

## Strategic Legal Fund

### Operation Nexus: Briefing Paper

We consider the lawfulness of Operation Nexus (“Nexus”), a collaboration between the Metropolitan Police Service (“the MPS”) and the Home Office, which seeks to increase the number of foreign nationals deported from the United Kingdom. Nexus deals with individuals whose deportation is said to be ‘conducive to the public good’<sup>1</sup>, but who have not necessarily been convicted of an offence by a criminal court. Two propositions are advanced: firstly, that the way Nexus appeals are conducted breaches Article 6 of the European Convention on Human Rights (“ECHR”); and that, secondly, depending on the circumstances of the case in question, Nexus may also breach appellants’ common law right to a fair trial. These will be explored in detail below.

### Deportation framework

In deportation decisions the Secretary of State for the Home Department (“SSHD”) will argue that it is in the ‘public interest’ to deport foreign criminals. This view has been repeatedly endorsed by the courts, both domestic and European, and is set out in primary legislation.<sup>2</sup> The ‘public good’ and the ‘public interest’ are referred to as ‘wide-ranging but undefined concepts’ where ‘broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged.’<sup>3</sup> In particular, three facets of the public interest in deporting foreign criminals have been identified: to prevent reoffending; to deter other foreign criminals from committing serious crimes; and the role of deportation as an expression of society’s ‘revulsion’ for the crimes committed.<sup>4</sup>

If an individual who is not a British national commits a crime for which they are sentenced to over 12 months imprisonment that individual’s deportation will,

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<sup>1</sup> S.3(5) Immigration Act 1971

<sup>2</sup> S.32(4) UK Borders Act 2007: ‘the deportation of a foreign criminal is conducive to the public good’

<sup>3</sup> *N (Kenya) v SSHD* [2004] EWCA Civ 1094 at 83

<sup>4</sup> *OH (Serbia)* [2008] EWCA Civ 694 at 15

automatically, be deemed to be conducive to the public good.<sup>5</sup> However, there remains a power for the SSHD to deem an individual's deportation 'conducive to the public good'<sup>6</sup> regardless of whether or not that individual has a criminal conviction. An individual is entitled to a statutory right of appeal against both types of decision.<sup>7</sup>

### Operation Nexus

Nexus is a collaboration between UK police and immigration authorities. Whilst initially restricted to London and the MPS, it appears that the operation has been rolled out to encompass the West Midlands police force area.<sup>8</sup> It is not entirely clear when it was launched: some sources indicate November 2012<sup>9</sup>, although June 2012 has been suggested<sup>10</sup>, as have other dates in between.<sup>11</sup> It appears to have previously been known, or existed as a pilot, as Operation Terminus.<sup>12</sup>

The stated aim of the operation is to 'maximise intelligence, information and worldwide links to improve how [the UK] deal[s] with and respond[s] to foreign nationals breaking the law'.<sup>13</sup> The MPS states that it is less effective at policing foreign nationals than 'indigenous criminals', for a range of reasons including 'lack of knowledge of their offending history, intelligence and our ability identify them via biometrics'.<sup>14</sup>

As part of Nexus immigration staff are stationed in police custody suites and run checks on foreign nationals who are arrested (regardless of whether or not the

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<sup>5</sup> S.32(2) UK Borders Act 2007

<sup>6</sup> *Op Cit*, n.1, above

<sup>7</sup> S.82 Nationality, Immigration and Asylum Act 2002

<sup>8</sup> Response to Home Office Freedom of Information Request 32144 by letter, dated 23 July 2014

<sup>9</sup> "Operation Nexus Launches", 10 November 2012, Metropolitan Police Website, accessed on 28 June 2014 at <http://content.met.police.uk/News/Operation-Nexus-launches/1400012909227/1257246741786>

<sup>10</sup> Letter from Mark Rowley, Assistant Commissioner Metropolitan Police, dated 24 July 2013, accessed at <http://www.london.gov.uk/moderngov/documents/s28677/6b%20-%20Appendix%20B%20to%20Summary%20List.pdf> on 28 June 2014

<sup>11</sup> Home Affairs Committee - Fifteenth Report - The work of the Immigration Directorates (April - September 2013) available at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmhaff/820/82002.htm> accessed on 28 June 2014

<sup>12</sup> See reference in *Waryoba, R (On the Application Of) v Secretary of State for the Home Department* [2014] EWHC 1496 (Admin) and Muir, H., 'Border Agency teams up with police in drive to target foreign criminals', 5 October 2014, The Guardian, available at <http://www.theguardian.com/uk/2012/oct/05/border-agency-police-foreign-criminals> accessed on 29 June 2014

<sup>13</sup> "Operation Nexus Launches", 10 November 2012

<sup>14</sup> Letter from Mark Rowley (AC, MPS) dated 24 July 2013

individual is charged<sup>15</sup>) in the London area. In March 2013 there were 60 full time Immigration Officers being recruited to fulfil these roles.<sup>16</sup> In July 2013 there were plans for the number of dedicated officers to be increased to 95.<sup>17</sup> The Home Affairs Select Committee was told that immigration staff were present in 21 police custody suites across London in their report dated 21 March 2014.<sup>18</sup>

The same committee was provided with an eight week snapshot ending in February 2013 where checks were performed against over 40,000 individuals following arrest with approximately a quarter identified as foreign nationals.<sup>19</sup> It is now clear that every single person who is arrested in London will have their fingerprints referred through the immigration authorities' database to check the immigration status of the individual concerned.<sup>20</sup>

The information gathered through these checks include 'details of relevant arrests ... where [the foreign national has] been accused of breaking the law ...[or]... where they have been victims or witnesses to violent crimes but refused to cooperate with police and an important list of gang or violent offender associations'.<sup>21</sup> As at July 2013, there were two targets as part of the operation, or 'headline performance indicators', which involved the referral of 100 high harm offenders to the immigration authorities for subsequent action per month and the detention of 200 foreign national offenders per month 'with a view to removal'.<sup>22</sup>

In terms of the use of this information one of the main aims of the operation is to identify high harm foreign national offenders including 'those involved in serious violence (including sex offending), prolific gang members, or those offenders who carry firearms or other weapons.'<sup>23</sup> Of the 10,000 or so foreign nationals arrested in the eight weeks to February 2013 highlighted in the Home Affairs Select Committee

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<sup>15</sup> Home Affairs Committee (Fifteenth Report)

<sup>16</sup> Written response from the London Mayor to Question 1094/2013 posed by Joanne McCartney in March 2013 at <http://joannemccartney.co.uk/2013/05/31/march-2013-mqt-answers/> accessed on 28 June 2014

<sup>17</sup> Letter from Mark Rowley (AC, MPS) dated 24 July 2013

<sup>18</sup> Home Affairs Committee (Fifteenth Report)

<sup>19</sup> Ibid.

<sup>20</sup> Written response from the London Mayor to Question 1095/2013 posed by Joanne McCartney in March 2013 at <http://joannemccartney.co.uk/2013/05/31/march-2013-mqt-answers/> accessed on 28 June 2014

<sup>21</sup> "Operation Nexus Launches", 10 November 2012

<sup>22</sup> Letter from Mark Rowley (AC, MPS) dated 24 July 2013

<sup>23</sup> Ibid.

report, 1,432 individuals were identified as 'high harm/prolific offenders'.<sup>24</sup> Other than the definition provided by Mr Rowley, however, there is no publicly available definition of 'harm'<sup>25</sup>, and the Home Office appears to accept that the definition varies even between the two forces currently involved in the Nexus process.<sup>26</sup>

Having identified 'high harm' offenders, the case will then be referred to a Home Office case worker who will take a decision as to whether deportation should be pursued. Consideration will be given to 'the subject's immigration status and the potential impact of deportation balanced against their previous offending history in line with existing legislation'<sup>27</sup>, although when questioned about the criteria used in the referral mechanism in September 2013 an MPS representative seemed to suggest that there was none.<sup>28</sup>

Once a decision is taken to pursue deportation the individual will be served with a decision that the SSHD deems his or her deportation to be 'conducive to the public good'.<sup>29</sup> Until very recently such a decision automatically attracted an in-country right of appeal, although the Home Office can now certify a decision to the extent that the right of appeal is only exercisable from abroad if the authorities take the view that there would be no 'serious irreversible harm' if deportation was effected immediately.<sup>30</sup> At the time of writing it remains to be seen how regularly and in what circumstances this power will be used.

