FOURTH SECTION

CASE OF A.W. KHAN v. THE UNITED KINGDOM

(Application no. 47486/06)

JUDGMENT

STRASBOURG

12 January 2010

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

In the case of A.W. Khan v. the United Kingdom,

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

Lech Garlicki, *President,*
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Päivi Hirvelä,
Mihai Poalelungi, *judges,*
and Lawrence Early, *Section Registrar*,

Having deliberated in private on 8 December 2009,

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

PROCEDURE

1. The case originated in an application (núm. 47486/06) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Pakistani national, Mr Abdul Waheed Khan ("the applicant"), on 17 November 2006.

2. The applicant was represented by Mr M. Malik of Malik Laws Solicitors, a lawyer practising in Manchester. The United Kingdom Government ("the Government") were represented by their Agent, Ms H. Moynihan of the Foreign and Commonwealth Office.

3. The applicant and the Government each filed observations on the admissibility and merits of the case (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

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

5. The applicant was born in 1975 in Pakistan. He entered the United Kingdom on 5 October 1978, when he was three years old, as a dependant of his father. He was granted indefinite leave to remain. He was educated in the United Kingdom and spent his formative years there.

6. On an unidentified date in 1993 he was found guilty of the theft of an insurance document. On an unidentified date in 1998 he was fined following a conviction for the use of a forged banker's draft.

7. On 22 January 2003 he was convicted by a Crown Court of involvement in the importation of a class A controlled drug. The conviction related to the attempted importation of 2.5 kilograms of heroin with an estimated street value of GBP 210,470.00. The applicant pleaded guilty. In his sentencing remarks the judge noted that he was not the principal in the criminal activity but concluded that he was a "knowledgeable, able and willing assistant". He was sentenced to seven years'

imprisonment but he was released on 3 April 2006 because of his good conduct in prison.

8. On 2 May 2006 the Secretary of State for the Home Department served on the applicant a notice of decision to make a deportation order pursuant to section 3 (5) of the Immigration Act 1971. The Secretary of State regarded as particularly serious those offences involving violence, sex, arson and drugs. Therefore, in view of the nature and severity of the applicant's offence, the Secretary of State concluded that his removal from the United Kingdom would be necessary in a democratic society for the prevention of disorder and crime and for the protection of health and morals.

9. The applicant appealed to an Immigration Judge. He indicated that he had been in the United Kingdom since he was three years old and was not familiar with the culture in Pakistan. All of his immediate family were in the United Kingdom. His mother and his siblings were all in poor health and he was the main person who kept the house clean. His mother had diabetes and a heart condition. His siblings suffered from asthma and/or eczema. The applicant suffered from ulcerative colitis for which he received treatment in the United Kingdom. He therefore submitted that his removal would be disproportionate in the circumstances and would violate his rights under Article 8 of the Convention.

10. On 9 August 2006 an Immigration Judge dismissed the applicant's appeal against the deportation order. He agreed that the applicant's deportation would be conducive to the public good and that the crime he had committed was sufficiently serious to warrant deportation. With regard to the applicant's family life in the United Kingdom, he found that it did not go beyond the natural ties of affection. In particular, he noted that the family had managed to cope without the applicant while he was in prison. He also found that the applicant would be able to adapt to life in Pakistan. He relied on the fact that he was an unemployed, single man of 28 years of age who, apart from having ulcerative colitis, was in good health. It was accepted that he could speak Punjabi. Moreover, the Immigration Judge observed that the medical evidence suggested that the applicant's attendance at hospital for treatment of his ulcerative colitis had been inconsistent and he could therefore continue to attend hospital sporadically in Pakistan.

11. On 22 August 2006 the Asylum and Immigration Tribunal made no order on his application for reconsideration. A Senior Immigration Judge noted that the applicant had been sentenced to seven years' imprisonment for his involvement in the importation of heroin and the Tribunal was entitled to find that this was a very serious matter and sufficiently serious of itself to warrant deportation.

12. On 8 November 2006 the High Court dismissed his application for reconsideration of the Immigration Judge's decision as it did not disclose any arguable error of law and an appeal would have no real prospect of success.

