrangements, regard will be had to the public interest generally, and to any additional expense that may fall on public funds.*

...”

13. Although the Explanatory Note to the Principal Rules did not form part of them, it is helpful, in my view, to set it out here:

“These Rules repeal and replace the Rules at present in force in the Bailiwick of Guernsey. They make provision as to the practice to be followed in the administration of the Immigration Acts 1971 The new Rules closely follow the United Kingdom “Statement of Changes in Immigration Rules”.”

14. By paragraph 1 of, and the Schedule to, the 2015 Amendment Rules, material changes were made to the parts of the Principal Rules which had dealt with deportation orders. By paragraph 5 of the 2015 Amendment Rules, it was stated that they came into force on 1st June 2015 and that they:

“apply to all decisions taken on or after that date.”

15. An argument to the effect that the 2015 Amendment Rules were not, or might not be, applicable to the present case was put to me by HM Comptroller on behalf of the Lieutenant-Governor, based in part on the position in the United Kingdom; she made helpful oral and written

submissions on the topic, as did Advocate Cobb for the Applicant. In my judgment, the Amendment Rules are so clear in wording and intent that the proper conclusion is that they were in force at the time of the making of the Deportation Order in relation to the Applicant on 24th June 2016. The decision of the Lieutenant-Governor to make a deportation order was, as I see it, quite clearly a decision taken on or after 1st June 2015, to which the Amendment Rules must apply. Such a reading is also, in my view, consistent with the definitions contained in paragraph 3 of the Amendment Rules; I do not consider that the context requires otherwise. In any event, both Advocate Cobb and HM Comptroller appeared to me to agree that, at least in relation to the instant case, there was no material difference between the position under the Principal Rules in their original state and the position under the Principal Rules as amended by the 2015 Amendment Rules. It is, *inter alia*, in my view, important to note both that paragraph 363 of the Principal Rules was not amended by the 2015 Amendment Rules and that the great majority of Paragraph 364 has been repeated in what are now paragraphs 390A and 396 to 398 of the Principal Rules as so amended.

16. The material changes to the Principal Rules relating to deportation orders carried into effect by the Amendment Rules on 1st June 2015 included the deletion of paragraph 364, which I have set out above, and its replacement by the following paragraphs which are material to the present case:

“390A. Where paragraph 398 applies, the Lieutenant-Governor will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

...

396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation.

397. A deportation order will not be made if the person’s removal pursuant to the order would be contrary to the Bailiwick of Guernsey’s obligations under the Human Rights Convention or the United Nation’s Convention and Protocol relating to the Status of Refugees. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

Deportation and Article 8

398. Where a person claims that their deportation would be contrary to the Bailiwick of Guernsey’s obligations under Article 8 of the Human Rights Convention, and

(i) the deportation of the person from the Bailiwick of Guernsey is conducive to the public good because that person has been convicted of an offence for which that person has been sentenced to a period of imprisonment of at least 4 years; or

(ii) ...

(iii) the deportation of the person from the Bailiwick of Guernsey is conducive to the public good because, in the view of the Lieutenant-Governor, that person’s offending has caused serious harm, or that person is a persistent offender who shows a particular disregard for the law;

the Lieutenant-Governor in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in

exceptional circumstances that the public interest in deportation will be outweighed by other factors.

399. *This paragraph applies where paragraph 398(b) or (c) applies if–*

(i) The person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the Bailiwick of Guernsey; and

(a) The child is a British Citizen; or

... or

(ii) ...

399A. *...*

399B. *Where paragraph 399 ... applies, limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Lieutenant-Governor deems appropriate.*

...”

17. The Amendment Rules were also accompanied by an Explanatory Note which was not part of the Rules. The Note may, however, be of some help. It states that the 2015 Amendment Rules amend the Principal Rules and that the 2015 Amendment Rules come into force on 1st June 2015. Although there is no specific reference to the case of a deportation order, the Note states that the 2015 Amendment Rules:

“... provide a clear basis for considering family and private life cases in compliance with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. ...”

18. It was common ground between the parties that the reference in paragraph 399 of the Amendment Rules to “*paragraph 398(b) or (c)*” was obviously a reference to paragraph 398(i) or (ii); I agree. It was also not part of Advocate Cobb’s case, as I understood it, that paragraph 399 applied to the present case.

19. The last sentence of paragraph 364 of the Principal Rules was not replaced by an equivalent sentence or paragraph in the 2015 Amendment Rules. But, in my view, on the facts of this case, nothing really turns on the absence of the last sentence of paragraph 364 of the Principal Rules from those Rules as amended by the 2015 Amendment Rules.

20. The rights of the Applicant, and those of his partner and of their son who was born in 2012, under the Convention for the Protection of Human Rights and Fundamental Freedoms, (“the ECHR”), are secured in Guernsey by The Human Rights (Bailiwick of Guernsey) Law 2000. In this case reliance is placed on their rights under Article 8, upon which much of the argument turned.

Article 8 of the ECHR, in so far as relevant, provides:

“1. Everyone has the right to respect for his private and family life, his home ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, ... or for the protection of the rights and freedoms of others”

The material facts

21. The Applicant is a Portuguese Citizen. He moved to Guernsey in 2007 and regards Guernsey as his home. He has three siblings who live in Guernsey, with whom he has a close relationship; he therefore has family ties within Guernsey. Nevertheless, he does not claim that any of his siblings is dependant upon him. The Applicant's mother, who was widowed in about May 2016, lives in Madeira. She is his closest relative in Portugal.
22. Since about 2009, the Applicant has been in a relationship with his partner. Their son is now 4½ years old. The Applicant's evidence was that from 17th May 2012 he had been living with them; accordingly, they had lived together as a family for about 11 months until the Applicant was sentenced by the Royal Court on 22nd April 2013 to two concurrent terms of 5 years' imprisonment for drug importation offences. The Applicant has received visits from his partner and his son on very many occasions after being sentenced. The evidence appears to establish that the Applicant has established a close bond with his son.
23. Before he was sentenced for the drugs offences, the Applicant had been convicted of six criminal offences including three common assaults, two offences of driving with alcohol above the specified limit and one public order offence; the period of his offending ran between July 2008 and January 2013.
24. Details of the material considered by the Lieutenant-Governor included a General Report by an officer of Guernsey Police into allegations of an assault at a nightclub on the Island late at night on 19th February 2011 and an alleged indecent assault on a woman on that occasion. The General Report also mentioned the arrest of the Applicant on suspicion of the two alleged assaults on 22nd March 2011 and his interview under caution. It appeared from the General Report that the Applicant had left Guernsey some time after the incident and had returned to the Island on 25th March 2012, when he was arrested and taken to Guernsey Police headquarters.
25. By letter dated 27th March 2012, an officer of the Guernsey Border Agency wrote to the Applicant to inform him that as part of the sentencing process for an alleged indecent assault and an alleged assault, in relation to which it seems that the Applicant was at that time remanded in custody, he could face a recommendation of deportation as part of the sentencing.
26. Details of an alleged offence of driving a quad bike whilst under the influence of alcohol above the prescribed limit in the early morning of 3rd June 2012 also formed part of the material considered by the Lieutenant-Governor. When the Applicant was, it seems, before the Magistrate's Court on 14th September 2012 on a charge of common assault, (and it is to be noted not on a charge of *indecent* assault), details of his then criminal record showed that on three previous occasions he had been sentenced to terms of imprisonment of two months for two separate occasions of common assault in 2008 and 2010 and for a public order offence in 2012. That record print-out was also part of the material considered by the Lieutenant-Governor.
27. On 24th October 2012, when the Applicant was 26 years old, he was arrested on suspicion of being concerned in the importation through the postal system of packages of controlled drugs, namely, 15 wraps of heroin, a Class A controlled drug, and an amount of suboxone, a Class C controlled drug. When interviewed by the police, the Applicant stated that he had imported the drugs through the post for his personal use and that he was a regular drug user.
28. A notice was served on the Applicant on about 8th February 2013 under section 6(2) of the 1971 Act as applicable in Guernsey, informing him that the offences with which he had been charged would, if proved, include as part of the sentencing for such crimes, the possibility of a recommendation for deportation under the 1971 Act.

29. In approximately March 2013, *i.e.* between the date of his arrest for the drugs offences and the sentencing hearing relating to those offences before the Royal Court on 22 April 2013, an officer of the Immigration Service of the Guernsey Border Agency interviewed the Applicant. The Applicant told the officer that he was single, that he had not been married on any occasion and that he had two dependants, namely, a daughter in the United Kingdom, then six years old, and a son then 11 months old. At that time, both the Applicant's parents were still alive, but his father died in May 2016. The Applicant also told the officer that he was named as the father of his son on his son's birth certificate. He gave details of the relatively limited contact which he maintained with his daughter in the UK, saying that he spoke to her "every so often". He also told the officer that he had previously supported his daughter in the UK, but that her mother supported her at that time. At the time of the interview, the Applicant said that he was not in employment.
30. On 22 April 2013 the Applicant was sentenced in the Royal Court for the two drugs offences, to which he had pleaded guilty. His co-defendant was sentenced on the same occasion. Detailed sentencing remarks were delivered by the Deputy Bailiff. The sentencing remarks, which formed part of the material before the Lieutenant-Governor, set out the Applicant's criminality and the details of the drug offences, fully and carefully. Amongst the sentencing remarks of the Deputy Bailiff was an acceptance on behalf of the Royal Court, that:

"... this was not a case in which financial gain played a role because the drugs were for [the Applicant's] personal consumption, rather than for onward sale. ..."