If an individual chooses to exercise an in-country right of appeal against a decision to deport then the case will be listed for hearing in a tribunal.<sup>31</sup> This is a civil court. It appears that, at this stage, the Home Office allocate the case to an Operation Nexus detective whose main responsibilities include liaising with the Home Office in relation to the appellant and presenting information to any tribunal hearing.<sup>32</sup>

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<sup>24</sup> Home Affairs Committee (Fifteenth Report)

<sup>25</sup> Response to Home Office Freedom of Information Request 32144 by letter, dated 23 July 2014

<sup>26</sup> *Ibid.*,

<sup>27</sup> *Ibid.*,

<sup>28</sup> Webber, F., 'Operation Nexus fears not allayed', Institute of Race Relations, 19 September 2013, at <http://www.irr.org.uk/news/operation-nexus-fears-not-allayed/> accessed on 28 June 2014

<sup>29</sup> *Op Cit*, n.1, above

<sup>30</sup> S.94B(3) Nationality, Immigration and Asylum Act 2002, inserted by s.17 Immigration Act 2014

<sup>31</sup> The First Tier Tribunal (Immigration and Asylum Chamber)

<sup>32</sup> Letter from Mark Rowley (AC, MPS) dated 24 July 2013

The detective will normally provide a witness statement summarising the individual's conduct, including reference to incidents contained on internal police systems where the individual concerned may not have been arrested, or even questioned, by police. This statement will be filed with the tribunal and served upon the appellant. The courts have made clear that these statements must be supplemented by the underlying CRIS (Crime Report Information System) reports (used to record, investigate and manage allegations of crime<sup>33</sup>) on the basis of which the statements are made.<sup>34</sup> The detective in question will usually attend the tribunal to give live evidence in relation to the alleged conduct.

The purpose of the information presented by the Home Office is, according to the authorities, to put before the tribunal an indication of the individual's suspected criminality, and to suggest that his or her presence in the UK is considered not conducive to the public good.<sup>35</sup> One of the noted aims of the operation is to prevent criminals appearing in front of tribunals and 'misleading them [as to] the true scale of their criminal activity'.<sup>36</sup>

In terms of the scale and effectiveness of Nexus, in December 2012 it was claimed that the operation had led to the removal of 175 of 'London's most prolific foreign national offenders' in just a few months.<sup>37</sup> It was later suggested that between October 2012 and July 2013 over 700 foreign national criminals had been removed or deported having been identified by the MPS after passing through a police custody suite.<sup>38</sup>

However, this is to be contrasted with evidence from the MPS suggesting that from June 2012 to June 2013 only 37 individuals were removed from the UK as a result of the operation.<sup>39</sup> In response to a recent Freedom of Information Request the Home

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<sup>33</sup> FOI Request 32144

<sup>34</sup> See *Farquharson (removal – proof of conduct)* [2013] UKUT 00146 (IAC)

<sup>35</sup> Home Affairs Committee (Fifteenth Report)

<sup>36</sup> Letter from Mark Rowley (AC, MPS) dated 24 July 2013

<sup>37</sup> Mark Harper, Minister for Immigration, statement on 28 December 2012 available at <https://www.gov.uk/government/news/operation-nexus-results-in-more-than-175-removals> accessed on 28 June 2014

<sup>38</sup> Mark Harper, Minister for Immigration, Hansard: Written Answers to Questions (17 July 2013), available at <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130717/text/130717w0001.htm> accessed on 28 June 2014

<sup>39</sup> Letter from Mark Rowley (AC, MPS) dated 24 July 2013

Office estimate that a total of 200 individuals have been deported as a result of the operation since its inception, and over 11,000 cases are recorded as being 'of interest'.<sup>40</sup> The success rate for appellants in Nexus deportation appeals is low, with Home Office records showing only 10 successful appeals in total.<sup>41</sup> There appear to be plans for Nexus to be extended across the country.<sup>42</sup>

Operation Nexus has been broadly welcomed in most quarters, and particularly in the press.<sup>43</sup> Given that Nexus appears to have only operated in the London area until relatively recently<sup>44</sup> the Home Affairs Select Committee asked why this 'good practice' was not being rolled out across the country.<sup>45</sup>

### Concerns

The overriding concern with regard to Nexus is that foreign nationals are being deported from the UK on the basis of allegations of conduct that have not been proven in the criminal courts.

In England and many other common law jurisdictions the standard of proof for an individual to be convicted of an offence which is contrary to the criminal law is 'beyond a reasonable doubt'. For serious offences, a jury will usually sit in judgment, appropriately directed by a judge, to decide whether or not such a doubt exists. There are safeguards which operate in the criminal courts governing the way in which evidence is presented to the jury to enable a fair trial to take place. These include the right for a defendant to cross-examine a witness who has testified against him; a defendant's right to publicly funded legal representation; the right for a

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<sup>40</sup> FOI Request 32144

<sup>41</sup> Ibid.

<sup>42</sup> 'Ending Gang and Youth Violence: Annual Report 2013', Home Office, published December 2013, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/278779/EndingGangYouthViolence2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/278779/EndingGangYouthViolence2013.pdf) accessed on 28 June 2014

<sup>43</sup> See for example <http://www.express.co.uk/news/uk/405709/One-hundred-foreign-crooks-a-week-are-kicked-out>; <http://www.standard.co.uk/news/crime/700-criminals-deported-in-london-crackdown-to-be-copied-by-rest-of-country-8716897.html>; <http://www.thetimes.co.uk/tto/news/uk/crime/article3784856.ece> accessed on 28 June 2014

<sup>44</sup> See *Ndow (AP) v Secretary of State for the Home Department* [2014] CSOH 37 at paragraph 23

<sup>45</sup> Home Affairs Committee (Fifteenth Report)

defendant to be tried by a jury of peers in almost all serious criminal law cases; and strict rules governing the use of hearsay evidence and unsworn testimony.<sup>46</sup>

During Nexus appeals none of these safeguards exist. As stated above, appeals are heard in the tribunal system, where the relevant standard of proof is the civil standard: the balance of probabilities. The tribunal can admit any evidence which it considers relevant, 'even if that evidence would be inadmissible in a court of law', specifically disavowing the laws of evidence which exist to protect defendants in criminal courts.<sup>47</sup> The tribunal does not have the power to issue a summons to require the attendance of a witness.

In particular, following cuts to the civil legal aid budget in April 2013, appellants in deportation appeals are not entitled to publicly funded legal representation. Given that one of the effects of a deportation decision is to automatically curtail any existing leave (and with it any legal right to work)<sup>48</sup>, appellants will often be dependent on the goodwill of friends or family members if they wish to instruct lawyers to represent them in these complex cases, involving significant quantities of documentation, and fast-moving areas of immigration and human rights law.

Much of the evidence provided to tribunals by the police in these cases is circumstantial: records of appellants being stopped and searched even if nothing is found and nothing eventuates; arrests which were made but where no further action was taken and the appellant later released; charges which were brought and subsequently withdrawn; and acquittals by juries following non-guilty pleas at full criminal trials. The current practice is for the relevant Nexus detective to summarise each of the incidents where the individual appears in a CRIS reports in a witness statement. Each incident, even where an individual is stopped and searched and there is no further action, is referred to rather euphemistically as a 'non-conviction'.

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<sup>46</sup> See in general *Horncastle & Ors, R. v* [2009] UKSC 14 (09 December 2009), paragraphs 16-19 for a recent discussion of these principles

<sup>47</sup> Rule 51(1) Asylum and Immigration Tribunal Procedure Rules 2005

<sup>48</sup> See *R (on the application of Fitzroy George) v Secretary of State for the Home Department* [2014] UKSC 28

## Evidential integrity

Given the difficulties faced by appellants who seek to challenge the evidence placed before the tribunal as discussed above, the integrity of the material provided by the police is absolutely critical.

It is therefore a matter of serious concern that the Home Secretary, in her speech to the Police Federation in March 2014, referring to the litany of police foul play, corruption and downright criminal activity in recent years, felt moved to propose a new offence of 'police corruption'.<sup>49</sup> A particular issue raised concerns the use of stop and search by the police, in which she suggests that improper use of the powers betrayed contempt for the public.<sup>50</sup> The concerns expressed by the Home Secretary are grounded in statistics that if you are black you are either six<sup>51</sup> or seven<sup>52</sup> times more likely to be stopped and searched than if you are white. Recent data suggest that over a quarter of stop and searches in 2013 may have been illegal.<sup>53</sup>

The MPS was originally described as institutionally racist following the handling of the Stephen Lawrence murder case in the 1999 MacPherson report.<sup>54</sup> Bevan Powell, previous chairman of the Black Police Officers Association ("the BPA"), marked the 20 year anniversary of the Lawrence death in 2013 to comment that the view of black and ethnic minority officers was that the MPS was still an institutionally racist organisation.<sup>55</sup> Janet Hills, current chairwoman of the BPA, reaffirmed this view in

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<sup>49</sup> Speech given by Home Secretary Theresa May at Police Federation 2014 on 21 May 2014 available at <https://www.gov.uk/government/speeches/home-secretarys-police-federation-2014-speech> accessed on 29 June 2014

<sup>50</sup> Ibid., The full quote reads as follows: "It is the same attitude expressed when young black men ask the police why they are being stopped and searched and are told it is "just routine" even though according to the law, officers need "reasonable grounds for suspicion". It is an attitude that betrays contempt for the public these officers are supposed to serve – and every police officer in the land, every single police leader, and everybody in the Police Federation should confront it and expunge it from the ranks"