13. On 4 August 2008 the applicant's representative wrote to the Home Office, indicating that the applicant had been receiving death threats from one of his co-defendants in the drugs offence. The co-defendant was believed to be living in Pakistan. The applicant therefore submitted that if returned there was a real risk that his life would be in danger. He further submitted that in view of his mother's ill health, if he were deported then in all likelihood he would not see her again.

14. On 11 September 2008 the Secretary of State for the Home Department advised the applicant that he would not consider the new representations as a fresh claim for asylum. In particular, the Secretary of State noted that the late asylum claim damaged the applicant's credibility as the first threatening phone call was allegedly received in 2006.

15. In a letter dated 13 November 2008 the applicant advised the Court that his British girlfriend was pregnant and due to give birth to their child on 16 December 2008. He submitted a statement by his girlfriend, in which she confirmed that she was pregnant and stated that she had been in a relationship with the applicant since August 2005. On 16 April 2009 the applicant advised the Court that his girlfriend had given birth to a baby girl. He subsequently submitted a birth certificate, which named him as the father.

II. RELEVANT DOMESTIC LAW

16. Section 3(5)(a) of the Immigration Act 1971 (as amended by the Immigration and Asylum Act 1999) provides that a person who is not a British citizen shall be liable to deportation from the United Kingdom if the Secretary of State for the Home Department deems his deportation to be conducive to the public good. Sections 82(1) and 84 of the Nationality, Immigration and Asylum Act 2002 provide for a right of appeal against this decision on the grounds, *inter alia*, that the decision is incompatible with the Convention.

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

18. The Rules relating to the revocation of a deportation order are contained in paragraphs 390 to 392 of the Immigration Rules HC 395 (as amended), supplemented by Chapter 13 of the Immigration Directorates Instructions ("IDIs"). There is no specific period after which revocation will be appropriate although Annex A to Chapter 13 of the IDIs gives broad guidelines on the length of time deportation orders should remain in force after removal. Cases which will normally be appropriate for revocation 3 years after deportation include those of overstayers and persons who failed to observe a condition attached to their leave, persons who obtained leave by deception, and family members deported under section 3(5)(b) of the Immigration Act 1971. With regard to criminal conviction cases, the normal course of action will be to grant an application for revocation where the decision to deport was founded on a criminal conviction which is now "spent" under section 7(3) of the Rehabilitation of Offenders Act 1974. Paragraph 391 of the Rules, however, indicates that in the case of an applicant with a serious criminal record continued exclusion for a long term of years will normally be the proper course. This is expanded on in Annex A to Chapter 13 of the IDIs, which indicates that revocation would not normally be appropriate until at least 10 years after departure for those convicted of serious offences such as violence against the person, sexual offences, burglary, robbery or theft, and other offences such as forgery and drug trafficking.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

19. The applicant complained that the decision to deport him violated his right to respect for his family and private life under Article 8 of the Convention. Article 8 reads as follows:

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."21. The Government contested that argument.

20. The Government contested that argument.

A. Admissibility

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

B. Merits

1. The parties' submissions

22. The applicant complained that in assessing the proportionality of deportation the domestic decision-makers wrongly separated out the factors weighing in his favour before concluding that no one factor outweighed the severity of the criminal offence. Instead, the applicant submitted that the decision-makers should have weighed all of the factors together and then determined whether cumulatively they led to the conclusion that deportation would be disproportionate.

23. The applicant identified the factors weighing in his favour as first, his conduct since conviction; secondly, the closeness of his family ties; and thirdly, the length of his residence in the United Kingdom.

24. The applicant was released from prison on 3 April 2006. Although he was rearrested on 4 May 2006, he was later released on bail on 16 June 2006. The applicant had committed no further offences since his release. Moreover, a report prepared by his probation officer indicated that he was a model prisoner and the risk of re-offending was low.