The Royal Court found that at the time of the drugs offences in October 2012 the Applicant had a drug addiction, but that he was saying that he was addressing his drug problems. For the importation of the heroin the Applicant was sentenced to a term of imprisonment of 5 years and for the importation of the suboxone the Applicant was sentenced to a term of imprisonment of 1 year, the sentences to run concurrently, thereby amounting to a total sentence of 5 years' imprisonment from 22nd April 2013.

31. Although the sentencing remarks of the Deputy Bailiff on 22nd April 2013 may not have been, it appears, verbatim as delivered in court, there was a detailed section headed "**Deportation**" in the following terms:

"... We emphasize, as we have to in this type of case, that the Royal Court itself does not have the power to order deportation; its powers under [the 1971 Act], as extended to the Bailiwick of Guernsey, are confined to making a recommendation to His Excellency the Lieutenant-Governor."

The Royal Court directed itself in accordance with the principles established by the Guernsey Court of Appeal in *O'Dette v Law Officers of the Crown* [2007-08] GLR 16, and considered whether the continued presence of the Applicant within the Bailiwick of Guernsey was to the detriment of the jurisdiction, whether the offences were serious enough to merit deportation and whether there was a risk of the Applicant re-offending. The Royal Court also took into account the Applicant's rights under the ECHR and, in particular, his right under Article 8 to respect for his family life, his private life and his home. At the end of its sentencing process, the Royal Court made a recommendation for deportation of both the Applicant and his co-accused, who had been responsible for posting the drugs to the Applicant from the UK. In relation to the Applicant, the typed version of the Deputy Bailiff's sentencing remarks read as follows:

"In your case, Mr Fernandes, the balancing exercise is more complex. You may regard Guernsey as your home, but the right in Article 8 relates not to a territory but to the physical premises in which you live. Unlike Mr Cerejo, however, you do have family in Guernsey, including a child. Accordingly, a decision to recommend your deportation engages Article 8 of the European Convention. That right, however, is not absolute. Your involvement importing Class A drugs into Guernsey is, in our view, serious enough to merit deportation."

The assessment in the Probation Report states that there is “a high likelihood of re-offending” and that you present “a risk of harm to the public”. Accordingly, the only aspect realistically capable of tipping the balance in your favour is the family you have here.

Our conclusion, however, is that you have abused your situation here in Guernsey and that the seriousness of your position, both in what you have now done and your overall behavior since arriving in Guernsey in 2007, justifies the Court making the recommendation to His Excellency for your deportation at the conclusion of your sentence. We regard this as a proportionate response in all the circumstances having regard to the offence, your personal situation and your family here. Accordingly, a recommendation is also made in your case.”

32. The Probation report referred to in the sentencing remarks at the Royal Court was prepared by Emma Pearce, a Probation Officer, and was dated 22nd April 2013. It was based, inter alia, on three interviews with the Applicant and on Ms Pearce’s previous knowledge of him as an offender in 2012. He had, it seems, been co-operative during his interviews and he accepted that he was at the time of the offences in question an illegal drugs user. The Probation report set out what he stated was his then drugs usage. The report also set out some details of the relationship of the Applicant with his co-defendant, with whom, it seems, he had lived in London for some months. The Probation report also established that, according to the Applicant, he had been in a relationship with his partner for about 2½ years, a relationship described by him as being good and supportive.
33. The Applicant applied for leave to appeal out of time against the Royal Court’s recommendation for deportation. Advocate Cobb appeared for him on that application, which was heard by the Court of Appeal in about December 2014. The approved text of the judgment is dated the 11th December 2014 – a Note also appears at *Fernandes v Law Officers of the Crown* [2014] GLR N [8]. Paragraph 9 of the judgment of the Court of Appeal set out details of a preliminary hearing held before the Deputy Bailiff alone in which he was informed of the fact that there had been a sexual relationship between the Applicant and his co-defendant in London on occasions between July 2011 and March 2012. An admission to that effect was entered into by the Advocates for the Crown and both defendants. It seems that the reason for such procedure being used was that the Applicant did not wish his partner, who would be sitting in court, to learn of his relationship with his co-defendant; in any event, the relationship was not, it seems, mentioned at the sentencing hearing in the Royal Court. Whether or not his partner learned of the relationship between the Applicant and his co-defendant as a result of the judgment of the Court of Appeal is not clear, but it seems to me that it is at least likely, and perhaps very probable, that she did learn of it either during the hearing in the Court of Appeal or shortly after the hearing.
34. It is clear from the judgment of the Court of Appeal, who referred to the judgment of the Court in *De Sousa v Law Officers of the Crown* [2014] GLR 107, that the approach taken in Guernsey differs from that in England and Wales. The courts in Guernsey undertake a more detailed consideration of the matters relevant to a recommendation for deportation. In *De Sousa* the Court of Appeal referred to the judgment of the Court in *Pinto, Loreto and Almeida v Law Officers of the Crown* [2013-14] GLR 83, (in which the Court of Appeal upheld the decision of the Royal Court to include in its sentences recommendations for deportation,) where, at paragraphs 49 – 52, Montgomery JA gave general guidance as to the proper approach to be taken in a case where a recommendation for deportation came into consideration. The approach of the Court in *Pinto*, which I have followed in this case, included a recognition, on the facts of that case, that the best interests of a child, when considering a right to family life under Article 8:

“... should have been treated as a primary consideration and the court needed to be armed with the facts required for a careful examination of those interests.”

In paragraphs 49-52 of her judgment, Montgomery JA said, so far as is material to the present case:

- “49. *The art. 8 rights to family life of the appellant and his daughter were clearly engaged by the sentencing process in this case. By definition, imprisonment and a recommendation for deportation were bound to interfere with the family life not only of the appellant but of those with whom the appellant normally lived and especially his daughter. The authorities, however, demonstrate that, while there is no rule requiring that the impact on family life must be exceptionally severe if a recommendation for deportation is to succeed, they also show that the more pressing the public interest in imprisonment or deportation, the stronger must be the claim under art. 8 if it is to prevail.*
50. *The right approach to art. 8 is to ask:*
- (a) *Is there an interference with family life?*
 - (b) *Is it in accordance with law and in pursuit of a legitimate aim within art. 8(2)?*
 - (c) *If so, is the interference proportionate, given the balance between the various relevant factors? (See R.(HH) v Westminster City Mags. Ct. ([2013] 1 AC 338, at para. 30, per Lady Hale).*
51. *As the English Court of Appeal subsequently observed in R v Petherick ..., in sentencing cases, the first two questions will usually be straightforward. There will almost always be some interference with family life and it will be in accordance with law and due to legitimate aims. It is the third question that may call for careful judgment.*
52. *In any criminal sentencing exercise, the legitimate aims of sentencing have to be balanced against the effect of any sentence on family life. These aims include the need of society to punish serious crime and to protect society from persons who may present a risk of committing further serious crimes. The interest of victims that punishment should constitute just desserts is also a legitimate aim as is the need of society for appropriate deterrence. The graver the offence, the less likely it is that any interference with family life inherent in a sentence of imprisonment or an order for deportation will be disproportionate. It needs to be remembered that just as a sentence may affect the family life of the defendant and of his innocent family, so the crime will very often have involved the infringement of other people’s family life. ...*
53. *We have now had the opportunity to consider further information about the appellant’s personal circumstances. It is clear that the relationship between the appellant and his daughter is a strong one and of real importance to the child since her natural mother has no contact with her. However, we must weigh this relationship and the undoubted harm that may be caused to the child by the loss of contact with her father consequent upon any deportation, against the interests of the complainant and the people of Guernsey, given the seriousness of the offending and the threat that may be posed by the appellant on his release, in circumstances where he has shown no real remorse for his conduct or insight into his behaviour.*
54. *We do not consider that it was either excessive or wrong in principle to recommend deportation in this case. We would observe, however, that it should not be assumed that the question of the proportionality of deportation has been finally settled by our decision to dismiss this appeal against sentence. In our view, the Lieutenant Governor will be required to consider with care the proportionality of any deportation at the point when the appellant is considered for release and removal since the possibility exists that, by that stage, the balance may have shifted so as to require a decision to be taken in his favour notwithstanding the recommendation of the court. The Supreme Court decision in HH demonstrates that the interests of the*

child will remain a matter of substantial importance throughout the process of removal. The Lieutenant Governor will need to proceed on a proper understanding of the facts that illuminate those interests. At the same time, the Lieutenant-Governor will be entitled to weigh against those interests, the impact of the powerful interests in public protection and appropriate punishment that exists in this case."
(The emboldening of text is mine.)

35. Returning now to the decision of the Court of Appeal in the instant case on the Applicant's appeal against the recommendation of the Royal Court for him to be deported, the judgment of the Court continued, at paragraph 13, as follows:

*"... With respect to the merits of the applicant's appeal, and by reference to the approach set out in De Sousa, the Royal Court had approached properly the balancing exercise which is required in considering the applicant's Convention rights. The Probation Report demonstrated that the applicant's relationship with his partner had ended at one point and the notice of admission acknowledged that he had also had a relationship with his co-defendant and that information was provided to the Jurats. **The conduct of the applicant whilst in prison and following sentencing is not relevant to this application but may be taken into account by the Lieutenant Governor who is obliged to follow the guidance given in Pinto but is not compelled to follow the recommendation made by the Royal Court...**"* (The emboldening of text is mine.)

