Otite v the United Kingdom: What about the incentivising function of process-based review?

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Otite v the United Kingdom revolves around the expulsion of a settled migrant from the United Kingdom following his conviction for two counts of conspiracy to make or supply articles for use in fraud. In its ruling, the European Court of Human Rights (ECtHR) found that the balancing exercise carried out by the UK courts had taken place solely within the framework of the domestic Immigration Rules and not with reference to the Court's case law. This led the Court to stray from the procedural approach which it typically applies in Article 8 expulsion cases, and conduct its own substantive review of the case. Nevertheless, it ultimately found that no violation of Article 8 had taken place.

The Court's finding of no violation despite its clear acknowledgement of flaws in domestic procedure is very interesting in light of the 'procedural turn' in the Court's jurisprudence in recent years. Where the procedural approach is adopted, the Court has begun to demonstrate a willingness to defer to the decisions of domestic authorities who show fidelity to their obligations under the European Convention on Human Rights (the ECHR; Convention). This approach is intended to incentivise domestic authorities to engage more actively with the Convention and relevant caselaw in their adjudication of cases, as when they do so, they stand to benefit from a more lenient style of review.

Could it be said that a ruling such as this one, where the Court find no violation of Article 8 despite identifying clear flaws in domestic processes, could serve to undermine this incentivising function? In this post I will first set out the facts of the case and the contents of the Court's judgment before reflecting on why I believe that this may be so.

Facts

The applicant, Junior Otite, is a Nigerian national who entered the UK as the spouse of a settled person when he was 31 years old. His wife is a British citizen and three children are British citizens.

In 2013, Mr. Otite's application for naturalisation as a British citizen was refused because he had a criminal record for tendering a false statement. In 2015, he was served with notice of his liability for deportation, having been convicted the previous year on two counts of conspiracy to make or supply articles for use in fraud. These convictions had resulted in a four-year-and-eight-month prison sentence. According to the judge's sentencing remarks, between 2010 and 2014 the applicant had operated a document

factory, producing documents to facilitate fraudulent acts. The judge was satisfied that the full extent of the losses suffered by others as a result of the fraudulent documents was "well over £100,000 if not several hundred thousand pounds." (para 9)

The applicant appealed his deportation, invoking Article 8 ECHR. His appeal was first considered and refused by the Secretary of State of the Home Office. The Secretary of State found that the domestic Immigration Rules provided a complete code for considering Article 8 claims and set out the situations in which a foreign criminals private and/or family life would be deemed to outweigh the public interest in his deportation. Pursuant to the provisions of domestic law, in the case of offenders who were sentenced to four or more years imprisonment, the public interest in their deportation would only be outweighed by their interests under Article 8 where there were "very compelling circumstances" over and above the existence of a genuine and subsisting relationship with a partner and/or minor children settled in the UK and for whom the effect of the offender's deportation would be "unduly harsh." (para 11) The Secretary of State found that this threshold was not met in Mr. Otite's case. Although this decision was initially overturned on appeal before the First-tier Tribunal, it was later upheld by the Upper Tribunal and the applicant was refused permission to lodge a further appeal before the Court of Appeal.

In reaching its decision, the Upper Tribunal noted reports showing that there was a 'noticeable risk' that the applicant would reoffend on his release from prison. They also considered his family situation and the impact his deportation would have on his wife and children. They concluded that Mr. Otite's family 'was an ordinary family which, like any other family, would be affected by the applicant's deportation.' (para 20) However, they held that the 'evidence was such that it would be extremely difficult to establish that his deportation would be "unduly harsh" on his wife or children, let alone that there existed additional "very compelling circumstances"' precluding his deportation. (para 20)

Judgment

The Court found that the applicant's deportation would constitute an interference with his rights under Article 8.1. There was a legal basis for this interference and it had the legitimate aim of preventing disorder and crime. The principal issue to be determined was whether a fair balance had been struck between Mr. Otite's Convention rights and the community's interests.

The Court noted that in determining this, it was not its task to 'substitute its own assessment of the merits for that of an independent and impartial domestic court or tribunal which has examined the facts carefully, applied the relevant human rights standards consistently with the Convention and the Court's case-law, and balanced the interests of the applicant against those of the general public' unless there were strong reasons for doing so. (See Ndidi v. the United Kingdom, Hamesevic v. Denmark, Alam v. Denmark) The Court also noted however, that in the absence of such an assessment, it remains empowered to give the final ruling on whether an expulsion measure can be

reconciled with the Convention. (para 42) Taken together, these statements amount to a reiteration of the principles of process-based review and an affirmation of the principle of subsidiarity, the broader doctrine upon which this approach is grounded.