25. The applicant further submitted that he had always lived with his mother and two brothers, all of whom were in ill-health. His mother suffered from diabetes, a heart condition and chronic obstructive airway disease. His brothers both suffered badly from asthma and eczema, and one also suffered from depression. The applicant submitted that this created a relationship of dependency between him and his mother and brothers. He argued that the Asylum and Immigration Tribunal's finding that his family coped very well while he was in prison was completely unfounded. His mother in fact suffered a mild heart attack and he was concerned that his deportation would exacerbate her heart condition and perhaps even cause another heart attack. Moreover, as his brothers did not work his family would not be able to visit him in Pakistan, even if their health permitted them to.

26. The applicant recently advised the Court that he had a British girlfriend and that she had given birth to their daughter in December 2008. He remains resident in his family home with his mother and siblings. It is a condition of his bail that he resides at that address. He visits his girlfriend and their baby on a daily basis but returns to the family home in the evening to sleep.

27. Finally, the applicant reiterated that he moved to the United Kingdom when he was three years old and he no longer recalled precisely which part of Pakistan his family

originated from. He had not returned to Pakistan and no longer had any close relatives or any social, cultural or family ties there. His father's brother lived in the United Kingdom and all of his mother's siblings had died.

28. The Government accepted that the applicant's deportation would interfere with his right to respect for his private life. They submitted, however, that the main focus of the applicant's private life was his mother and siblings and there was no evidence to suggest he had any deeper ties within the community. As the applicant and his siblings were all adults, the Government contended that the family life limb of Article 8 was not engaged. They further contended that there was no evidence of true dependency between the applicant and his mother and brothers, as the family coped without him while he was in prison.

29. The Government submitted that the decision to deport the applicant was proportionate to the legitimate aims pursued, namely, the protection of health and morals and the prevention of disorder and crime. The Government relied on the Court's jurisprudence, which had recognised the serious nature of drugs offences and found that they were capable of justifying "great firmness" on the part of the State (*El Boujaïdi v. France*, 26 September 1997, *Reports of Judgments and Decisions* 1997-VI; *Baghli v. France*, no. 34374/97, ECHR 1999-VIII; *Dalia v. France*, 19 February 1998, *Reports of Judgments and Decisions* 1998-I).

30. In view of the severity of the applicant's offence, his lack of a family life in the United Kingdom and the lack of any real dependency in his relationship with his mother and brothers, the Government submitted that there could be no suggestion that a fair balance was not struck by the domestic decision makers.

2. The Court's assessment

(a) Was there an interference with the applicant's right to respect for his family and private life?

31. The Government have accepted that the applicant's deportation would interfere with his private life as reflected in his relationship with his mother and brothers, and the Court endorses this view. The Court also recalls that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants such as the applicants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8. Regardless of the existence or otherwise of a "family life", and having regard to the considerable period of time he has lived in the United Kingdom, the expulsion of the applicant would therefore constitute an interference with his right to respect for his private life. The Court recalls that it will depend on the circumstances of the particular case whether it is appropriate for the Court to focus on the "family life" rather than the "private life" aspect (see *Maslov v. Austria* [GC], no. 1638/03, ECHR 2008 § 63).

32. In immigration cases the Court has held that there will be no family life between parents and adult children unless they can demonstrate additional elements of dependence (*Slivenko v. Latvia* [GC], no. 48321/99, § 97, ECHR 2003 X; *Kwakye-Nti and Dufie v. the Netherlands* (dec.), no. 31519/96, 7 November 2000). The Court does not accept that the fact that the applicant was living with his mother and brothers, or the fact that the entire family suffered from different health complaints, constitutes a sufficient degree of dependence to result in the existence of family life. In particular, the Court notes that in addition to his two brothers, the applicant also has three married

sisters who live in the United Kingdom. It does not, therefore, accept that the applicant is necessarily the sole carer for his mother and brothers. Moreover, while his mother and brothers undoubtedly suffer from health complaints, there is no evidence before the Court which would suggest that these conditions are so severe as to entirely incapacitate them.

33. The applicant has only recently informed the Court that he was in a long term relationship with a British citizen. In November 2008 he informed the Court that his girlfriend was pregnant and was due to give birth in December. In April 2009 the applicant informed the Court that his girlfriend had given birth to a baby girl.