36. When considering the merits of the application for leave to appeal against the recommendation for deportation in the case of the Applicant, the Court of Appeal carefully set out the proper approach to be taken on an appeal against such a recommendation, whilst making it clear, at paragraph 18, in reliance upon paragraphs 16 to 18 of the judgment in *De Sousa*, that on an appeal to the Court of Appeal against the sentencing of an offender including a decision to recommend deportation, the proper approach of the court was whether the sentence was manifestly excessive or wrong in principle and that such a standard was to be distinguished from the standard in judicial review. Nevertheless, I think it is helpful, whilst reminding myself of the difference in approach to be taken on this application for permission to bring judicial review from an appeal against a criminal sentence including a recommendation for deportation, to take into account the following passages in the judgment of the Court of Appeal in the Applicant's application for leave to appeal:

"16. *The proper approach of the Royal Court to the making of a recommendation for deportation, and the approach of this Court in considering grounds of appeal against such a recommendation, have been set out by this court in the following three previous decisions: [O'Dette]; [Pinto]; and [De Sousa]. From the relevant passages in the judgments of the Court in these cases, the following considerations in an appeal of this sort may be identified.*

17. *The starting point is that it is in the public interest that persons who are not British citizens, and who are convicted of an offence or offences, should be deported other than in exceptional circumstances: see [the Principal Rules], rule 364. In a situation where it is open to the Royal Court to recommend under section 3(6) of the 1971 Act that a person who has been convicted should be deported, the Court must first have regard to the Convention rights of the convicted person which are secured by the ECHR: see the 2000 Law, section 6(1), and [the Principal Rules], rule 364. Secondly, the Court must have adequate information on all relevant matters upon which to make its decision and, if necessary, it should make preliminary enquiries if it does not have sufficient information: see O'Dette, ... at [2007-08 GLR 16] at paragraph 68. Thirdly, a decision to recommend deportation is bound to interfere with the rights to family life of the convicted person and his family which are secured by Article 8: see Pinto, ... [2013-14 at GLR 83] at paragraph 49. Fourthly, the Court should carry out the balancing exercise which is described by Montgomery JA in Pinto in the judgment ... at paragraph 50 ...*

Fifthly, the fact that a convicted person may have dependents in Guernsey, including dependent children, does not mean that deportation can never be recommended or ordered: see Pinto, ... at paragraph 49. This is, of course, consistent with the fact that the Convention rights secured by Article 8.1 are qualified by Article 8.2. Sixthly, the more serious the offence or offences in question, the less likely that any interference with family life will be disproportionate: see Pinto, ... at paragraph 52. Finally, the exercise to be carried out in Guernsey is to be distinguished from that which is now the approach in England and Wales ...: see O'Dette, ... at paragraphs 66 to 68, and followed in De Sousa, ... at paragraphs 18 and 20. This means that the previous approach which was formerly adopted in England and Wales, and is explained in cases such as R v Nazari, may still provide assistance in Guernsey.

...

23. *Finally, ... the actual decision to deport the applicant will be made by His Excellency the Lieutenant Governor who will make his decision having regard to the statutory function which is conferred upon him by the 1971 Act. **The Lieutenant Governor will make his decision based upon the up-to-date circumstances relating to the applicant and he will do so having regard to whether or not deportation would be conducive to the public good**: see the 1971 Act, section 3(5), and [the Principal Rules], rule 363. **The Lieutenant Governor will carry out that exercise having regard to the guidance given in previous decisions of this Court. In particular, we repeat what was said by Montgomery JA in Pinto ... at paragraph 54 ... As Montgomery JA goes on to say, the interests of a child will remain a matter of substantial importance throughout the process, and we can conceive that other considerations may also play a significant part. While these will be matters to be assessed by the Lieutenant Governor at the time, we can conceive that it could be material for the Lieutenant Governor to take into account the fact that a convicted person, such as the applicant, has been successfully treated for drug addiction or dependency during his time in prison if that were shown to be the case. We repeat that the standard is whether the deportation of the convicted person will be conducive to the public good and that will depend upon an assessment by the Lieutenant Governor of all of the circumstances as they exist at the point when a decision to deport is being considered.*** (The emboldening of text is, again, mine.)

37. It is, I believe, appropriate at this stage for me to return to the decision of the Court of Appeal in *O'Dette* not to follow the approach of the English courts in *R v Carmona*. The Court of Appeal, per Sir John Nutting JA, was considering whether or not the issue for the Royal Court would be so limited as to leave the Royal Court with considering the seriousness of the offence alone and:

“... vest the whole responsibility in the hands of the Lieutenant-Governor for the much more difficult questions relating to the offender’s Convention and other rights.” (paragraph 71)

In paragraphs 72 to 74 of their judgment, the Court of Appeal declined to follow *Carmona* and expressed their reasons and other matters of principle as follows:

- “72. We have decided not to follow *Carmona* and we have declined to do so for the following reasons:

- (1) *The Lieutenant-Governor in this jurisdiction is in a very different position to that of the Home Secretary in the United Kingdom. He has few of the resources available to the latter in making relevant enquiries since the latter has a large number of agencies, officials and advisors to whom he can refer.*
- (2) *A recommendation to deport is not to be equated with a mere suggestion that the Lieutenant-Governor should consider deportation. A recommendation imports the conclusion that the Court believes the deportation is the proper course for the Lieutenant-Governor to adopt.*

Such a recommendation made by a Court in this jurisdiction might put the Lieutenant-Governor in a potentially invidious position viz a viz the public, if, in the event, he refused to accept the recommendation.

(3) *If a recommendation to deport is made by a Court in this jurisdiction there should be a reasonable expectation that it will be acted upon.*

(4) *There is no appeal from the decision of the Lieutenant-Governor to deport in this jurisdiction, unlike the position in the United Kingdom... In the absence of any appellate mechanism from the Lieutenant-Governor's decision, an offender's only recourse in this jurisdiction would be to challenge the Order by way of judicial review.*

73. *It is our view that within the Bailiwick the recommendation and the decision to deport should not be compartmentalised but should be more inclusive, and should involve preliminary enquiries by the Court on all matters relevant to the question of deportation including the engagement of the offender's Convention rights. Based on such information the Court can and should then determine whether to make a recommendation or not. If the Court makes the recommendation the Lieutenant-Governor, having made such additional enquiries as he deems relevant, must then (or towards the end of the expiry of the offender's sentence) uphold or reject the recommendation.*

74. *It is not of course impossible, as suggested in Carmona, that the offender's circumstances may have changed between the time when he is sentenced and the time when he finishes his sentence. However, we do not regard the possibility of such change as being a factor which would prevent the Court from making the decision whether to recommend or not at the earlier time."*

38. It is also to be noted, as the Court of Appeal stated in paragraph 18 of their judgment in *De Sousa*, that, whilst the Court of Appeal in *O'Dette* reached their decision by reference to the 1999 Immigration Rules as applied in light of the subsequent incorporation of the ECHR into Guernsey Law by the 2000 Law, the Court of Appeal in *De Sousa* itself did not consider that changes consequent upon the making of the Principal Rules were of any significance.

39. The evidence establishes that during his period of imprisonment the Applicant has been a model prisoner. It appears that he has been free of drugs during his time in prison and that, when admitted, he has tested negative for drugs. Random tests in prison have also produced negative results. It also seems that he may now be more aware of the effects of his previous offending and of his history of abuse of alcohol leading to offences of violence. Emma Pearce, the Probation Officer who prepared the pre-sentence report for the Royal Court dated 22nd April 2013, also prepared a Parole Assessment report dated 9th March 2015, which was broadly in support of the Applicant's application for early release on parole and for him to be permitted to remain in Guernsey. It seems from this report that the Applicant's plans, if he were released, would be to return to live with his partner and their son and to take all necessary steps, with appropriate agency support, not to repeat his drug and alcohol abuse of the past. This is also clear from a report from Sarah Craske, a registered psychotherapist, dated 21st July 2015.

40. In about November 2015 or soon thereafter, the acting Lieutenant-Governor, the Bailiff, sought up-to-date information as part of his consideration whether or not to deport the Applicant.

41. On 14th January 2016, Peter Archer, an Immigration Officer, wrote to Tina Wilson of Drug Concern seeking up-to-date information about what she had said in an earlier open letter dated 16th January 2015, which she had written in her capacity as Prison Substance Misuse Worker, and in which she appeared to support the Applicant's wish to remain in Guernsey on his release from prison; such further information was asked for by mid-February 2016. Regrettably, Drug Concern's business manager informed Mr Archer by letter 25th January 2016 that, although

Drug Concern had decided not to retract Tina Wilson's letter of 16th January 2015, no further information could be provided by Drug Concern to the acting Lieutenant-Governor. But, by letter dated 5th February 2016, support for the Applicant came from a physical education instructor at Guernsey Prison, setting out what the Applicant had done in order to become rehabilitated.

42. The Applicant's partner had earlier sent a letter dated 11th January 2015 supporting her partner, the Applicant, about his qualities as a father of their son and about her plans for the future, stressing that, in her view, the best chance for their son being brought up in a loving and caring family environment would be with both parents and asking for the then Lieutenant-Governor to give the Applicant, "*a final chance to be a father to his son*". By her further letter dated 8th February 2016, she supported the Applicant in his attempt to remain in Guernsey "*to give us our final chance to be a family.*"
43. By letter dated 28th January 2015, the Applicant himself had earlier written to the then Lieutenant-Governor. In that letter, the Applicant gave details of his earlier life in Madeira and of his life in Guernsey before he was imprisoned. He accepted responsibility for his criminal past and set out his plan for a drug-free life on release from prison. He said:

"I ask that Your Excellency takes into consideration all that I have said and allows me to be the father that [my son] deserves and an asset to society. I have always worked hard and have no doubt that I would find a job without too much trouble. I cannot change the past but I can make a good future for my family. I adore my son and have a stable relationship with [my partner] who does not deserve any more punishment.

It has been suggested that if I get deported [my partner], who has stood by me through all this, and my son could move to Madeira. This is something which is not an option as I would not expect my son and his mum to uproot from a safe and stable community to go and live somewhere where the financial situation is really hard at the moment, without speaking the language or having the ability to work. [My son's] maternal grandparents also live on the Island, so he would lose the close contact he enjoys with them now. If I get deported my son will lose his father and [my partner] will have no support.