<sup>51</sup> Press Association, 'Met Police to publish stop and search data', The Guardian (26 August 2014), available at <http://www.theguardian.com/uk-news/2014/aug/26/met-police-stop-and-search-data> accessed on 26 August 2014

<sup>52</sup> 'Viewed with Suspicion: The Human Cost of Stop and Search in England and Wales', Open Society Justice Initiative, April 2013, available at <http://www.opensocietyfoundations.org/sites/default/files/viewed-with-suspicion-human-cost-stop-and-search-in-england-and-wales-20130419.pdf> accessed on 29 June 2014

<sup>53</sup> Press Association, 'Met Police to publish stop and search data', The Guardian (26 August 2014), available at <http://www.theguardian.com/uk-news/2014/aug/26/met-police-stop-and-search-data> accessed on 26 August 2014

<sup>54</sup> The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William MacPherson of Cluny', February 1999, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/277111/4262.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf) accessed on 29 June 2014

<sup>55</sup> Muir, H., 'Metropolitan police still institutionally racist, say black and Asian officers', The Guardian, 21 April 2014, available at

March 2014, stating that the MPS was still institutionally racist and that there had been 'no change, no progression'.<sup>56</sup> There is already widespread perception, especially in the Black-Caribbean community, that the police unfairly target ethnic minorities in London: figures show that only 42% of those with a Caribbean background trust the police.<sup>57</sup>

The argument advanced is not necessarily that individual police officers are guilty of fabricating allegations (although in the tribunal this would be fairly straightforward), but that the fairness of a trial should not largely depend on the diligent performance of their duties by the prosecuting authorities.<sup>58</sup> In an atmosphere where prejudice against young black and other ethnic minority men is an accepted problem by the SSHD herself, and leaving aside the deeply troubling irony that, notwithstanding those concerns, it is the SSHD and her officers who are basing allegations of gang membership and other criminal activities on, amongst other things, incidents of stop and search, it is surely right to consider the diligence of the prosecuting authorities in Nexus appeals.

Given the questions raised about the integrity of the MPS, there is no more important time to ensure that the 'evidence' (which is, in reality, 'intelligence'<sup>59</sup>) provided in respect of an individual's alleged criminality is subjected to the full rigour of judicial process and scrutiny. Although the MPS deny that the scope of the operation has widened<sup>60</sup> Nexus now arguably provides the opportunity for the state to find foreign nationals responsible for acts amounting to criminal conduct in the tribunal system, 'circumventing the criminal process'<sup>61</sup> and dispensing with safeguards created and developed over the past 200 hundred years to protect defendants during criminal trials.

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<http://www.theguardian.com/uk/2013/apr/21/metropolitan-police-institutionally-racist-black> accessed on 29 June 2014

<sup>56</sup> Dodd, V., and Evans, R., 'Lawrence revelations: admit institutional racism, Met chief told', The Guardian, 7 March 2014, available at

<http://www.theguardian.com/uk-news/2014/mar/07/lawrence-revelations-institutional-racism-met-police> accessed on 29 June 2014

<sup>57</sup> Home Secretary Police Federation Speech, 21 May 2014

<sup>58</sup> *Davis, R v* [2008] UKHL 36 (18 June 2008), paragraph 15

<sup>59</sup> Webber, 'Deportation on suspicion', dated 19 September 2013

<sup>60</sup> Letter from Mark Rowley (AC, MPS) dated 24 July 2013

<sup>61</sup> Laville, S., 'Met crackdown on foreign suspects raises fears justice will be denied', The Guardian, 6 June 2013, available at <http://www.theguardian.com/uk/2013/jun/06/metropolitan-police-foreign-nationals-deportation>, accessed on 29 June 2014

### Reception in the English courts

Operation Nexus has been approved in the English courts. The leading authorities to date are *V*<sup>62</sup>; *Bah*<sup>63</sup>; and *Farquharson*<sup>64</sup>. All three cases involved appeals against orders made by the SSHD to deport on the basis of suspected criminality. In the cases of *V* and *Bah*, this included allegations of gang membership and involvement in associated crimes, including, in the case of *V*, murder.<sup>65</sup> In *Farquharson* the appellant had been accused of several counts of rape but had never been convicted.

In *V* initial arguments were raised in the tribunal in 2009 – seemingly before Nexus had been formalised into an operational procedure – as to the appropriate standard of proof to be applied in these cases. *V* had already been acquitted by a criminal court of an allegation of murder that was again being made against him, and the argument was made that this amounted to an abuse of process. The tribunal, in an interlocutory decision, found that the standard of proof to be applied was the normal civil standard; that the proceedings did not constitute an abuse of process; and that the tribunal was not engaged in a quasi-criminal trial ‘since deportation proceedings are not criminal proceedings’.<sup>66</sup>

This decision was challenged in the High Court by way of judicial review. It was argued by *V* that his acquittal meant that the SSHD could not re-run the arguments advanced by the prosecution in his murder trial by reference to the doctrine of *res judicata*, whereby the verdict of a jury cannot be questioned in any court for any purpose.<sup>67</sup> Further, the evidence relating to alleged possession of the murder weapon (which the MPS were seeking to rely on in the tribunal) came from an anonymous source. This meant that the appellant could not effectively challenge that evidence. Much of the remainder of the criminal intelligence evidence, it was averred, was second-hand hearsay.

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<sup>62</sup> *V, R (on the application of) v Asylum and Immigration Tribunal & Anor* [2009] EWHC 1902 (Admin)

<sup>63</sup> *Bah (EO (Turkey)) – liability to deport* [2012] UKUT 00196 (IAC)

<sup>64</sup> *Farquharson (removal – proof of conduct)* [2013] UKUT 00146 (IAC)

<sup>65</sup> *V*, paragraph 4

<sup>66</sup> *Ibid.*, paragraph 6

<sup>67</sup> *Ibid.*, paragraph 9

The argument that an acquittal in the criminal courts could not be reconsidered by a deportation tribunal was given short shrift by the High Court, who held that the doctrine had no place in criminal law<sup>68</sup>, relying on the case of *Hunter & Ors v Chief Constable of West Midlands Police*<sup>69</sup> in which, ironically, the wrongly convicted 'Birmingham Six' attempted to overturn their convictions by way of a tortious action against the police. The court also found that, whilst proceedings might be stopped by the tribunal if there would inevitably be unfairness<sup>70</sup>, the question for the tribunal was the weight to be accorded to the evidence, not its admissibility, and the mere fact of SSHD's reliance on that evidence did not render the proceedings 'unfair'.<sup>71</sup> In relation to the standard of proof, the High Court refused to be drawn on the question in an evidential vacuum.<sup>72</sup>

The first leading tribunal case concerned Mohammed Bah<sup>73</sup>, a 25 year old national of Sierra Leone who had been living in the UK since he was 7 years old. Mr. Bah had a number of minor convictions and only one sentence of imprisonment. However, the main basis for the decision to deport him was his alleged membership of a prominent south London gang.<sup>74</sup> The initial tribunal heard live evidence from three police officers regarding the appellant's alleged criminal activity, and had before them CRIS reports concerning the same. The police officers attending refused to disclose the names of their sources.<sup>75</sup> Nevertheless, the tribunal decided to accord weight to this evidence and accepted that Mr. Bah was a member of the gang as suggested by the attending police officers.

On appeal to the Upper Tribunal the case raised important issues relevant in Nexus cases concerning, inter alia, the admissibility of hearsay evidence and the applicable standard of proof. Relying on the case of *V* (above), the court found that there was no basis to suggest that hearsay or evidence from anonymous sources could be excluded.<sup>76</sup> It was reiterated that appellants in deportation proceedings could not rely

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<sup>68</sup> *V*, paragraph 40

<sup>69</sup> [1981] UKHL 13 (19 November 1981)

<sup>70</sup> *V*, paragraph 35; 60

<sup>71</sup> *Ibid.*, paragraph 46

<sup>72</sup> *Ibid.*, paragraph 50

<sup>73</sup> *Bah (EO (Turkey)) – liability to deport* [2012] UKUT 00196 (IAC)

<sup>74</sup> *Ibid.*, paragraph 4

<sup>75</sup> *Ibid.*, paragraph 6

<sup>76</sup> *Bah*, paragraph 53

on the right to a fair trial under Article 6 ECHR by reference to the established jurisprudence following *Maaouia*<sup>77</sup> (where immigration proceedings were found not to involve the determination of a civil right or obligation). No consideration was given to the question of whether the tribunal was in fact engaged in the 'determination of a criminal charge' (see discussion below). Relying on *Rehman*<sup>78</sup> the court found that the standard of proof in relation to past acts should be the balance of probabilities.<sup>79</sup>