Mr. Otite's complaint was directed primarily towards the Upper Tribunal's decision-making process and its alleged failure to conduct an Article 8 compliant proportionality assessment. The Court reiterated its previous finding (see Unuane v. the United Kingdom, para 83), that the domestic framework did not necessarily preclude the striking of a fair balance on the facts of an individual case. It found that the Upper Tribunal had given detailed consideration to the particulars of the applicant's situation, balancing the seriousness of his offence against the likely impact the deportation order would have on his private and family life with regard to many of the relevant criteria set out in the Court's previous case law. It did not consider the difficulties that the applicant's wife and children would face in Nigeria if they returned with him as they did not think that this was a likely outcome (para 44).

Nonetheless, the Upper Tribunal did not conduct this balancing exercise by reference to the case-law of the Court. Instead, it reached its decision solely within the framework provided by the domestic Immigration Rules, with a view to determining whether the impact of Mr Otite's deportation on his family would be 'unduly harsh' and whether there were any 'very compelling circumstances' capable of outweighing the public interest in his deportation. In light of this, the Court found that the balancing exercise had not been conducted as the case-law required and that it fell to the Court 'in exercise of its supervisory jurisdiction, to give the final ruling on whether the applicant's expulsion would be reconcilable' with the Convention. (para 45)

Having conducted this balancing exercise itself, the Court found that the Mr. Otite's expulsion could be reconciled with Article 8. The Court agreed with the Upper Tribunal that the fraud offence committed by the applicant was sufficiently serious to outweigh the interests of a long-term resident alien who had arrived in the UK as an adult and who had not recognised the severity of his offence nor the impact and consequences it had had on the victims and who was, therefore, likely to reoffend.

The Court noted the submission of the third-party interveners (the AIRE Centre and the Joint Council for the Welfare of Immigrants), who suggested that in cases such as this one, the best interests of the children should be the primary situation. While it recognised that in all decisions involving children, their best interests should be afforded 'significant weight,' it held that when an offender is being deported as a consequence of a criminal offence, the deportation decision first and foremost concerns him. The family's interest may be outweighed by other factors. In this case, while the applicant's deportation would be certainly be difficult for his wife and children, there was nothing to suggest that they were in absolute need of his support. Furthermore, there was no evidence to suggest that his family could not return to Nigeria with him or that they could not remain in the UK and visit him in Nigeria and keep in contact via telephone and internet. Ultimately, the Court

concluded that the strength of the applicant's family and private life in the UK was not such as to outweigh the public interest in his expulsion and held, by five votes to two, that his deportation would not violate Article 8 of the Convention.

In a joint dissenting opinion, Judge Guerra Martins and Judge Motoc disagreed with the majority and found that despite the seriousness of the offence committed by the applicant, his deportation would violate Article 8 of the Convention. In reaching this conclusion, they noted that the Upper Tribunal 'failed to strike an appropriate balance between the public and private interests by underestimating, without sufficient justification, one of the most relevant criteria established by the Court, namely the best interests and well-being of the children.' (dissenting opinion, para 7)

Comment

Having set out the facts of the case and the arguments advanced by the Court in its judgment, I would like to return to the question posed at the outset of this post: does this ruling undermine the prior efforts of the Court to incentivise domestic authorities to actively engage with the Convention by properly applying the criteria set out by the Court when assessing the proportionality or otherwise of an expulsion order? To answer this question I will first revisit what is meant by the procedural approach (something which I have written about in a previous post on this blog) and the purported incentivising function thereof, before returning to the reflect on the judgment at hand.

In recent years, numerous scholars have identified a so-called 'procedural turn' in the jurisprudence of the Court. This development is closely linked to the principle of subsidiarity and the doctrine of the margin of appreciation as the Court demonstrates a willingness to 'defer to the reasoned and thoughtful assessment by national authorities of the Convention obligations.' Following the case-load crisis that threatened the Court subsequent to its geographic and jurisdictional expansion during the 1990s as well as the backlash against it during the 2000s for its interventionist role, both of these concepts have been subject to significant attention – and to very tangible effect! Indeed, the adoption of the Brighton Declaration in 2012 (entered into force in 2021) introduced an explicit reference to subsidiarity and the margin of appreciation into the text of the ECHR for the first time.

This procedural turn can be understood to encompass two closely related developments: (a) the Court's practice of reading self-standing positive obligations into the scope of substantive convention rights and (2) its burgeoning tendency, to rely on the quality of national decision-making procedures when reviewing the proportionality of an impugned measure. A strong supporter of the procedural turn, the former President of the Court, Róbert Ragnar Spanó, has dubbed the latter element of this typology 'process-based review.' Arguing that the Court is moving into a new 'age of subsidiarity,' he asserts that the Court is beginning to take on a more 'framework-oriented role when reviewing domestic decision-making.' This review is process-based as the Court is increasingly 'examining whether Convention principles have been adequately embedded into the domestic legal order and if so, whether certain material elements allow it to grant

deference to national authorities so they can fulfil their duties as the primary guarantors of Convention rights.' In other words, we are seeing a shift in the Court's focus from evaluating the substantive impact of alleged violations on individual applicants to a amore process-orientated examination of how the law was applied and interpreted by national authorities.