[My son] visits me, with [my partner], every week and we have a really close bond. He deserves a good dad who will look out for him, making sure he does not fall in the same bad ways that I did. If I am not here, I will not be able to do that.

With all the help and support in the last few months I have stayed drug-free, even prior to coming into prison, and changed my outlook on life. My son and partner are my first priority and I will do anything to make them proud of me. I am so desperate to be in [my son's] life that I even declined to apply for Parole at the first opportunity as I prefer to stay in prison and see my son for another year, rather than go out but not be part of his life."

44. By letter dated 22nd February 2016, the Applicant wrote again, on this occasion to the acting Lieutenant-Governor. He gave details of his time in prison and the rehabilitatory work carried out by him there. He also mentioned his increasingly strong relationship with his son and stated that he could never ask his partner to move to Madeira and said that if he were to be deported, "*... proper contact would be difficult, if not impossible. ...*".
45. Further details of the Applicant's progress in prison were set out in an assessment for the Parole Review Committee by his offender supervisor in a report dated 15th February 2016. On 19th February 2016 Ms Pearce, the Probation Officer, submitted a Parole Assessment Report dated 18th February 2016 to the Parole Review Committee. In this report, she addressed the Applicant's attitude to his offending, his response to his prison sentence, the courses which he had completed whilst in prison including individual sessions with Tina Wilson, the Substance Misuse Worker in Guernsey Prison, and the Applicant's negative mandatory drug tests. As I have mentioned earlier, the Applicant appears to have been a model prisoner. Ms Pearce also

set out in detail plans for the early release of the Applicant on Parole in Guernsey. She also dealt with the possibility of the Applicant being deported to Madeira and the support that his mother might be able to provide for him there. Ms Pearce stated that she was in support of his application for early release on Parole Licence if he were to be allowed to remain in Guernsey, and given support and what she described as “*the additional benefits of Probation Supervision ...*”.

46. Further support for the Applicant was provided by other prison staff. Sarah Craske provided a further report dated February 2016 on the Applicant’s progress on the Choices and Challenges Booster Course in Guernsey Prison. On 25th May 2016, the Parole Review Committee granted the Applicant’s Parole application, subject to him finding suitable accommodation approved by his Probation Officer. In a detailed decision, which gave full reasons for it, the Committee summarized his case for Parole.
47. On 19th July 2016, the Lieutenant-Governor swore an affidavit in these proceedings. His unchallenged evidence was that on 3rd June 2016 he met representatives of the Guernsey Border Agency to discuss the Applicant’s case. In paragraph 14 of the affidavit, the Lieutenant-Governor set out his direction, given, it seems, on that occasion, that those who had previously provided reports in relation to the Applicant be approached again to see whether they wanted to update the position for his consideration so that he could ensure that the information available to him was the most up-to-date information possible.
48. By email dated 3rd June 2016, Ms Pearce, the Applicant’s Probation Officer, notified Mrs Michelle Lacey, an Immigration Manager, of the death of the Applicant’s father in Madeira in about mid-May 2016 and said that the Applicant had managed the position well. By further e-mail dated 20th June 2016, Ms Pearce updated Mrs Lacey with the information that the Applicant’s partner had moved into a two-bedroomed apartment; Ms Pearce also confirmed that she had undertaken a home visit and confirmed that the property was appropriate for the release of the Applicant should he be allowed to remain in Guernsey. Kerry Tardif of Guernsey Prison e-mailed Mrs Lacey on 3rd June 2016 and said that the Applicant had continued to cope well.
49. By e-mail to Mr Archer dated 6th June 2016, the Applicant’s partner confirmed that her relationship with the Applicant remained the same and that she continued to wish to remain together with him and their son as a family in Guernsey. Further up-to-date information was provided by Deborah Clark of Guernsey Prison by e-mail dated 7th June 2016 about the visits made to the Applicant by his partner and their son twice a week and the strong bond between the Applicant and his partner and their son. Ms Clark’s e-mail was broadly supportive of the Applicant. Equally supportive was a final report from Sarah Craske dated 21st June 2016. That final report also gave up-to-date information about the Applicant’s partner’s work, stated that she had recently been promoted, and spoke positively about her personal qualities. Ms Craske stated that the Applicant’s son would be starting school in September 2016 and expressed her concern for his emotional wellbeing if he had to cope with transition to school at the same time as losing the presence of his father.
50. Finally, by letter dated 14th June 2016, the Applicant himself wrote to the Lieutenant-Governor. After mentioning the death of his father, the Applicant informed the Lieutenant-Governor of the plans which he and his partner had for living together in their new home with their son. At the end of his letter he said:

“I have worked hard to change my ways, have not been in any trouble, even when going through some very stressful times, and I hope I have proved that I am not the same person who walked into prison all those months ago. I now need to prove to my son and partner that the time spent away from them was worth it, because it saved me from myself. I want to be a hardworking member of society and put something back into the community but most of all be there for my family.”

51. By a full, written report dated 21st June 2016, Mrs Michelle Lacey, an Immigration Manager of Guernsey Border Agency, set out for the Lieutenant-Governor the recommendation of the Border Agency that the Applicant should be deported from Guernsey. Mrs Lacey drew the attention of the Lieutenant-Governor to the statutory background, including the 1971 Act and the Principal Rules, and also mentioned the 2015 Amendment Rules, which she said imported new deportation and Article 8 provisions into the Principal Rules. Mrs Lacey advised the Lieutenant-Governor that legal advice had been received that, since the changes to the UK Nationality, Immigration and Asylum Act 2002 provisions, made by the Immigration Act 2014, had not been extended to operate within the Bailiwick of Guernsey, the provisions of the Principal Rules unamended by the Amendment Rules, “... *should be taken into account when considering deportation matters.*” It is clear that the Lieutenant-Governor followed that advice in making his decision to make a deportation order against the Applicant.
52. Accordingly, Mrs Lacey drew the attention of the Lieutenant-Governor to the provisions of Part 13 of the Principal Rules, which included paragraph 364.
53. As was accepted during the oral hearing before me by Advocate Cobb on behalf of the Applicant, Mrs Lacey’s report set out the factual background for the Lieutenant-Governor in sufficient details. She dealt with (i) the Applicant’s length of residence in Guernsey, (ii) his domestic circumstances, (iii) the hearing before the Deputy Bailiff and the Royal Court in 2013 and the recommendation for deportation made by the Royal Court on 22nd April 2013, (iv) the decision of the Guernsey Court of Appeal on 11th December 2014 on the Applicant’s application for leave to appeal out of time against the Royal Court’s recommendation for deportation (v) the reports from Sarah Craske, the registered psychotherapist for the Home Department, (vi) the Applicant’s satisfactory Income Tax and Social Insurance history, (vii) the previous criminal record of the Applicant, (viii) what she described as “*Compassionate circumstances and representations received on person’s behalf*”, and (ix) the grant to the Applicant by the Parole Review Committee of early release on Parole Licence on 25th May 2016.
54. Mrs Lacey drew the attention of the Lieutenant-Governor to the decision of the Court of Appeal in *O’Dette*. She also informed the Lieutenant-Governor that the Applicant relied upon, and claimed the protection of, Article 8 of the ECHR.
55. Attached with Mrs Lacey’s report were copies of the most up-to-date letters and e-mails from the Applicant himself, his partner, Ms Pearce, Kerry Tardif, Deborah Clark and Sarah Craske, to all of which I have already referred.
56. Mrs Lacey referred the Lieutenant-Governor to the sentence imposed on the Applicant of five years imprisonment for the importation of both Class A and Class C drugs. She rightly described the drugs offences as a serious offence.
57. In a further detailed section headed “**Recommendation**” of the report, Mrs Lacey stated:

“This is by no means a straightforward case and due consideration is bound to be given to [the Applicant’s] family circumstances in Guernsey.”

Mrs Lacey referred the Lieutenant-Governor to Article 8 being enforceable in Guernsey’s courts by virtue of the Human Rights (Bailiwick of Guernsey) Law, 2000. The legal position was, in my judgment, fairly and fully set out on page 7 of Mrs Lacey’s report. She set out the Applicant’s previous criminal record fairly. She referred to his previous offences of violence, including common assault on an adult in 2008, and an assault on an adult in October 2010. There was also a reference made by Mrs Lacey to what was described as a further court appearance on 29th March 2012. It is to be noted especially, in my view, that there was no reference made by Mrs Lacey to any conviction of the Applicant for an offence of *indecent* assault. Further, although the Applicant’s partner’s e-mails to the Lieutenant-Governor and the

acting Lieutenant-Governor and the Applicant's own letters to the Lieutenant-Governor and the acting Lieutenant-Governor were clearly considered, Mrs Lacey also said this:

"[The Applicant] is from Madeira, a Portuguese archipelago. If [the Applicant] is deported and the family wish to remain as a unit, there is no apparent reason why [his partner] and their child could not consider moving to Madeira. Alternatively, if [the Applicant] is deported to Madeira, this would not make contact with his family impossible, there is no apparent reason why he could not, for example, skype, email and/or telephone his family or why they could not visit him from time to time, as they have done during his detention in prison, albeit this is likely to be on a less frequent basis."

58. After referring once again to paragraph 364 of the Principal Rules, Mrs Lacey stated that she was not convinced that there were sufficient exceptional circumstances that should preclude the Applicant from being deported. She referred to the warnings about his liability to deportation received by him should he continue to offend and said that he had ignored them by committing the serious drug trafficking offence, for which he was sentenced to five years imprisonment. She concluded with this recommendation:

"... Whilst he has made progress whilst in prison and has developed a positive and important bond with his son, I consider that his deportation is likely to serve as a deterrent to other foreign criminals and would meet a legitimate aim of preventing disorder or crime under Article 8. In the circumstances I consider his deportation would be proportionate and would strike a fair balance between his right to family life and the wider general interests of the Bailiwick.