34. It is clear from the Court's case-law that children born either to a married couple or to a co-habiting couple are *ipso jure* part of that family from the moment of birth and that family life exists between the children and their parents (see *Lebbink v. the Netherlands*, no. 45582/99, § 35, ECHR 2004-IV). Although co-habitation may be a requirement for such a relationship, however, other factors may also serve to demonstrate that a relationship has sufficient constancy to create *de facto* family ties (*Kroon and Others v. the Netherlands*, 27 October 1994, § 30, Series A no. 297-C). Such factors include the nature and duration of the parents' relationship, and in particular whether they had planned to have a child; whether the father subsequently recognised the child as his; contributions made to the child's care and upbringing; and the quality and regularity of contact (see *Kroon*, cited above, §30; *Keegan v. Ireland*, 26 May 1994, § 45, Series A no. 290; *Haas v. the Netherlands*, no. 36983/97, § 42 ECHR 2004-I and *Camp and Bourimi v. the Netherlands*, no. 28369/95, § 36, ECHR 2000-X).

35. In the present case the Court notes that the applicant and his girlfriend have been in a relationship since August 2005; the applicant has recognised his daughter and is named as the father on her birth certificate; although the conditions of his bail prevent the applicant from living with his girlfriend and their daughter, he has contact with them on a daily basis. The Court therefore finds that the relationship has sufficient constancy to create *de facto* family ties.

36. Accordingly, the Court accepts that the measures complained of interfered with both the applicant's "private life" and his "family life". Such interference will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", as pursuing one or more of the legitimate aims listed therein, and as being "necessary in a democratic society" in order to achieve the aim or aims concerned.

(b) "In accordance with the law"

37. It is not in dispute that the impugned measure had a basis in domestic law, namely section 3(5)(a) of the Immigration Act 1971 (as amended by the Immigration and Asylum Act 1999).

(c) Legitimate aim

38. It is also not in dispute that the interference served a legitimate aim, namely "the prevention of disorder and crime" and "the protection of health or morals".

(d) "Necessary in a democratic society"

39. The principal issue to be determined is whether the interference was "necessary in a democratic society". The relevant criteria that the Court uses to assess whether an expulsion measure is necessary in a democratic society have recently been summarised

as follows (see *Üner v. the Netherlands* [GC], no. 46410/99, §§ 57 - 58, ECHR 2006-...):

> "57. Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision (see, for example, the judgments in Moustaquim v. Belgium, Beldjoudi v. France and Boultif v. Switzerland, [cited above]; see also Amrollahi v. Denmark, no. 56811/00, 11 July 2002; Yılmaz v. Germany, no. 52853/99, 17 April 2003; and Keles v. Germany, 32231/02, 27 October 2005). In the case of Boultif the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria, as reproduced in paragraph 40 of the Chamber judgment in the present case, are the following:
>
> - the nature and seriousness of the offence committed by the applicant;
> - the length of the applicant's stay in the country from which he or she is to be expelled;
> - the time elapsed since the offence was committed and the applicant's conduct during that period;
> - the nationalities of the various persons concerned;
> - the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
> - whether the spouse knew about the offence at the time when he or she entered into a family relationship;
> - whether there are children of the marriage, and if so, their age; and
> - the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.
>
> 58. The Court would wish to make explicit two criteria which may already be implicit in those identified in the *Boultif* judgment:
>
> - the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
> - the solidity of social, cultural and family ties with the host country and with the country of destination."

40. The Court reiterates that in view of the devastating effects of drugs on people's lives, it understands why the authorities show great firmness with regard to those who actively contribute to the spread of this scourge (*Dalia v France*, cited above, § 54; *Bhagli v France*, cited above, § 48). The applicant's offence was particularly serious as it involved the importation of a significant quantity of heroin. The severity of the offence is reflected in the fact that the applicant was sentenced to seven years' imprisonment, taking account of his decision to plead guilty at a very early stage. The severity of this offence must therefore weigh heavily in the balance.