The final leading authority concerns the case of Lincoln Farquharson, a 46 year old Jamaican national who arrived in the UK in 1999. At the time of the decision to make an order for deportation the appellant had not been convicted of any criminal offences in the UK. However, Mr. Farquharson had been accused of six separate offences of rape between 2006-2011. He had been arrested and charged on 5 separate occasions and kept on remand for several months. The CPS had brought prosecutions on two occasions, both of which resulted in hung juries.<sup>80</sup>

The Upper Tribunal in *Farquharson*, led by the same judge who determined the case of *Bah*, relied upon the legal principles evinced in that previous authority. The appellant's conduct was therefore decided according to the balance of probabilities, although the panel was apparently 'astute to the need to avoid speculation'.<sup>81</sup> The CRIS reports were found to be reliable documents upon which reliance could be placed.<sup>82</sup> The appellant was found, on the balance of probabilities, to constitute a danger to vulnerable women and his appeal dismissed.<sup>83</sup>

In the guidance given in *Farquharson* the panel warned that the SSHD should not allege conduct which she is not prepared to prove to the appropriate civil standard, and that if intelligence was so sensitive that it could not be disclosed then it should not be raised at appeal.<sup>84</sup> Further, the information derived from police sources should fairly reflect the strengths and weaknesses of the appeal, and should not be 'cherry

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<sup>77</sup> *Maaouia v France* (39652/98) [2000] ECHR 455 (5 October 2000)

<sup>78</sup> *Secretary of State For The Home Department v. Rehman* [2001] UKHL 47 (11th October, 2001)

<sup>79</sup> *Bah*, paragraph 63

<sup>80</sup> *Farquharson*, paragraph 19

<sup>81</sup> *Ibid.*, paragraph 27

<sup>82</sup> *Farquharson*, paragraph 27

<sup>83</sup> *Ibid.*

<sup>84</sup> *Farquharson*, paragraph 89

picked' to present only one side of the case.<sup>85</sup> The tribunal also requested that the information relied upon be filed and served in good time and that legal aid be 'granted readily in such cases'.<sup>86</sup>

Although some of the evidence against *Farquharson* was apparently compelling and, even with the protections accorded to defendants in criminal trials, may have resulted in similar findings being made, the case raises some serious concerns. The appellant in *Farquharson* was detained throughout this process<sup>87</sup> which would have seriously inhibited his ability to find legal representation or, if representing himself, to obtain evidence in his own cause. At a preliminary hearing on 22 January 2013 (the full hearing followed a month later) the appellant was without legal representation meaning that he would have had to have conducted his affairs throughout the 16 month<sup>88</sup> process by himself, and in a detained environment. The appellant's reading ability was 'not great'.<sup>89</sup>

Although it is not unusual for those charged with criminal offences and awaiting trial to be remanded in custody, in such cases the defendant has a right to a publicly funded representative who will undertake most of the preparation for trial. As outlined above, the appellant was not able to examine witnesses who were said to have given 'intelligence' to the police against him. The conclusions were reached by the Upper Tribunal on the balance of probabilities.

The principle argument advanced is that the process of finding an appellant responsible for acts which would otherwise amount to criminal conduct using the vehicle of deportation proceedings is unconstitutional. This is for two reasons: firstly, because the right to a fair trial under Article 6 ECHR should apply, and currently it does not; and secondly because the English common law guarantees the right to a fair hearing and, for the reasons explored below, we argue that this is breached in Nexus appeals.

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<sup>85</sup> *Farquharson*., paragraph 90

<sup>86</sup> *Ibid.*, paragraphs 92-93

<sup>87</sup> *Farquharson*, Annex A, paragraph 12

<sup>88</sup> *Ibid.*, paragraph 88

<sup>89</sup> *Ibid.*, paragraph 93

## Article 6

Article 6 ECHR protects the right to a fair trial. It applies in the determination of an individual's civil rights and obligations or 'in the determination of any criminal charge against him' and guarantees the right to a fair and public hearing by an independent tribunal established by law.<sup>90</sup> Where an individual is charged with a criminal offence and Article 6 applies, certain rights are guaranteed under Article 6(3). These include the right to have adequate time and facilities to prepare a defence (Article 6(3)(b)); the right to publicly funded legal representation (Article 6(3)(c)); and the right of a defendant to examine witnesses against him (Article 6(3)(d)).

Since the case of *Maaouia v France*<sup>91</sup> it has been repeatedly found that Article 6 does not apply to immigration proceedings because, in normal circumstances, the courts are not engaged in the determination either of an individual's civil rights or obligations or of a 'criminal charge'. Given that deportation proceedings do not involve the determination of 'civil rights' and do not normally concern the 'determination' of a criminal charge<sup>92</sup> Article 6 rights have not been considered in Nexus appeals. We posit that Nexus tribunals are arguably 'determining a criminal charge' and Article 6 should therefore apply.

In order to assess the strength of this proposition, it is necessary to consider what is meant by the various terms of Article 6 by reference to the Strasbourg jurisprudence on the point. To do this we pose three questions: firstly, is the Nexus appellant subject to a 'charge' for the purposes of Article 6; and if so, secondly, can the 'charge' be said to be 'criminal'; and thirdly, is the tribunal engaged in the 'determination' of that 'criminal charge'.

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<sup>90</sup> Article 6(1) European Convention on Human Rights, 1950

<sup>91</sup> [2000] ECHR 455 (5 October 2000)

<sup>92</sup> *Bah*, paragraph 53: [the appellant] 'cannot rely on jurisprudence relating to the right of fair trial in Article 6 of the ECHR ... because it is well established that deportation proceedings are neither criminal proceedings nor involve the determination of a civil right or obligation'

## 'Charge'

The concept of a 'charge' is autonomous, which means that it has to be understood within the context of the ECHR and not solely within its definition in domestic law.<sup>93</sup> Whilst the relevant domestic law is not without importance, it serves only as a starting point in determining whether an individual is subject to a 'charge'.<sup>94</sup> It is therefore necessary to consider the way in which the term has been interpreted by the Strasbourg court.

The case of *Ozturk v Germany*<sup>95</sup> concerned an applicant who appealed against the direction of a German court that he pay the cost of a court interpreter. The proceedings related to an appeal against the imposition of a fine for a motoring offence. The government attempted to argue that Mr. Ozturk did not have the status of a person 'charged with a criminal offence' because the statutory framework under which the fine had been issued did not provide for any 'charge' to be made, or refer to the 'accused'.

In deciding the case the ECtHR referred to its well-established case law on the issue whereby 'charge' for Article 6 purposes may in general be defined as 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'. The court also found that a 'charge' could 'take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect'.<sup>96</sup> As a result, it was found that the applicant became subject to a 'charge' for the purposes of Article 6 when the relevant decision was communicated to him.<sup>97</sup>

In the case of *Deweere v Belgium*<sup>98</sup> a Belgian butcher was found to have been charging too much for his produce and ordered to pay a 'friendly settlement' or face closure of his premises and imprisonment. Reciting the relevant jurisprudence concerning the meaning of 'charge' as also referred to in *Ozturk*, the Strasbourg

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<sup>93</sup> *Mikolajova v Slovakia* (Application no. 4479/03), 18 January 2011

<sup>94</sup> *König v. Germany* (Series A no. 27), 28 June 1978, paragraph 89

<sup>95</sup> *Ozturk v Germany* (Application no. 8544/79), 21 February 1984

<sup>96</sup> See also *Foti v Italy* (10 December 1982), Series A no. 56, p. 18, paragraph 52

<sup>97</sup> *Ozturk*, paragraph 55

<sup>98</sup> *Deweere v Belgium* (Application no. 6903/75), 27 February 1980

court found that on the day the applicant received this letter from the Belgian authorities he was found to have been under a 'criminal charge'<sup>99</sup>, despite the fact that he was not arrested, and was not provided with any official notification of impending prosecution.<sup>100</sup>

In the case of *Mikolajova*, referring to the *Deweer* decision, the court found that due to the 'prominent place held in a democratic society [of] the right to a fair trial...a 'substantive' rather than a 'formal' conception of the 'charge' referred to by Article 6' should be adopted where courts 'look behind the appearances and examine the realities of the procedure in question in order to determine whether there has been a 'charge' within the meaning of Article 6'.<sup>101</sup>

Finally, in the case of *Neumeister v Austria*<sup>102</sup> the court investigated both the English and French versions of the Convention, and noted the French referred simply to 'the accused'. The court summarised that in both interpretations of the term refer to 'the legal act of requesting the Court to rule on whether the allegation that an individual has committed a punishable offence is well-founded'.<sup>103</sup>

Applying the learning of the Strasbourg court to the current subject matter, the argument advanced is that those who are subject to Operation Nexus are also subject to a 'charge' within the autonomous meaning of Article 6. It is surely arguable that a deportation order alleging criminal conduct comes within the 'other measures which carry the implication of ... an allegation [of criminal conduct]' as defined in *Ozturk* and, we argue, it is from this point that the individual is subject to a criminal charge. It would be difficult to see how such an allegation could not 'substantially affect the situation of the suspect' given that he or she faces deportation in the event and to the extent that those allegations are proven.