As already stated, this is by no means a straightforward case, and the decision as to whether or not to deport now rests with the Lieutenant Governor. His Excellency will need to balance all the factors referred to in this letter including the [A]pplicant's family ties, relationship with his son and partner, his conduct in prison, essentially his up to date circumstances and balance these against the seriousness of the offending and the need to prevent disorder and crime."

Mrs Lacey attached a draft Deportation Order to her report to the Lieutenant-Governor.

59. In paragraphs 16-18 of his affidavit, the Lieutenant-Governor set out carefully what he did after receiving Mrs Lacey's report and the draft Deportation Order attached. He deposed that he considered the matter and had in mind the facts as referred to in *O'Dette*, in respect of which he said, (paragraph 16):

"... I was mindful that the detailed reasoning regarding the overall merits of deportation was an exercise undertaken by the courts when making any recommendation for deportation."

60. On 24th June 2016, the Lieutenant-Governor decided to make a deportation order against the Applicant and he signed the Deportation Order, which was dated the same day. By letter also dated the same day, the Secretary to the Lieutenant-Governor then forwarded the Deportation Order to Mrs Lacey in the following terms:

"I am directed by the Lieutenant-Governor to forward the enclosed Deportation Order for [the Applicant] duly signed by His Excellency.

I am to say that His Excellency has deemed it conducive to the public good to deport [the Applicant], bearing in mind the recommendation for deportation made by the Royal Court in 2013. In making his decision, His Excellency has considered all pertinent and up-to-date factors that could be said to be a change in circumstances since the recommendation for deportation was made and has balanced relevant factors with applicable ECHR rights. I am to point out that while this letter is marked confidential, the preceding content of this paragraph (only) may be shared with [the Applicant] should you consider that helpful.

I also enclose a confidential memorandum for your file, which sets out in full the reasoning behind His Excellency's decision to sign this deportation order. The content of this memorandum is not to be shared with [the Applicant] and is intended solely for future reference, if required."

61. On 24th June 2016, the Applicant was informed of the making of the Deportation Order. It seems from paragraph 17 of the Lieutenant-Governor's affidavit that there might have been a custom and practice not to provide any confidential memorandum of reasoning to a person who was the subject of a deportation order. But, in due course, the confidential memorandum was provided; it forms part of exhibit "IFC1" to the Lieutenant-Governor's affidavit.
62. The Memorandum prepared and signed by the Lieutenant-Governor was dated 24th June 2016, the date of the Deportation Order. In the Memorandum, the Lieutenant-Governor referred to section 3(5) and 3(6) of the 1971 Act, as extended to Guernsey by the 1993 Order, and to paragraphs 363 and 364 of the Principal Rules. He also stated that he had given due consideration to Article 8 of the ECHR and to the interests of the Applicant's son. He continued as follows:

"I have taken as the starting point for my deliberation the Royal Court's recommendation in its sentencing judgment of 22 April 2013 that [the Applicant] be deported on completion of his custodial sentence of 5 years imprisonment; thus rendering him liable to deportation under the legislation previously outlined. This recommendation was made, the Court having completed a balancing exercise weighing up the seriousness of the offences against [the Applicant's] rights under Art 8, and in full knowledge of his family circumstances. In addition, I have noted the Court of Appeal acknowledgement of the Royal Court's satisfactory conclusion of this balancing exercise in its judgement of 11 December 2014. I have also noted their guidance that I should have regard to whether or not deportation would be 'conducive to the public good' (in accordance with section 3(5) Immigration Act).

However, mindful that I am required to consider with care the proportionality of any deportation at the actual point when the appellant [sic] is considered for release and removal since the balance may have shifted by that stage, I have also called for, and taken careful consideration of, up-to-date reports from all relevant authorities and parties, including from [the Applicant] himself.

In examining all relevant factors I consider the following to be key determinants:

1. *The fact that [the Applicant] has been convicted of a number of offences since arriving in Guernsey in 2007 (the most recent and most serious attracting a custodial sentence of five years), that he had been previously warned for deportation (to no effect), and that the Royal Court highlighted the assessment in his sentencing probation report that there was a high likelihood of re-offending, all suggest that there continues to be a strong public interest in his removal. This public interest exists both in terms of the removal of the residual risk to the public should [the Applicant] re-offend and also the requirement to uphold the credibility of an immigration control system that had already served him with a deportation warning letter following an earlier conviction for assault. I recognize that [the Applicant] has made substantial attempts to address the underlying cause of his offending, i.e. prolonged substance abuse, whilst in prison however, given his long history of drug use, his release in Guernsey on parole would still require substantial risk mitigation.*
2. *Within the controlled conditions of a custodial sentence, I accept that [the Applicant] is developing a strong relationship with his son, ... and that [his son's] interests are of substantial importance. I also accept that deportation could cause some emotional harm to [the Applicant's son], and would not be in his absolute best interest providing, of course, [the Applicant] maintains this positive trajectory post release. However there is no*

evidence that any adverse effect would be so exceptional so as to outweigh the strong public interest in [the Applicant's] removal. Indeed [the Applicant's son] is assessed by his nursery teacher to have a 'very strong bond with his mother', a 'fantastic mum' and 'a very good support network' in the current circumstances of his father's imprisonment.

3. *It is also not apparent that the converse risk of emotional harm to [the Applicant's son] can be discounted should [the Applicant] be permitted to remain in Guernsey and then reoffend and/or his relationship with [his partner] deteriorate. Whilst [his partner's] current support for [the Applicant] is commendable and [the Applicant] declares himself committed to his family and to reform, the fact that he apparently continues to withhold knowledge of his previous sexual relationship with his co-defendant, together with other aspects of his behavior before going to prison (his repeat offending including indecent assault on another female, his repeated addiction, and his lack of relationship with his daughter), all give cause for enduring doubt.*
4. *Finally, if [the Applicant] is deported and the family really does wish to remain as a unit, there is no compelling reason why [the Applicant's partner] and the son could not consider moving to accompany him to Madeira (on the presumption that this would be his chosen relocation destination as it is where [he] has spent a substantial part of his life. He also has other family members there). Specifically [the Applicant's partner's]/[their son's] inability to speak Portuguese is not persuasive. Alternatively, and recognizing both [the Applicant's partner] and [their son's] strong family support network in Guernsey, neither is it clear why the relationship could not endure through regular visits supplemented by frequent communication e.g. telephone, email, Skype, Facetime. Such family arrangements are by no means unusual in modern society. I also note that [the Applicant] has other family ties, in particular, three siblings in Guernsey. I am not aware that there is any form of dependency between [the Applicant] and his siblings but in any event, similarly, his deportation will not prevent him from being able to maintain contact with them.*

In summary, Paragraph 364 of the [Principal Rules] make[s] it clear that where a person is liable to deportation the presumption shall be that the public interest requires deportation and that 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 ECHR to deport. Having considered all the factors (including, in particular, [the Applicant's] family ties, substantial interests of his son, also his positive work in Prison) I can see no such exceptional circumstances sufficient to outweigh the strong public interest both in terms of the residual risk posed by [the Applicant], the legitimate need to send a strong deterrent message to other potential foreign criminals, and the requirement to uphold the credibility of Guernsey's immigration and criminal controls system. Nor, for the record, do I see sufficient change in circumstances from those assessed and foreseen by the Royal Court in its original judgement to reject its original recommendation for deportation.

I have therefore decided, under the powers conferred on me by the Immigration Act 1971, that the various factors noted above do, in all the circumstances, legitimately outweigh [the Applicant's] right to family life under Article 8 and that it would be conducive to the public good for him to be deported. I thus make a deportation order against [the Applicant].”

63. In paragraph 18 of his affidavit, whilst stating that he did not intend to add anything to the reasoning contained in his Memorandum of 24th June 2016, the Lieutenant-Governor stated that he had reviewed the relevant papers and had later realized that, in referring to the behaviour of the Applicant prior to his imprisonment and to his repeat offending, he had made an error in stating that the repeat offending included an indecent assault on a woman; the Lieutenant-Governor stated that he did not believe that the Applicant had a conviction in that regard, but

that he had a conviction for assault which took place on the same occasion as what he described as “... *the alleged indecent assault*”. The Lieutenant-Governor stated:

“I do not however consider this to be a significant error as it was but one of a whole range of matters which I took into account and is not and would not have been of sufficient significance to change my decision. In short, I believe that I have weighed up all the relevant information fairly, having particular regard to [the Applicant’s] Article 8 rights and reached a decision which is legitimate and not unreasonable ... I also believe my decision is a proportionate and necessary response to a legitimate public aim as detailed in my memorandum of 24th June 2016.”