41. Nevertheless, the Court must also take into account the fact that the applicant had not previously committed any serious criminal offences in the United Kingdom, and has committed no further offences following his release in June 2006. Under the approach taken in the *Boultif* judgment (cited above, §51), the fact that a significant period of good conduct has elapsed following the commission of the offence necessarily has a certain impact on the assessment of the risk which the applicant poses to society.

42. As regards the applicant's private life, the Court accepts that the applicant has lived most of his life in the United Kingdom, having arrived there at the age of three, and no longer has any real social, cultural or family ties to Pakistan. The applicant has not returned to Pakistan, even for a short visit, and he has no immediate family in Pakistan.

43. In the United Kingdom the applicant has established close ties with his mother and two brothers, with whom he has lived for most of his life. The relationship clearly entails an additional degree of dependence which results from the relative ill-health of

all of the parties. Although there is no evidence to suggest that the family would not be able to cope without the applicant, his removal would likely cause greater difficulties than would otherwise be the case.

44. With regard to the applicant's family life, the Court notes that the applicant has submitted that he and his girlfriend are in a stable relationship, and although they cannot live together as a family unit, the applicant enjoys regular contact with his girlfriend and their daughter. The applicant's girlfriend is a British citizen, who states that she has never lived anywhere other than the United Kingdom. She does not speak Urdu or Punjabi and has no family or friends in Pakistan. The applicant's girlfriend has therefore indicated that she would not be prepared to move to Pakistan if he were to be deported, although no circumstances have been identified which would inherently preclude her from living there.

45. Although the Court has no reason to doubt the applicant's claims, it observes that he has not sought to make fresh representations to the Home Office on the basis of his family life. In particular, the Court notes that despite making fresh representations to the Home Office in August 2008, the applicant did not mention that he had a pregnant girlfriend even though he must have known of the pregnancy at the time.

46. Moreover, the Court notes that the applicant's relationship with his girlfriend began in August 2005, while he was still serving his prison sentence. She was therefore fully aware of his criminal record at the beginning of the relationship.

47. Accordingly, no decisive weight can be attached to this family relationship.

48. The Court must also have regard to the duration of the deportation order. Although the Immigration Rules do not set a specific period after which revocation would be appropriate, it would appear that the latest the applicant would be able to apply to have the deportation order revoked would be ten years after his deportation.

49. Finally, the Court notes that while the applicant has not formally complained under Articles 2 or 3 of the Convention, he recently has indicated that he believes his life would be at risk on return to Pakistan as he has been receiving death threats from a co-defendant believed to be in Pakistan. The applicant has submitted no evidence capable of substantiating this claim and the Court is persuaded by the domestic authorities' finding that the failure to mention the threats, which allegedly began in 2006, at an earlier stage severely damaged the applicant's credibility.

50. In light of the above, having particular regard to the length of time that the applicant has been in the United Kingdom and his very young age at the time of his entry, the lack of any continuing ties to Pakistan, the strength of his ties with the United Kingdom, and the fact that the applicant has not reoffended following his release from prison in 2006, the Court finds that the applicant's deportation from the United Kingdom would not be proportionate to the legitimate aim pursued and would therefore not be necessary in a democratic society.

51. There would accordingly be a violation of Article 8 of the Convention if the applicant were deported to Pakistan.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

52. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

53. In recognition of the severity of the offence of which he was found guilty, the applicant did not seek an award in damages.

B. Costs and expenses

54. The applicant claimed GBP 1,609.37 in respect of legal costs and expenses.

55. The Government had no comments on the applicant's claim.

56. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the total sum claimed.

C. Default interest

57. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there would be a violation of Article 8 of the Convention in the event of the applicant's deportation;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,750 (one thousand seven hundred and fifty euros), plus any tax that may be chargeable, in respect of costs and expenses, to be converted into British Pounds at the rate applicable at the date of settlement, plus any tax that may be chargeable to the applicant

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 12 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Lech Garlicki
Registrar President

A.W. KHAN v. THE UNITED KINGDOM JUDGMENT