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<sup>99</sup> *Deweer.*, paragraph 46

<sup>100</sup> *Ibid.*, paragraph 43

<sup>101</sup> *Mikolajova*, paragraph 41

<sup>102</sup> *Neumeister v Austria (Application no1936/63)*, 27 June 1968

<sup>103</sup> *Neumeister.*, paragraph 28

'Criminal'

The leading case on the question of whether or not a charge is 'criminal' in nature is *Engel v Netherlands*.<sup>104</sup> The court asked itself firstly, whether the offence was criminal under the law of the Member State; secondly, it considered the nature of the offence; and thirdly, it considered the nature and degree of the severity of the penalty.<sup>105</sup> With regards to the first and second issues, if the same charges in Nexus cases were pursued through the criminal courts they would normally be criminal offences in the UK, and the alleged offence will usually be, at least arguably, criminal in nature. In *V* the alleged conduct included murder and in *Farquharson* it was rape.

There may be some debate over whether or not membership of a gang might be considered a 'criminal' charge for the purposes of Nexus. In both *V* and *Bah* the SSHD alleged that such membership formed at least part of the basis of the decision to deport. Appellants may then be in a position where they are only able to argue that certain allegations are protected by Article 6 (those punishable under the criminal law), although may not be in a similar position in relation to allegations which are not so punishable (e.g. membership of a gang, which is not a criminal offence *per se*). Where the conduct clearly amounts to a criminal offence (e.g. rape in *Farquharson*) but is expressed in terms of the appellant being found to present a 'danger to women' (as *Farquharson* was in the final reckoning, rather than 'guilty' of rape) it is still arguably the case that, if the conduct did take place, it would be punishable under UK criminal law and therefore for these purposes a strong argument would remain that it is an allegation of 'criminal' conduct.

It is the third issue which presents a potential stumbling block to appellants raising Article 6 in Nexus cases, and specifically the consideration of the 'nature and severity' of the penalty which eventuates as a result of the decision to deport. The argument that will inevitably be made, following *Maaouia*, is that deportation involves no penalty, or punishment, and is essentially an exercise in prevention.<sup>106</sup>

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<sup>104</sup> *Engel v Netherlands* (Application no 5100/71), 8 June 1976

<sup>105</sup> *Ibid.*, paragraphs 82-83; and *Ozturk*, paragraph 50

<sup>106</sup> *Maaouia*, paragraph 39

Although the three factors listed in *Engel* appear to be considerations rather than requirements, and are accorded separate weight (for instance, ‘the very nature of the offence is a factor of great import’<sup>107</sup> whereas the classification of the offence under domestic law ‘provides no more than a starting point’<sup>108</sup>), it was suggested by Lord Bingham in *Re B*<sup>109</sup> that no Strasbourg authority has ever held proceedings to be ‘criminal’ where an adverse outcome for the defendant cannot result in a penalty.<sup>110</sup>

However, in his concurring opinion in *Maaouia*, Sir Nicholas Bratza states that ‘the situation would be different if the order for deportation were made by a court following a conviction for a criminal offence and formed an integral part of the proceedings resulting in the conviction.’<sup>111</sup> In the context of Nexus deportation hearings, a judge is making a decision in relation to the question of whether or not the relevant behaviour and/or conduct is proven, and then whether deportation is justified on basis of those findings. Importantly, Bratza goes on to find that ‘the procedural guarantees of Article 6 would clearly apply to the criminal proceedings as a whole, whether or not the deportation order which resulted was to be regarded as a penalty or as having an exclusively preventative function’.<sup>112</sup>

Whereas in the normal course of events there is a separation between the body which makes a decision on conduct (usually a criminal court), and the body which decides whether the deportation can be justified on the facts of the case (usually a tribunal), in a Nexus appeal hearing there is a conflation of these two processes, where a judge is required not only to decide on the lawfulness of exclusion, but also where the court in which he or she sits ‘form[s] an integral part of the proceedings’ where the conduct or allegations are proven. The words used by Sir Nicholas Bratza are ‘resulting in the conviction’, but in our view and by reference to the principle in *Neumeister*<sup>113</sup>, the fact that a deportation tribunal is not formally ‘convicting’ an appellant does not affect the principle that it is making findings in relation to the

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<sup>107</sup> *Engel*, paragraph 82

<sup>108</sup> *Ibid.*

<sup>109</sup> *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340

<sup>110</sup> *Ibid.*, paragraph 28; and confirmed in *R (McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London Borough Council* [2002] UKHL 39

<sup>111</sup> *Maaouia*, see Concurring Opinion of Sir Nicholas Bratza

<sup>112</sup> *Ibid.*

<sup>113</sup> *Op. Cit.*, n.105, above: ‘the terms ‘criminal charge’ and ‘accusation’ ... refer, in both the Continental and the Anglo-American systems, to the legal act of requesting the Court to rule on whether the allegation that an individual has committed a punishable offence is well-founded’ (paragraph 28)

conduct of that individual in the same court that then decides on the lawfulness of deportation.

We argue, as a result of this conflation, and based also on the reasoning advanced by Bratza in his concurring opinion in *Maaouia*, that the preventative function of deportation proceedings, or the lack of a punitive element, should carry little or no weight in the *Engel* test to decide whether or not the proceedings are ‘criminal’, and that emphasis should be placed on the first two limbs: namely the classification of the offences under domestic law and the nature of the offences in question. It was clearly envisaged in Bratza’s concurring opinion that Article 6 *could* apply in a case whether or not the deportation order was regarded as a punishment or having an exclusively preventative function. As a result, we would argue that, despite the finding in *Maaouia* that deportation contains no punitive element, the charges laid against appellants in Nexus appeal cases are criminal in nature.

It should also be noted that, although Article 6 has been repeatedly held not to apply to deportation proceedings following *Maaouia*, the decision was specifically premised on deportation proceedings involving appellants with previous convictions and conduct proven in the criminal courts.<sup>114</sup> Interestingly, the French government commented as part of their argument that a deportation court or tribunal was not involved in the ‘determination’ of a criminal charge: that ‘such proceedings did not entail any decision by the relevant court on the merits of the charge’ and that the deportation tribunal or court ‘did not decide whether the applicant was guilty of the offence forming the basis of the exclusion order’.<sup>115</sup>

In Nexus appeals, this is precisely what the tribunal is tasked to do.

### ‘Determination’

The final question is whether or not the tribunal is engaged in a ‘determination’ of a ‘criminal charge’ for the purposes of Article 6. There is not a great deal of case law regarding the meaning of ‘determination’ in this context, although *Neumeister* notes

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<sup>114</sup> *Maaouia*, paragraph 39

<sup>115</sup> *Ibid.*, paragraph 30

that ‘the terms ‘criminal charge’ and ‘accusation’ ... refer, in both the Continental and the Anglo-American systems, to the legal act of requesting the Court to rule on whether the allegation that an individual has committed a punishable offence is well-founded’.<sup>116</sup> We argue that the tribunal is engaged in a similar activity: ruling on whether the allegation in question is ‘well-founded’ and is therefore ‘determining’ the criminal charge for the purposes of Article 6.

In summary then, it is at least arguable that Article 6 applies to Nexus deportation proceedings on the basis that the tribunal is ‘determining a criminal charge’. If this is found to be the case then it will have important ramifications in two respects. Firstly, appellants will have a right to publicly funded legal representation which they currently do not. Secondly, it will severely restrict the way in which the SSHD is able to rely upon testimony given by anonymous witnesses and the other ways in which cases are currently presented.

### Common law

If Nexus hearings are not covered by Article 6, we argue that, further and in the alternative, they breach the fundamental right to a fair trial guaranteed under English common law, and a right that existed long before the ratification of the ECHR. To make a hearing fair, we argue, the following rights should be included within the Nexus trial process, each of which will be explored below: the application of a standard of proof commensurate with the gravity of the charge; the right to cross-examine a witness giving evidence against you (confrontation) and restrictions on the use of hearsay evidence and particularly anonymous testimony; and other features, including publicly funded legal representation.