Discussion

64. On behalf of the Applicant, Advocate Cobb accepted that the decisions of the Lieutenant-Governor, and of the acting Lieutenant-Governor before him, seeking and obtaining up-to-date information, were appropriate decisions. She argued, however, that there was a vast amount of updated information in relation to the Applicant, available to the Lieutenant-Governor, which had the cumulative effect of demonstrating that there were exceptional circumstances why the deportation order against the Applicant should not have been made. Whilst accepting that he was not able to contend that such information had not been taken into account, she argued that the Lieutenant-Governor had given it insufficient weight and that the balance had shifted between 22nd April 2013, when the Royal Court had recommended deportation, and the present time. Advocate Cobb asked rhetorically, (and it was, I thought, accepted by HM Comptroller that Ms Cobb was able to do in the context of the evidence considered by the Lieutenant-Governor): What else could the Applicant have done to have improved his position whilst in prison? Ms Cobb also argued, contrary to the approach taken by the Royal Court of Jersey in *De Gouveia (infra)*, that it was improper and unfair of the Lieutenant-Governor to have used the element of deterrence to other foreign criminals as a reason for making the deportation order.
65. Advocate Cobb’s main submission was based on the Article 8 rights of the Applicant, of his partner and of their son to maintain, and to have respected, their family life together in Guernsey. She submitted, relying upon the evidence submitted to the Lieutenant-Governor, his predecessor and the acting Lieutenant-Governor by the Applicant and his partner in 2015 and 2016, that it was not feasible for the family to move to Madeira because of the existing family ties and place of employment of the Applicant’s partner. Ms Cobb also contended that travel to Madeira for visits would be prohibitively expensive; I consider that the Court can at the least take judicial notice of the fact that there are no direct flights between Guernsey and Madeira. In her oral submissions, HM Comptroller accepted, in relation to key determinant 4, that it was most unlikely that his partner would accompany the Applicant to Portugal or Madeira, if he were deported to Portugal. Advocate Cobb contended that it was unreasonable of the Lieutenant-Governor to suggest that contact between the Applicant on the one hand and his partner and their son on the other hand, through indirect means, such as Skype or other similar social media means, was by no means unusual in present times. Ms Cobb also contended that it was unreasonable for the Lieutenant-Governor to have used the fact that the Applicant’s son had a good relationship with his mother so as to minimize the impact of deportation of the Applicant on their son. She argued that their son had a right to a relationship, pursuant to Article 8(1), with both his parents.
66. Whilst arguing in her skeleton argument that the welfare of children was a paramount consideration, I thought that Advocate Cobb agreed in oral argument, I think rightly, that the English cases relevant to the present application were persuasive and required the Lieutenant-Governor to take into account the interests of the Applicant’s son as a primary consideration or as a matter of substantial importance, rather than as a paramount, or the paramount, consideration – see *SS (Nigeria) (infra)*.

67. Advocate Cobb also contended that it was irrelevant, if it were the case, that the Applicant did not have a strong relationship with his daughter who lives in England, with whom he may have, it seems, regular weekly or almost weekly telephone contact. Ms Cobb argued that such a factor did not affect his convention rights under the ECHR or those of his son or those of his partner, or in any way affect their proven, close bond. On the contrary, she argued that that factor illustrated that separation from a child was a key factor and explained why the relationship of the Applicant and his daughter in the UK was not as strong as it might otherwise have been.
68. Ms Cobb further argued that the Lieutenant-Governor had over-emphasized the Applicant's drug reliance and history. She contended that the more recent reports by Ms Pearce, the Probation Officer, and the report of the Parole Board Committee dated 25th May 2016 should have been taken into account by the Lieutenant-Governor in favour of the Applicant more than appeared to have been the case. The fact that the Applicant had been drug-free for over three years whilst in Prison, and the fact that the offences in question were the only drug-related offences in the Applicant's criminal record, were also stressed by Ms Cobb on his behalf.
69. In summary, Advocate Cobb argued that there were exceptional circumstances that should have led the Lieutenant-Governor to find that the presumption that deportation was in the public interest and that the deportation of the Applicant was conducive to the public good had been thereby overturned and that the decision of the Lieutenant-Governor should be quashed as *either* being so contrary to the balance of the material before the Lieutenant-Governor on 24th June 2016, when he made his decision to deport the Applicant from Guernsey, that the Court should conclude that the proportionality balancing exercise carried out by the Lieutenant-Governor was not capable of having led him to the decision which he made *or* being *Wednesbury* unreasonable – see, again, the relief sought in the Cause.
70. In reliance upon her arguments, Advocate Cobb cited the decision of the European Court of Human Rights in *Üner v Netherlands* [2006] ECHR 873. In that case the applicant was convicted of manslaughter and assault and sentenced to 7 years imprisonment in the Netherlands. Whilst in prison, he took a number of courses to assist him on his release. His partner and son, and later his partner and both his sons, visited him frequently in prison. His children had Dutch nationality and neither his partner nor his children spoke his native language, Turkish. The applicant relied upon an alleged violation of Article 8 of the ECHR. The general principles applicable were described by the Court in paragraphs 54 to 59 of the judgment as follows:

“54. *The court reaffirms at the outside that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there... The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with the right protected under paragraph 1 of Article 8 be in accordance with the law and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued 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... The court considers nevertheless that, even if a non-national holds a very strong residence status and has attained a high degree of integration, his or her position cannot be equated with that of a national when it comes to the above-mentioned power of the Contracting States to expel aliens ... For one or more of the reasons set out in paragraph 2 of Article 8 of the Convention. ... Contracting States are entitled to take measures in relation to persons who have been convicted of criminal offences in order to protect society – provided, of course that, to the extent that those measures interfere with the rights guaranteed by Article 8, paragraph 1 of the Convention, they are necessary in a democratic society and proportionate to the aim pursued. Such administrative measures are to be seen as*

*preventive rather than punitive in nature ... 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 v Switzerland** 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 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 nationality 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.*

*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. ... [it] must be accepted that the totality of social ties between settled migrants and the community in which they are living constitute part of the concept of 'private life' within the meaning of Article 8. Regardless of the existence or otherwise of a 'family life' therefore, the court considers that the expulsion of a settled migrant constitutes interference with his or her right to respect for private life. It would 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'."*

71. HM Comptroller submitted that the test of proportionality posed by Article 8 (2) of the ECHR was whether the decision-maker had struck a fair balance and there was, therefore, a discretionary area of judgment; a breach would only occur where a decision had been made which was outwith the range of reasonable responses. In making this submission, with which I agree and which I consider to be the proper approach for me to take in the Royal Court, HM Comptroller relied upon paragraphs 6 to 20 of the judgment of the English Court of Appeal in *Edore v Secretary of State for the Home Department* [2003] 1WLR 2979, where Lord Justice Simon Brown relied upon the approach taken by Mr Justice Moses in *R (Ala) v Secretary of State for the Home Department* [2003] All ER (D) 283. It was clear that, as Lord Justice Dyson put it in the well-known case of *R (Samaroo) v Secretary of State for the Home Department* [2001] UK HRR 1150, at paragraphs 26, 35 and 36:

“It is important to emphasise that the striking of a fair balance lies at the heart of proportionality. In Sporrøng v Sweden (1982) 5 EHRR 35 at paragraph 69, the court said:

‘[T]he Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. ... The search for this balance is inherent in the whole of the Convention.’

...

In reaching its decision the court must recognize and allow to the Secretary of State a discretionary area of judgment.

...

In my judgment, in a case such as this, the Court should undoubtedly give a significant margin of discretion to the decision of the Secretary of State. The Convention right engaged is not absolute. The right to respect for family life is not regarded as a right which requires a high degree of constitutional protection. It is true that the issues are not technical as economic and social issues often are. But the court does not have expertise in judging how effective a deterrent is a policy of deporting foreign nationals who have been convicted of serious drug trafficking offences once they have served their sentences.”

72. In *Edore* Lord Justice Simon Brown at paragraph 16, also cited, with approval, paragraph 44 of the judgment of Mr Justice Moses in *Ala*, where he said:

“It is the convention itself and, in particular, the concept of proportionality which confers upon the decision-maker a margin of discretion in deciding where the balance should be struck between the interests of an individual and the interests of the community. A decision-maker may fairly reach one of two opposite conclusions, one in favour of a claimant the other in favour of his removal. Of neither could it be said that the balance had been struck unfairly. In such circumstances, the mere fact that an alternative but favourable decision could reasonably have been reached will not lead to the conclusion that the decision maker has acted in breach of the claimant’s human rights. Such a breach will only occur where the decision is outwith the range of reasonable responses to the question as to where a fair balance lies between the conflicting interests. Once it is accepted that the balance could be struck fairly either way, the Secretary of State cannot be regarded as having infringed the claimant’s art 8 rights by concluding that he should be removed.”

73. H M Comptroller also relied upon the approach taken by Sir Michael Birt, Bailiff, in the Royal Court of Jersey in *De Gouveia v Lieutenant Governor and Minister for Home Affairs* [2012 (1) JLR 291], which was a decision on an application for leave to apply for Judicial Review of a decision of the Lieutenant-Governor of Jersey that the applicant should be deported. Like the Applicant himself here, the applicant in *De Gouveia* had been born in Madeira and was convicted, with others, of being concerned in the importation of heroin and in supplying heroin. His crime was, it seems, more serious than that of the Applicant in this case since he was sentenced to 7 years imprisonment, with a recommendation from the Royal Court, which was upheld on appeal, that he should be deported at the end of his sentence. Like the Applicant, De Gouveia had been a model prisoner and taken advantage of all opportunities available to him in prison. Like the Applicant, he had positive references from members of prison staff about his worth ethic. Like the Applicant, he had worked all of his adult life away from Madeira and his family was essentially in Jersey. The Bailiff of Jersey refused to grant leave to apply for judicial review of the decision of the Lieutenant-Governor. The Bailiff followed the approach taken by Lord Justice Dyson in *Samaroo* and accepted the submission of Counsel for the applicant, as I do as well in the case of the Applicant in the instant case, that the traditional approach of *Wednesbury* unreasonableness was insufficient in cases involving convention rights. The Bailiff of Jersey followed the approach of Lord Steyn in *R (Daly) v Home Secretary* [2001] 2 AC 532, at paragraph 27, where he said:-

“The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. Making due allowance for important structural differences between various convention rights, which I do not propose to discuss, a few generalisations are perhaps permissible. I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny tests developed in R v Ministry of Defence, ex p.Smith [1996] QB517, 554, is not necessarily appropriate to the protection of human rights ... In other words, the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.”