The application of process-based review can be seen very clearly in a string of recent cases under Article 8 dealing with the expulsion of settled migrants. (See for example, Ndidi v the United Kingdom, Levakovic v Denmark, Munir Johana v Denmark, Khan v Denmark, Avci v Denmark*)* In these cases, the Court relies on the quality of domestic decision-making processes when reviewing the proportionality or reasonableness of the contested measures, placing an emphasis on the procedural question of whether national authorities have carefully applied the case-law of the Court and sufficiently identified and balanced the relevant interests in deciding whether the expulsion measure in question was proportionate to the aim pursued – and thus meeting the requirements of Article 8.2. Where national authorities show that they have done so, the Court defers to their substantive judgment in the specific case.

Commentators have identified both significant risks and significant advantages which can be associated with this process-based approach. On the one hand, it can be argued that it could lead to a diminishing of legal accountability for human rights in Europe by creating check-box style approach to rights protection. Furthermore, it could pose a particular risk to the rights of minorities whose voices may be underrepresented in democratic processes at the domestic level – as seen for example, in the much criticised in S.A.S. v France ruling. Here, the Court's adoption of a process-based approach led it to accept the compatibility of a ban on face coverings with the ECHR – despite convincing submissions from several third-party interveners, as well as the applicant, who highlighted that certain Islamophobic remarks marked the debate prior to the adoption of the law (para 149) and cited research showing that it led to the social exclusion of Muslim women who wore the full-face veil, rather than promoting greater integration.

Returning to the case at hand, the issue is not that Mr. Otite or the voices of settled migrants (another minority group) were not taken into consideration during the domestic processes within which the Immigration Rules were developed – although this may well have been the case. Rather, my criticism of the Court's approach is rooted in the fact that it serves to undermine one of the key purported benefits of procedural review: namely, that it could serve to improve the human rights protection available at the domestic level by empowering domestic authorities to take on a more decisive role in the adjudication of human rights cases and rewarding those who properly engage with the Convention and its case law with a more lenient style of review. Thus, individuals would not be forced to pursue a case at the international level in order to seek redress, making the search for justice much more accessible.

In *Otite*, the Court identified and emphasised certain flaws in the balancing exercise conducted at the domestic level. It found that the balancing exercise was conducted with reference to national law rather than the requirements of Article 8 and the associated

case law, which is necessary to show proper engagement with the Convention at the domestic level. For example, the Upper Tribunal did not consider the difficulties the applicant's family would face if they moved to Nigeria with him (para 44). Furthermore, insofar as it considered the factors identified in Boultif v. Switzerland and Üner v. the Netherlands, it did so without explicit reference to those judgments and with a view to determining whether Mr. Otite's expulsion would be 'unduly harsh' on his family and whether there existed any 'very compelling circumstances' based on which his appeal should succeed. (para 45)

The inadequacies the Court identified at the national level led it to conduct its own substantive assessment of the case, ultimately finding in favour of the state. While from one perspective this is understandable – Mr. Otite had committed serious crimes and presumably did have the requisite ties with his country of origin to set up a life there – it does not align with the incentivising function of process-based review. If the Court wishes to send a message to domestic authorities encouraging greater engagement with the Convention (as it appears to have done in past expulsion cases) then perhaps it should have simply found a violation of Mr. Otite's rights under Article 8 given that the proportionality of his expulsion was not properly assessed at the domestic level. Such a finding may not necessarily have precluded his eventual deportation but it would have required the domestic authorities to at least review the case afresh in a manner compliant with Convention standards. This would have sent a much stronger signal as to the importance of proper and Convention complaint procedures, while simultaneously allowing the Court to continue to acknowledge and maintain the 'fundamentally subsidiarity' role it regularly states it holds within the Convention system. (See for example Thorn v. Sweden, para 48; Vavřička and Others v. the Czech Republic, para 273; Q and R v. Slovenia, para 104)

Conclusion

It is clear from the case law that a 'procedural turn' has emerged in the jurisprudence of the ECtHR and that a more procedural or process-based style of review is regularly being applied in Article 8 cases on the expulsion of settled migrants. In general, this has been seen to lead to greater deference to domestic authorities who are seen to comply with the requirements of the Convention and the caselaw. The expected flipside to this, is that flaws in domestic proceeding would lead to stricter review and findings of a violation. Thus, it is somewhat surprising that despite identifying failings at the domestic level the Court continued to reach a finding of no violation in *Otite*. The literature suggests that one of the key merits of process-based review is increased engagement with the Convention at the national level – a benefit that *Otite* arguably serves to undermine. Arguably, regardless of the outcome which should have been reached based on a substantive assessment of the applicant's conduct and personal circumstances, from a procedural perspective, the flaws in the domestic balancing process identified by the Court, should have led to a finding of a violation. Such a result would have reinforced the importance of proper consideration of Article 8 requirements at the domestic level and incentivised greater engagement with Convention in future cases.