### Standard of proof

Perhaps the greatest concern in Nexus appeals is the standard of proof applied. The standard of proof used in civil courts to determine past conduct is the balance of

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<sup>116</sup> *Op. Cit.*, n.105, above

probabilities<sup>117</sup> whereas in criminal courts a fact has to be proved to have happened 'beyond a reasonable doubt'.<sup>118</sup> The approach adopted in Nexus appeal cases is that facts must be proven on the balance of probabilities.<sup>119</sup>

In some of the leading cases discussed above the tribunal does remind itself that the civil standard 'is flexible according to the nature of the allegation made'.<sup>120</sup> However, it seems to ignore its own guidance in *Farquharson*, for instance, when considering two allegations of rape made against the appellant (undoubtedly serious allegations) the tribunal finds 'it more probable than not' that one incident occurred<sup>121</sup> and that 'on balance' another incident occurred, applying the civil standard in both cases.<sup>122</sup>

In coming to its conclusions with regards to the standard of proof, the panel in *Bah* rely heavily on the House of Lords decision in *Rehman*<sup>123</sup>, and the way in which it was interpreted in *Zatuliveter*.<sup>124</sup> The only other case which is referenced in the tribunal's reasoning with regard to the standard of proof is *Re B*<sup>125</sup> which, as explained above, does not appear to have been taken into account. The findings made in *Rehman* concern the prevention of terrorist acts, and in the case of *Zatuliveter*, spying by a foreign state. Both cases were originally heard by the Special Immigration Appeals Commission (SIAC), a court reserved for national security threats, and seek to address the question of whether or not an individual 'is a danger to national security'<sup>126</sup>, where 'the cost of failure can be high'.<sup>127</sup> In *Rehman* the spectre of a catastrophic terrorist attack is posed as the potential consequence of an inflated standard of proof and the judgment specifically cites the 11 September 2001 attacks which occurred shortly before judgment was handed down.<sup>128</sup>

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<sup>117</sup> *Newis v Lark* (1571) 2 Plowd 408; *Cooper v Slade* (1858) 6 HL Cas 746; *Lancaster v Blackwell Colliery Co Ltd* (1919) 89 LJKB 609, HL

<sup>118</sup> *Horncastle*, paragraph 24

<sup>119</sup> *Bah*, paragraph 63; *Farquharson*, paragraph 27

<sup>120</sup> *Bah*, paragraph 63

<sup>121</sup> *Farquharson*, paragraph 50

<sup>122</sup> *Ibid.*, paragraph 61

<sup>123</sup> [2001] UKHL 47

<sup>124</sup> *Zatuliveter v SSHD* [2011] UKSIAC 103/2010, paras 5-8

<sup>125</sup> [2001] 1 WLR 340

<sup>126</sup> *SSHD v Rehman* [2000] 2 WLR 1240, paragraph 44 (Court of Appeal, Lord Woolf MR)

<sup>127</sup> *Rehman* (HL), paragraph 62

<sup>128</sup> *Ibid.*, paragraph 29

In *Zatuliveter*, the SIAC court refers to the fact that since *Rehman* it has been able to make findings of past fact on the balance of probabilities. The panel in *Zatuliveter*, however, also state that it would not be 'impossible to envisage circumstances in which a decision to deport' could be made even if the facts could not be established on the balance of probability.<sup>129</sup> The example is then given of a decision to exclude an assassin. In *Rehman* Lord Hoffman specifically doubts the utility of the concept a standard of proof in SIAC cases at all, distinguishing this class of case from civil or criminal cases.<sup>130</sup>

The context and undercurrent of these national security cases is that, if the standard of proof is set too high then the country runs the risk of a terrorist attack (*Rehman*), or a similar national scale disaster involving foreign spies (*Zatuliveter*). This much is clear from the language and tenor of these decisions. As a result, they are arguably of dubious authority in the context of a tribunal charged with deciding, essentially, whether an appellant has committed crimes punishable under English criminal law.

Indeed, when counsel for *Bah* attempted to draw an analogy with deportation decisions made on national security grounds<sup>131</sup>, the comparison was found to be 'misconceived', specifically stating that 'proceedings before the [tribunal] are not criminal proceedings or SIAC appeals'.<sup>132</sup> It is strange, therefore, that when it comes to the standard of proof applied, the panel in *Bah* refer exclusively to two SIAC cases.

More surprising still is the fact that no heed is paid to the long line of cases referring to the standard of proof in civil courts where allegations of a criminal nature have been made. It is clear that the 'civil standard is a flexible standard to be applied with greater or lesser strictness according to the seriousness of what has to be proved and the implications of proving those matters'.<sup>133</sup> In a case involving deprivation of

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<sup>129</sup> *Zatuliveter*, paragraph 6

<sup>130</sup> *Rehman* (HL), paragraph 5: 'In a criminal or civil trial in which the issue is whether a given event happened, it is sensible to say one is sure that it did, or that one thinks it more likely than not that it did. But the question in the present case is not whether a given event happened but the extent of the future risk'.

<sup>131</sup> *Bah*, paragraph 57

<sup>132</sup> *Ibid.*

<sup>133</sup> *B v Chief Constable of Avon & Somerset Constabulary* [2000] EWHC 559 (QB) (05 April 2000), paragraph 30, referring to *Bater v Bater* (1951) P 35; *Hornal v Neuberger Products Ltd* [1957] 1 QB 247; *Khawaja v Secretary of State for the Home Department* [1984] AC 74.

liberty it was found that the difference between the civil standard and the criminal standard would be 'largely illusory'.<sup>134</sup> It is generally accepted that the more serious the allegation, for example fraud<sup>135</sup>, crime<sup>136</sup> or the sexual abuse of children<sup>137</sup>, the higher will be the required degree of proof: the standard of proof must be consistent with the 'gravity of the charge'.<sup>138</sup>

In the case of *McCann* although proceedings to obtain an anti-social behaviour order were civil under domestic law, 'given the seriousness of the matters involved' in such proceedings 'at least some reference to the heightened civil standard (which is virtually indistinguishable from the criminal standard) will usually be necessary'<sup>139</sup> and magistrates in all such cases were directed by the House of Lords in that case to apply the criminal standard of proof.

In the case of *Breslin & Ors*<sup>140</sup> the families of the victims of the Bloody Sunday bombings brought a tortious action against the alleged perpetrators for unlawful killing. Counsel for the defendants relied heavily on the decision in *McCann* to argue that the appropriate standard of proof, given the gravity of the charge and the circumstances of the case, should be the criminal standard. However, in distinguishing *McCann* the presiding judge found that the litigation was between 'two private sets of individuals' and was a tortious claim and therefore the civil standard applied.<sup>141</sup> No such reasons have been given to explain why the reasoning in *McCann* has not been applied to Nexus tribunals.

Even though *Maaouia* found that deportation or removal does not constitute a penalty for the purposes of Article 6, the same decision nevertheless recognises that these types of decisions have 'major repercussions' for those subject to them.<sup>142</sup> In

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<sup>134</sup> Ibid., paragraph 31; and see also *Percy v Director of Public Prosecutions* [1995] 1 WLR 1382

<sup>135</sup> *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, CA; followed in *Nishina Trading Co Ltd v Chiyoda Fire and Marine Insurance Co Ltd* [1969] 2 QB 449, [1969] 2 All ER 776, CA; *Chalmers v Shackell* (1834) 6 C & P 475 (forgery)

<sup>136</sup> *Re Dellow's Will Trusts, Lloyds Bank Ltd v Institute of Cancer Research* [1964] 1 All ER 771, [1964] 1 WLR 451; *Miles v Cain* (1989) Times, 15 December, CA (civil proceedings for rape); *Herbert v Poland* (1932) 44 LI L Rep 139 (arson and conspiracy)

<sup>137</sup> *Re H and R (minors)* (sexual abuse: standard of proof) [1996] AC 563

<sup>138</sup> *Re Bramblevale Ltd* [1970] Ch 128, p.137G, where imprisonment could result in contempt proceedings proof beyond reasonable doubt was required

<sup>139</sup> *McCann*, paragraph 37

<sup>140</sup> *Breslin & Ors v Mckevitt* [2011] NICA 33 (07 July 2011)

<sup>141</sup> Ibid., paragraph 24

<sup>142</sup> *Maaouia*, paragraph 38

addition, addressing the type of allegation made (and leaving the consequences to one side), it is also clear that the majority of the allegations made in Nexus cases relate to criminal conduct, or conduct that would be criminal if it was pursued under the criminal law. The gravity of the charges, or allegations, cannot be in doubt.

Finally, there is arguably strong support for the proposition that the standard of proof required is dependent on the allegation made from the first leading case of *V* in which the court specifically declines to comment on the applicable standard of proof on the basis that the exercise would have been undertaken in an evidential vacuum.<sup>143</sup> This heavily implies that the nature of the accusation and evidence adduced needs to be known before an assessment is made as to the correct standard of proof to be applied.