74. In *De Gouveia* the Bailiff of Jersey also quoted a passage from the judgment of Mr Justice Thomas (as he then was) at first instance in *Samaroo*, which passage had been approved by Lord Justice Dyson in the English Court of Appeal. Mr Justice Thomas said:-

“44. For these reasons, it is my view, on the present authorities, that the task of the court is not to make up its own mind on the question of proportionality. The decision-maker is the Secretary of State and it is he who must decide within his discretionary area of judgment whether the interference with family life by deportation is necessary in a democratic society, that is to say justified by a pressing social need, and in particular proportionate to the legitimate aim pursued. In that decision making process, he has in accordance with the Convention and the Human Rights Act a discretionary area of judgment in achieving the necessary balance.

45. The task of the court, in accordance with the jurisprudence of the European Court of Human Rights, is therefore supervisory of that discretionary area of judgment. The court must decide whether the Secretary of State has, within the discretionary area of judgment accorded to him, struck a fair balance, between the relevant interests, namely the applicant’s right to respect for his private life and family life, on the one hand, and the prevention of crime and disorder, on the other. It will do so by subjecting his decision to intense and anxious scrutiny on an objective basis to see whether he could reasonably have concluded that the interference was necessary to achieve one of the legitimate aims set out in Article 8.2 and was proportionate. ... The burden, as Mr Howell for the Secretary of State accepted, is on the Secretary of State to persuade the court that he so acted.”

75. The Bailiff of Jersey adopted the approach set out in *Samaroo* and *Edore* as applicable in Jersey. At paragraph 23 of his judgment in *De Gouveia* he said:-

“... It follows that, in a human rights case, the court will subject the decision of the Lieutenant Governor to intense and anxious scrutiny on an objective basis to see whether the Lieutenant Governor has, within the discretionary area of judgment accorded to him, struck a fair balance between the relevant interests, namely the offender’s right to respect for his private and family life, on the one hand, and the prevention of crime and disorder and (in the case of drug trafficking offences) the protection of the health, rights and freedoms of others, on the other. The burden is on the Lieutenant Governor to persuade the court that he could reasonably have concluded that the interference with the offender’s Convention rights was necessary for the achievement of one of the legitimate aims set out in art. 8(2) and was proportionate. The court will review the weight attached to the various factors but, in reaching its decision, the court must recognize and allow to the Lieutenant Governor a discretionary area of judgment.”

76. Like the Bailiff of Jersey, I respectfully adopt the approach set out in *Samaroo* and *Edoree* as equally applicable in Guernsey. Equally, I accept the submission that, as well as the Court of Appeal, at paragraph 52 in *Pinto*, both the English Courts and the European Court of Human Rights have accepted that a decision-maker, when faced with a decision whether or not to deport a convicted drug importer, can properly give considerable weight to the need to deter drug trafficking. I, therefore, respectfully agree with what the Bailiff of Jersey said at paragraph 30 of his judgment in *De Gouveia*:-

“... *The Lieutenant Governor is entitled to place considerable weight upon the need to deter the commission of crime in the Island by deporting foreign nationals who have committed serious offences.*”

77. During the oral argument, I drew the attention of Counsel to more recent authority from England. I shall deal with only one such case, which I consider to be influential in this area, the decision of the English Court of Appeal in *SS (Nigeria) v Secretary of State for the Home Department* [2014] 1 WLR 998. Lord Justice Laws’ judgment contained, with respect, a formidable analysis of the general considerations material to cases where Article 8 rights are engaged in deportation and removal cases. Paragraphs 36 to 47, 57 and 58 are, in my view, of particular assistance in an analysis of the balancing exercise which was required to be undertaken by the Lieutenant-Governor when reaching his decision whether or not to order the deportation of the Applicant. The learned Lord Justice said:-

“36. *First, however, there are certain general considerations material to Article 8 claims in deportation and removal cases which I should address. At the highest level of generality, I should make some remarks about the nature of the proportionality doctrine, a primary touchstone of legitimacy for the purpose of ECHR Article 8 (2).*

...

37. *I have cited learning ... concerning the discretionary area of judgment to be accorded by the courts to Parliament where the terms of primary legislation are the target of an ECHR claim. But the force of this line of authority is blunted by the common assumption that proportionality requires the court itself to decide, more closely or intrusively than was the case under the conventional Wednesbury rule ..., the merits of the decision under review. It is therefore necessary to be clear as to the nature of the proportionality doctrine.*

38. *There is no doubt that proportionality imposes a more demanding standard of public decision-making than conventional Wednesbury review, whose essence is simply an appeal to the rule of reason. But the true innovation effected by proportionality is not, in my judgment, to be defined in terms of judicial intrusion or activism. Rather it consists in the introduction into judicial review and like forms of process of a principle which might be a child of the common law itself: it may be (and often has been) called the principle of minimal interference. It is that every intrusion by the State upon the freedom of the individual stands in need of justification. Accordingly, any interference which is greater than required for the State’s proper purpose cannot be justified. This is at the core of proportionality; it articulates the discipline which proportionality imposes on decision-makers.*

...

40. *The principle of minimal interference may be seen as a unifying rationale of the different insights found in the cases into the requirement of Article 8 (2) that the State’s interference with the right must be “necessary in a democratic society”. These include the need to demonstrate a “pressing social need” ... ; and also, in too many cases to need citation, proportionality itself: the term nowhere appears in the ECHR. The principle of minimal interference justifies these ideas as linked imperatives for the avoidance of arbitrary rules; and therefore locks them into what is “necessary in a democratic society”.*

41. *But the principle does **not** tell us that when a challenge is brought on the ground of its violation, the court must always be the primary judge of the principle's fulfilment or otherwise. The court insists that the decision-maker respect the principle; but that is perfectly consonant with the decision-maker's enjoyment of a margin of discretion as to what constitutes minimal interference. As the cases show, the breadth of this margin is conditioned by context, and in particular driven by two factors: (1) the nature of the public decision, and (2) its source. ... Where the decision applies State policy which is general or strategic in nature, and where the policy source is primarily legislation, the margin will be correspondingly broad ...*
42. *The importance of these considerations of proportionality is as follows. The principle of minimal interference means that the fundamental right in question in the case can never, lawfully, be treated as a token or a ritual. But the margin of discretionary judgment enjoyed by the primary decision-maker, though variable, means that the court's role is kept in balance with that of the elected arms of government; and this serves to quieten constitutional anxieties that the Human Rights Act draws the judges onto ground they should not occupy. These points matter especially when the area in question is controversial, as is the edge between a child's rights and the deportation of a foreign criminal. This brings me to the second general issue ...*
43. *I will next describe two characteristics, one positive, the other negative, which the learning shows apply in Article 8 cases involving children. The first is that the interests of the child or children are a primary consideration. The second (which applies to all removal cases, whether or not there are children) is that there is no rule of "exceptionality": that is, there is no class of case where the law stipulates that an exceptional Article 8 case must be shown in some situations but need not be in others.*
44. *These two characteristics are vouchsafed by authority of the House of Lords and the Supreme Court. With great respect they are capable, if not carefully understood, of investing child cases with a uniform prevailing force which yields no or little space to the context in hand. As for the first characteristic, the key phrase is of course "a primary consideration". It ... is taken from Article 3 (1) of the UNCRC, so the choice of words may be regarded as having particular significance. What sense is to be given to the adjective "primary"? We know it does not mean "paramount" – other considerations may ultimately prevail. And the child's interests are not "the" but only "a" primary consideration – indicating there may be other such considerations which, presumably, may count for as much. Thus the term "primary" seems problematic. In the course of argument Mr Auburn accepted that "a primary consideration" should be taken to mean a consideration of substantial importance. I think that is right.*
45. *The second characteristic is that there is no rule requiring an exceptional case under Article 8 to be demonstrated. Here there is a risk that the absence of such a rule may appear to suggest that there is a single standard for breach of Article 8 which, once met, will carry the claim whatever the context. But that cannot be what is meant. The public interest in favour of removal or deportation may be stronger or weaker; and accordingly it will take more, or less, to mount an Article 8 claim that will prevail against it.*

...

46. *Thus while the authorities demonstrate that there is no rule of exceptionality; they also clearly show that the more pressing the public interest in the removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. This antithesis, in my judgment, catches in the present context the essence of the proportionality test required by Article 8 (2).*

(3) SUMMARY

47. *It is worth drawing these general considerations together. (1) The principle of minimal interference is the essence of proportionality: it ensures that the ECHR right in question is never treated as a token or a ritual, and thus guarantees its force. (2) In a child case the*

*right in question (the child's best interests) is always a consideration of substantial importance. (3) Article 8 contains no rule of "exceptionality", but the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. (4) Upon the question whether the principle of minimal interference is fulfilled, the primary decision-maker enjoys a variable margin of discretion, at its broadest where the decision applies general policy created by primary legislation. This approach strikes two balances: the balance between public interest and private right, the search for which 'is inherent in the whole of the [ECHR] ...' (see, amongst many statements to the same effect, *Sporrong v Sweden* (1982) 5 EHRR 85, paragraph 69); and the constitutional balance between judicial power and the power of elected government, and in particular the power of the legislature."*