### Confrontation and 'hearsay' evidence

It is a long-established principle of the English common law that, the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence.<sup>144</sup> The root of this right date back to Ancient Greece, but in England it is referred to in the King James Bible<sup>145</sup>, by Shakespeare in *Richard III*<sup>146</sup>, and at the trial of Sir Walter Raleigh for treason in 1603.<sup>147</sup> It has been a fundamental tenet of the common law since at least 1720.<sup>148</sup>

Bentham considered the cross-examination of adverse witnesses as 'the indefeasible right of each party, in all sorts of causes' and criticised inquisitorial procedures practised on the continent, where evidence was received under a 'veil of secrecy' and the door was left 'wide open to mendacity, falsehood, and partiality.'<sup>149</sup>

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<sup>143</sup> *V*, paragraph 50

<sup>144</sup> *Davis*, paragraph 5

<sup>145</sup> King James Bible, Acts 25:16: 'It is not the manner of the Romans to deliver any man to die, before that [of which he] is accused have the accusers face to face, and have licence to answer for himself concerning the crime laid against him'

<sup>146</sup> Shakespeare, W., *Richard III*: 'face to face / And frowning brow to brow, ourselves will hear / The accuser and the accused freely speak'

<sup>147</sup> Metcalfe, E., 'Time for the UK supreme court to think again on hearsay', *The Guardian*, 15 December 2011

<sup>148</sup> *Duke of Dorset v Girdler* (1720) Prec. Ch. 531-532, 24 ER 238: 'the other side ought not to be deprived of the opportunity of confronting the witnesses, and examining them publicly, which has always been found the most effectual method of discovering of the truth'

<sup>149</sup> Bentham, *Rationale of Judicial Evidence* (1827), Vol II, Bk III, pp 404, 408, 423, referred to in *Davis*, paragraph 5

In the United States, borrowing from the English common law, the right to cross-examine a witness has been elevated to a constitutional right, described as 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal'.<sup>150</sup>

Notwithstanding the value accorded to cross-examination in England as an enduring aspect of the adversarial legal process, the rules governing a Nexus appeal are clear: the tribunal 'may not compel a party or witness to give any evidence...which he could not be compelled to give...at the trial of a civil claim' in the same jurisdiction.<sup>151</sup>

In *Davis*, in which the House of Lords rejected attempts to circumscribe the right of cross-examination due to concerns regarding witness intimidation, the court agreed with the 1975 Gardiner committee<sup>152</sup>, tasked to investigate the use of anonymous witnesses in Northern Ireland during the troubles, which found that granting anonymity to witnesses would place 'very serious limitations...on effective cross-examination [which] would imperil the whole concept of a fair trial'.<sup>153</sup> The court in *Davis* found that there could be no better illustration of the strength of the common law requirements on the point.<sup>154</sup>

The practical issues for an appellant in Nexus appeals are the same as for defendants in criminal trials for the three reasons referred to in *Davis*<sup>155</sup>: firstly, that no investigation can be conducted by the accused's legal representatives into the witness' background to ascertain whether he has a general reputation for untruthfulness, whether he has made previous inconsistent statements nor to investigate other matters which might be relevant to his credibility in general; secondly, it is more difficult to make enquiries to establish that the witness was not at places on the occasions mentioned by him; and thirdly, it heightens the witness' sense of impregnability and increases the temptation to falsify or exaggerate. This

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<sup>150</sup> *Pointer v Texas* 380 US 400, 405 (1965)

<sup>151</sup> Asylum and Immigration Tribunal Rules 2005, Rule 51(2)

<sup>152</sup> Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland, Chairman: Lord Gardiner (*Cmd. 5847*), January 1975

<sup>153</sup> Quoted in *Davis*, paragraph 6

<sup>154</sup> *Davis*, paragraph 40

<sup>155</sup> *Ibid.*, paragraph 51, referring to the judgment of Ackermann J in the South African case of *State v Leepile* (5) 1986 (4) SA 187, 189

would be especially so where the testimony of the witnesses concerned constitutes the sole or decisive evidence implicating the appellant.<sup>156</sup>

Where evidence is adduced from witnesses who are either anonymous or absent (or both) from the hearing, their evidence becomes 'hearsay': that is, any statement of fact other than one made, of his own knowledge, by a witness in the course of oral testimony.<sup>157</sup> The starting point in relation to the admissibility of this evidence in Nexus hearings (and in all other immigration tribunal hearings) is that it is admissible as long as it 'appears to be relevant...even if that evidence would be inadmissible in a court of law'.<sup>158</sup>

The relaxed approach of the civil courts with regard to the admissibility of hearsay evidence is to be contrasted with the strict rules which exist in the criminal justice system. The reason for the general exclusion of this type of evidence in criminal proceedings is that it is potentially unreliable.<sup>159</sup> In addition, 'the weight to be given to such evidence [is] less easy to appraise than that of evidence delivered by a witness face to face with the defendant and subject to testing by cross-examination'.<sup>160</sup> Its exclusion provides a safeguard against such untested evidence being given a 'probative force which it does not deserve'.<sup>161</sup>

Whilst by and large hearsay remains excluded from the criminal process exceptions have been created by legislation which enables certain evidence to be admitted in certain circumstances, for example if witnesses are unavailable through death, illness, or absent through fear.<sup>162</sup> However, the relaxation of these rules does not extend to witnesses who are not only anonymous but absent<sup>163</sup> and, importantly, in the criminal process a defendant who is faced with hearsay evidence will be entitled to ask the court to call upon the Crown to investigate the credibility of any absent witness and to disclose anything capable of challenging it.<sup>164</sup> Irrespective of the

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<sup>156</sup> *Davis*, paragraph 59

<sup>157</sup> *Horncastle & Ors, R. v* [2009] UKSC 14 (09 December 2009), paragraph 20

<sup>158</sup> Rule 51(1) Asylum and Immigration Tribunal Rules 2005 (as amended)

<sup>159</sup> *Horncastle*, paragraph 21

<sup>160</sup> *Ibid.*

<sup>161</sup> *R v Blastland* [1986] AC 41 at 53

<sup>162</sup> See, *inter alia*, s.116 Criminal Justice Act 2003

<sup>163</sup> *Horncastle*, Annex 4, paragraph 13

<sup>164</sup> *Ibid.*, paragraph 36

merits of the individual case concerned, a criminal court would never be able to reach a conclusion of fact regarding the conduct of an individual based on evidence given by anonymous and absent witnesses.<sup>165</sup>

The SSHD will inevitably argue that the principles outlined above are relevant only in criminal trials. However, many of the concerns expressed in *Davis*, are equally relevant in Nexus appeal hearings. In Nexus appeals the task of the tribunal judge is essentially the same as a jury in a criminal trial: to decide whether or not alleged conduct took place. Other than by reference to procedural rules, it is not clear why the use of anonymous witnesses is declared to be fair in one set of proceedings, and unfair in another.

### Other features

There are three further features of the Nexus appeals process which suggests that it is unlawful.

Firstly, the lack of access to publicly funded legal representation. As discussed above, for the majority of the process the appellant in *Farquharson* was without legal representation, and spent most of the time detained. Legal aid is no longer available to those appealing against decisions to deport them and appellants must now instruct representatives on a private basis. The expressions of the bench in *Farquharson* that legal aid should be granted 'readily' in such cases is not enough to persuade the Legal Aid authorities to make exceptions to the general rule.<sup>166</sup>

The cost of representation is greater than normal (compared to other deportation cases) given the number of documents usually served in the form of CRIS reports. Whilst there is regular argument about the rates paid to publicly funded lawyers in criminal cases, there is rarely any disagreement that solicitors and/or barristers should be available to represent litigants where they are accused of crimes by the state and will be at risk of losing their liberty if found guilty.<sup>167</sup>

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<sup>165</sup> *Horncastle.*, Annex 4, paragraph 13

<sup>166</sup> *Op. cit.*, n.86, above

<sup>167</sup> A fine example of the assumption that litigants in complex criminal cases should be entitled to publicly funded representation is clear from the conspicuous absence of any consideration of, or reference to, the rationale

Furthermore, defendants in criminal trials will often instruct experts (at public expense) to comment on the reliability of certain evidence adduced by the prosecution. This is particularly the case in relation to medical and DNA evidence. In the case of *Farquharson*, medical evidence was relied on by the tribunal without demur<sup>168</sup>, and the appellant, without legal representation was not in a position to challenge that reliance which he may well have been in a position to do in a criminal trial.

Secondly, in criminal cases where an individual is accused of serious wrongdoing, there is a right to be tried by a jury of your peers. This right goes back to Magna Carta<sup>169</sup> and 'represents the value that society places on the judgment of peers when citizens are accused of serious crime'.<sup>170</sup> Polls routinely find that the vast majority of people think jurors are fairer than judges in deciding whether a person is guilty.<sup>171</sup> The court in *V* was unimpressed by the submission that 'professional' tribunal judges were not properly equipped to maintain the proper degree of objectivity in considering the appropriate weight to accord the evidence advanced on behalf of the Home Office.<sup>172</sup> However, this begs the question as to why we have juries at all if judges are adequately equipped to perform this task alone.

Thirdly, there are serious concerns about the dearth of information relating to Nexus. There does not, for example, appear to be any publicly available policy governing how an individual is referred to Nexus by the police.<sup>173</sup> The amount of conflicting information regarding the operation from various sources (as explored above) seems to suggest there is not even an unpublished policy governing the operation of the

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underlying the need for such representation in *R v Crawley* [2014] EWCA Crim 1028, a case concerning the absence of suitably qualified QCs in serious fraud cases.

<sup>168</sup> *Farquharson*, paragraph 48

<sup>169</sup> Wagner, A., 'Is the historic right to trial by jury slipping away?', UK Human Rights Blog, (13 April 2010), available at <http://ukhumanrightsblog.com/2010/04/13/is-the-historic-right-to-trial-by-jury-slipping-away/> accessed on 25 August 2014

<sup>170</sup> Paul Mendelle QC, Chairman of the Criminal Bar Association, quoted in Porter, H., 'Trial by jury is basis of British justice', *The Guardian*, (1 April 2010), available at <http://www.theguardian.com/commentisfree/henryporter/2010/apr/01/trial-by-jury-heathrow-case> accessed on 25 August 2014

<sup>171</sup> Grimes, J., 'Importance of Trial by Jury', *The Huffington Post* (16 March 2014), available at [http://www.huffingtonpost.co.uk/jonathan-grimes/importance-of-trial-by-jury\\_b\\_4965104.html](http://www.huffingtonpost.co.uk/jonathan-grimes/importance-of-trial-by-jury_b_4965104.html) accessed on 25 August 2014

<sup>172</sup> *V*, paragraph 44

<sup>173</sup> FOI Request 32144

scheme. The Home Affairs Select Committee itself complained about the opacity of Nexus and requested that further evidence be provided.<sup>174</sup> In light of relatively recent guidance from the Supreme Court<sup>175</sup>, it is questionable whether, in the absence of a policy which governs its operation, Nexus can be considered lawful.

### Ultra Vires?

The admissibility of hearsay evidence; the right to cross-examine a witness; the correct application of the standard of proof; and access to justice in the form of legally aided representation are fundamental tenets of the common law right to a fair trial, which is itself a basic constitutional right in England and Wales. We briefly examine how the status of these rights might be used to challenge the way in which Nexus tribunals operate.

In *Ex P Morgan Grenfell*<sup>176</sup> Lord Hoffman described the way in which the courts will ordinarily construe general words in a statute which have the effect of overriding fundamental human rights 'as not having been intended to do so' and that 'an intention to override such rights must be expressly stated or appear by necessary implication'.<sup>177</sup> This principle of statutory construction 'has long been applied to the question of whether a statute is to be read as having overridden some basic tenet of the common law'.<sup>178</sup> The House of Lords<sup>179</sup> had earlier accepted that Parliament can legislate 'contrary to fundamental principles of human rights' but must 'squarely confront what it is doing and accept the political cost' given that the 'constraints on its power are ultimately political, not legal'.<sup>180</sup>

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<sup>174</sup> Op. Cit., [Home Affairs Committee - Fifteenth Report - The work of the Immigration Directorates (April - September 2013)]

<sup>175</sup> *Lumba (WL) v Secretary of State for the Home Department* [2011] UKSC 12 (23 March 2011): 'The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute: see *In re Findlay* [1985] AC 318, 338E. There is a correlative right to know what that currently existing policy is, so that the individual can make relevant representations in relation to it' (paragraph 35)

<sup>176</sup> *R (Ex P Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21

<sup>177</sup> *Ibid.*, paragraph 8

<sup>178</sup> *Ibid.*, paragraph 44; referring also to *Viscountess Rhondda's Claim* [1922] 2 AC 339; *B v DPP* [2000] 2 AC

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<sup>179</sup> *Regina v. Secretary of State for the Home Department Ex Parte Simms* [2000] 2 AC 115 at p.131

<sup>180</sup> *Ibid.*, p.131

The fundamental right arising in *Ex Parte Morgan Grenfell* concerned legal professional privilege and it was held that, although the provision in question<sup>181</sup> clearly stated that a person so required must deliver to an inspector documents pertaining to tax liabilities, the claimants in the case were not required to deliver up the relevant documents because the ‘statute [did] not contain any express words that abrogate[d] the taxpayer’s common law right to rely upon legal professional privilege.’<sup>182</sup> Where there is no express enactment which abrogates the fundamental right, the provision must do so by ‘necessary implication’<sup>183</sup> which is a matter of ‘express language and logic not interpretation’<sup>184</sup>

Alternatively, and especially when dealing with secondary legislation which is relevant for our purposes, the provision giving authority must be ‘within the reasonable range of responses which Parliament could have intended’.<sup>185</sup> For example ‘if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, ‘Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.’<sup>186</sup> As found by Lady Hale ‘the more fundamental the right interfered with, and the more drastic the interference, the more difficult it is to read a general rule or regulation making power as authorising that interference.’<sup>187</sup>

We argue that the interference with the common law right to a fair trial, itself a prized right amongst rights, can, for the reasons given above, properly be described as ‘drastic’ and that Parliament cannot have intended to abrogate the rights of appellants in this way. In the absence of a finding that Article 6 applies to Nexus appeals, we would argue that the secondary legislation<sup>188</sup> which governs deportation appeals should be read down to exclude evidence provided by anonymous witnesses, and to enable witnesses to be summoned. If these provisions are not capable of bearing such a reading then they should, in Nexus appeals, arguably be

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<sup>181</sup> S.20 Taxes Management Act 1970 (as amended)

<sup>182</sup> *Ex parte Morgan Grenfell*, paragraph 45

<sup>183</sup> *R v SSHD ex parte Leech* [1994] QB 198

<sup>184</sup> *Ex parte Morgan Grenfell*, paragraph 45

<sup>185</sup> *Kruse v Johnson* [1898] 2 QB

<sup>186</sup> *Ibid.*, paragraphs 99-100

<sup>187</sup> *R (Ex parte Mohammed Salim) v Secretary of State for the Home Department* [1990] Imm AR 316, p. 457

<sup>188</sup> In particular Rule 51(1) and 51(2) Asylum and Immigration Tribunal Rules 2005 (as amended)

declared *ultra vires* the Tribunals, Courts and Enforcement Act 2007 which give them life.

### Conclusion

Operation Nexus strips foreign nationals in deportation appeals of almost every tool available to their similarly accused British counterparts to challenge allegations made against them by the state of wrongdoing. They must litigate without the power to cross examine witnesses giving evidence against them, who may remain anonymous and absent from the court, without publicly funded legal representation, without any restriction as to the material placed before the fact-finding court, and can be found responsible for conduct on a mere balance of probabilities. It is an axiom that the fairness of a trial should not largely depend on the diligent performance of their duties by the prosecuting authorities<sup>189</sup>, but there is significant scope by the authorities in Nexus appeals for systemic abuse, if not intentionally then institutionally, as ironically pointed out by the SSHD herself.

Appellants are generally prevented from making the obvious argument that the implications of a wrong decision, or wrong decisions, in a deportation appeal are arguably far worse than those in the event of wrongful conviction: the worst-case scenario in the event of a wrongful conviction is that the individual goes to prison. If someone is found to be liable for deportation by reason of their conduct, however, the likely outcome is removal from the jurisdiction and permanent exclusion from a country where they may have spent a good portion (and in many cases the vast majority) of their lives and we entirely agree with the view that deportation constitutes a 'double punishment, in the humane sense of the term'.<sup>190</sup> The legal fiction created in *Maaouia* that deportation does not amount to such a punishment continues to haunt deportation hearings, but is surely unsustainable as a proposition in Nexus cases, where conduct is yet to be proven.

The possible wider consequences are more sinister still. A British national in this country is innocent until proven guilty. If he is charged and stands trial, his acquittal

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<sup>189</sup> *Op. Cit.*, n.58, above

<sup>190</sup> Concurring Opinion of Judge Costa in *Maaouia*, paragraph 6

will be his public vindication.<sup>191</sup> For the immigrant, though, the verdict of a criminal court is now arguably irrelevant to the question of whether or not he is considered to be guilty of the impugned conduct. It is conceivable that when it comes to dealing with foreign nationals, the CPS will no longer concern themselves with the difficult and complicated venture of a criminal prosecution, and will merely refer the individual to the immigration authorities, circumventing the criminal process. In response to a recent FOI request the Home Office did not deny that this was possible.<sup>192</sup>

In any Nexus appeal the authorities only need show that conduct occurred on the balance of probabilities, will not have to call any witnesses other than police officers to confirm the contents of intelligence reports, will have no restrictions on the bad character evidence that can be adduced, will have to persuade a single judge (or panel of two) rather than a jury, will singularly rely on the evidence of an organisation which has, at the very least, acknowledged severe problems in its dealings with ethnic minority populations, and will be facing a litigant with no right to publicly funded legal representation, and no right to work if he wishes to instruct private counsel.

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<sup>191</sup> *Home Office Report of the Advisory Group on the Law of Rape*, Cmnd 6352, December 1975, p 31, para 177

<sup>192</sup> FOI Request 32144