78. In *SS (Nigeria)* the Appellant had been convicted of serious offences of peddling Class A drugs – see paragraph 56 of the judgment of Lord Justice Laws. The learned Lord Justice also dealt, on the facts of that case, with the interests of the appellant's son, who was then aged five, and said that the case would not have involved the child having to move to Nigeria and he would continue to be looked after by his primary carer, his mother, as had been the case while the appellant was in prison. In that case, the learned Lord Justice described the public interest in the deportation of the appellant as: "... extremely pressing ...".
79. The analysis of Lord Justice Laws in *SS (Nigeria)* is, with the greatest respect, masterful and persuasive. I have carefully taken it into account, and sought to follow it, in this judgment.
80. Finally, Advocate Cobb relied upon alleged mistakes of material facts contained in the Memorandum of the Lieutenant-Governor dated 24th June 2016 in which he set out his reasoning, including mistakes in some of the matters referred to by him as "key determinants". She argued that in a case like the present case, where the concept of proportionality is clearly engaged, the Court must view the facts with closer assessment or, as HM Comptroller accepted to be the right test, with heightened scrutiny.
81. Advocate Cobb referred to what she described as fundamental flaws, especially in key determinant 3, in which the Lieutenant-Governor mentioned "*other aspects of his behavior before going to prison*" as having included an indecent assault on a woman, a lack of relationship between the Applicant and his daughter and that the Applicant "*apparently continues to withhold knowledge of his previous sexual relationship with his co-defendant*" and Ms Cobb submitted that such matters all gave cause for enduring doubt. She contended that the most serious mistake of fact was the reference in that paragraph to the Applicant's previous offending having included an indecent assault on a woman and submitted that the errors on the part of the Lieutenant-Governor in key determinant 3 had further tipped the balance, as it were, in favour of making a deportation order in relation to the Applicant.
82. Advocate Cobb contended that it was not permissible for the Lieutenant-Governor to give evidence, as he had done in paragraph 18 of his affidavit, seeking to explain that he did not believe that the Applicant had a conviction for indecent assault on a woman. Relying upon paragraph 11-047 of *De Smith on Judicial Review*, 7th Edition (2013), Advocate Cobb submitted that there had been a misdirection or mistake of material fact on the part of the Lieutenant-Governor, unsupported by substantial evidence, of such a fundamental nature as to undermine the reliability of the decision of the Lieutenant-Governor and to give rise to such substantial unfairness that the decision of the Lieutenant-Governor should be quashed. In making this submission, Ms Cobb relied upon paragraph 63 of the judgment of Lord Justice Carnwath in *E v Secretary of State for the Home Department* [2004] QB 1044, where he held that in England and Wales a decision could be quashed if a mistake of fact gave rise to unfairness provided that (a) there was a mistake as to an existing fact, (b) the fact had been established, (c) the applicant or his advisors were not responsible for the error and (d) the mistake had played a material, although not necessarily decisive, part in the decision-maker's reasoning. Ms Cobb submitted that mistakes of existing facts had been made, the facts had been established, neither the

Applicant nor his advisors were responsible for the errors and the mistakes had played a material, although not decisive, part in the Lieutenant-Governor's reasoning.

83. On behalf of the Lieutenant-Governor, HM Comptroller accepted that key determinant 3 did contain mistakes of fact. First, the Applicant's prior criminal record before the drug offences were committed by him did not include a conviction for an indecent assault on a woman, or indeed any conviction for indecent assault. Secondly, the evidence established that the Applicant had a daughter in the UK with whom he kept in contact by telephone calls. Accordingly, it could not accurately be stated that he had a "lack of relationship" with his daughter, although it could accurately have been stated, in my view, that his relationship with his daughter was limited in that he kept in touch with her over the telephone. Thirdly, it could not, as I see it, fairly have been described as a fact that the Applicant either continued or apparently continued to withhold knowledge from his partner or more generally of his previous sexual relationship with his co-defendant, who was involved in the drug offences. Although the matter may not, in my view, have been fully clear from the documents before the Lieutenant-Governor at the time when he made his decision to make the deportation order against the Applicant, it could not then have been fairly said to have been an established fact that the Applicant had continued to withhold knowledge of his previous sexual relationship with his co-defendant from his partner, or more generally. Indeed, in my judgment, it should have been appreciated by the Lieutenant-Governor from the judgment of the Court of Appeal delivered on 11th December 2014 that it was likely, perhaps very likely, that the Applicant's partner had come to know of the Applicant's relationship with his co-defendant either during the hearing before the Court of Appeal in December 2014 or, at the latest, on the delivery of the judgment of the Court of Appeal, which had made the matter public.
84. As to the mistakes of fact set out in key determinant 3 in the Lieutenant-Governor's Memorandum, Advocate Cobb also argued that it was clear from a fair reading of the Memorandum that the mistakes had played a material, although not necessarily decisive, part in his reasoning. In summary, she argued that such mistakes had clearly given rise to a serious fault in reasoning by the Lieutenant-Governor. Miss Cobb argued that an error of such a fundamental nature could not be rectified or glossed over. She added, in my judgment, rightly, that the Court must review the decision of the Lieutenant-Governor as at the time it was made and Advocate Cobb submitted that at that time it contained, and was based on, significant mistakes of fact.
85. HM Comptroller argued, relying upon part of the judgment of Lord Templeman in the House of Lords case of *R v Independent Television Commission* [1996] E.M.L.R. 318, which was a case where the proportionality principle did not come into play since it was not a convention rights case, that:
- "... Mistakes of fact may be made provided that the mistakes are not grave enough to undermine the basis of a multi-faceted decision."*
86. HM Comptroller submitted that normally on an application for judicial review, or for leave to bring proceedings for judicial review, the Court is concerned with the law and not the merits and will not normally, therefore, interfere with the assessment by a decision-maker of the evidence or the facts, accepting always that where, as here, the principle of proportionality is engaged, a closer assessment, or heightened scrutiny, of fact may be required. HM Comptroller argued that the reference to a conviction for indecent assault, although an error, was not a material error on the part of the Lieutenant-Governor. She contended that key determinant 3 was centred on the proven bad criminal record of the Applicant at the time of committing the offences of drug importation and that the reference to a conviction for indecent assault was not a matter considered to be material to the decision-maker, *i.e.* the Lieutenant-Governor.

87. On this aspect of the case, I consider that any part of the evidence contained in paragraph 18 of his affidavit to assist in a proper and fair analysis, to an objective reader, of the Memorandum made by him on 24th June 2016 is inadmissible and I have therefore not taken it into account in reaching my decision. Whether an error was a significant error or not, must depend, as I see it, upon a full reading of the Memorandum; the Lieutenant-Governor's evidence of what at the time of making his affidavit he did not believe, and, in particular, that at that time he did not believe that the Applicant had a conviction for indecent assault, seemed to me to have amounted to an attempt to add further reasoning to support the decision made by him on 24th June 2016. I, therefore, reject that evidence as inadmissible evidence. Further, I also reject the Lieutenant-Governor's evidence that the error "... is not and would not have been of sufficient significance to change my decision". The decision made by him on 24th June 2016 must be considered by me on the basis of the reasoning of the Lieutenant-Governor on 24th June 2016, and not on any evidence of a later reconsideration of such reasoning. Although in paragraph 18 of his affidavit, the Lieutenant-Governor was correct to identify the fact that he had made an error in his Memorandum in stating that the repeat offending of the Applicant had included an indecent assault on a woman, he could not, in my judgment, go further than identifying the mistake. In identifying the mistake, he would be doing no more than correcting a misdirection of fact on his part; evidence of that nature is admissible.
88. In summary, HM Comptroller argued that it was necessary for me to view the mistakes in key determinant 3 in the context of the entire document and that, when that was done, the proper conclusion was that there was no evidence of insufficient weight being given to relevant factors or to irrelevant factors being taken into consideration and that the Memorandum set out reasoning upon which the Lieutenant-Governor was entitled to rely and, importantly, set out how the Lieutenant-Governor had carried out the more intensive proportionality-based consideration of the facts required in a case where convention rights are engaged – see Lord Steyn in *Daly*, at paragraph 27.

Decision

89. In my judgment, if there had not been errors of fact in key determinant 3 of the Lieutenant-Governor's Memorandum dated 24th June 2016, it would have been unarguable that the decision taken by him to make a deportation order against the Applicant should be quashed; in my view, it would not have been open to the Applicant to argue that the Lieutenant-Governor had reached a decision which, in the words of Sir Michael Birt in paragraph 30 of his judgment in *De Gouveia*, "went beyond the margin of discretion afforded to him.". I consider that the Lieutenant-Governor's decision, as explained in the Memorandum, demonstrated with a high degree of clarity that he had carried out his investigation prior to making his decision to make the order both conscientiously and fairly, ensuring that, so far as was possible, he had before him as much up-to-date information as could be obtained about the Applicant so that he could take into account what changes in his circumstances had occurred in the interim between the sentencing hearing in the Royal Court on 22 April 2013 and the time of his own decision-making. In my judgment, it would have been clear beyond argument to the contrary that the Lieutenant-Governor had taken all relevant factors into account in reaching his decision, and that he had reached his decision after an intensive, proportionality-based consideration of the facts. It is also important, I believe, for me to record that it is clear from his Memorandum that the Lieutenant-Governor, as he was entitled to do, placed a considerable amount of weight on the need to deter foreign nationals from committing serious crimes, like the crimes of the Applicant himself, within the Bailiwick of Guernsey.
90. In my judgment, the mistakes of fact made in determinant 3 of the Lieutenant-Governor's Memorandum dated 24th June 2016, when read in the context of the Memorandum as a whole, against the background of all the documents then before the Lieutenant-Governor which had been considered by him in reaching his decision, did not have the effect of rendering the entire decision taken on that day so open to doubt that it must be quashed by the court. Applying the

words of Lord Templeman, I do not consider those errors of fact to have been so grave that they undermined the decision.

91. In the application before the court Advocate Cobb relied on *Wednesbury* unreasonableness as an alternative to her argument on the convention rights of the Applicant, his partner and their son. Since I have rejected Ms Cobb's arguments based on proportionality, where a lower test has to be established than on *Wednesbury* unreasonableness, her arguments on such unreasonableness cannot advance the Applicant's case beyond the part of his case which is based on such convention rights.
92. I therefore refuse the Applicant leave to apply for judicial review.

PATRICK TALBOT QC

Lieutenant Bailiff

23 September 2016, as approved on 29 September 2016