www.migrationwatchuk.org

THE CHINDAMO CASE

1 Chindamo was born in Italy in 1980 of a Philippina mother and Italian father. His mother obtained a legal separation from the father on grounds of violent behaviour. She obtained a residence permit as an EEA national exercising Treaty rights and the appellant arrived in the United Kingdom with her in January 1987. In December 1995, at the age of 15, as a member of a gang he murdered the headmaster of a school in Maida Vale. He was convicted of murder and sentenced to be detained during Her Majesty's pleasure. The tariff decided by the Home Secretary, under procedures which obtained at that time, was 12 years – i.e. he could not be considered for parole until the expiry of that period.

2 Chindamo's recent successful appeal to the Asylum and Immigration Tribunal against a Home Office decision to deport him to Italy has given rise to a considerable controversy and the government has announced its intention of appealing. The appeal was heard by a panel of three immigration judges and any appeal from it will lie under section 103E of the Nationality, Immigration and Asylum Act 2002, on a point of law to the Court of Appeal.

3 The Tribunal and the Home Office appear to have acted in concert in trying to keep the details of the appeal secret. The media and the public were excluded from the hearing and the Tribunal and Home Office between them initially declined to make the Tribunals' determination public. However, by someone's error the determination was published on the Tribunal's website and it is now available on the website of The Times, from which I have downloaded it. The first leader of The Times on 22 August is rightly highly critical of this attempt to keep secret a determination which is of major public concern.

4 The Tribunal's determination depends mainly on the interpretation of provisions of European law which regulate the rights of citizens of Member States to move and reside freely within the territory of Member States other than their own. The first such instrument is the Citizens' Directive of April 2004, the object of which is to set out those rights in the general interest of social cohesion and integration. Recital (23) of the Preamble to the Directive limits the right of a Member State to expel a citizen of another Member State "in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin". Recital (24)

of the Preamble goes on to provide that "only in exceptional circumstances, where there are imperative grounds of public security, should an expulsion measure be taken against Union citizens who have resided for many years in the territory of the host Member State".

5 Article 16(1) of the Directive confers a right of permanent residence on a Union citizen who has resided legally in a Member State for five years (see paragraph 8 below). Once the right of permanent residence is acquired it may be lost only through absence from the Member State in question for a period exceeding two consecutive years. This however is subject to an exception in Article 28 quoted below by the words in bold type. Article 27 allows Member States to restrict the freedom of movement and residence of Union citizens only on grounds of public policy, public security or public health. The most material Article for the purposes of the case is 28, which I quote in full below, apart from a sub paragraph which has no relevance
:

> **"Article 28**
>
> **Protection Against Expulsion**
>
> 1. Before taking an expulsion decision on grounds of public policy or public security the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin.
>
> 2. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, **except on serious grounds of public policy or public security**.
>
> 3. An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
>
> (a) have resided in the host Member State for the previous ten years;
> (b) ……."

6 Also relevant to the case are the provisions of the Immigration (European Economic Area) Regulations 2006, a statutory instrument made by the UK government to comply with the provisions of the Citizens' Directive. This confers a right of permanent residence on an EEA national who has lived in the UK for a continuous period of five years. Regulation 21 provides that in the case of an EEA national who has lived in the United Kingdom for a continuous period of at least ten years he may not be expelled "except on imperative grounds of public security" – this being in line with Article 28.3 of the Directive quoted above. Regulation 21 provides also that a decision to expel must comply with the principle of proportionality and must be based exclusively on the personal conduct of the person concerned. The personal conduct of the person concerned must represent a genuine, present and

sufficiently serious threat affecting one of the fundamental interests of society and the person's previous criminal convictions do not in themselves justify the decision.

7 The Tribunal therefore had to consider (a) whether Chindamo should be regarded as having been resident in the UK for the last ten years and (b) if so, whether his history and present character justified expulsion on imperative grounds of public security. A matter to be considered in relation to (a) was the fact that although the appellant had spent 19 years in the UK at the time of the hearing by the Tribunal, for 11 of those years he had been in prison. The Tribunal considered at length the various legal issues on this, including its own earlier decisions on the point, and concluded that the appellant had not resided in the UK for the previous ten years, having regard to the Tribunal's interpretation of the relevant provisions of the Directive and Regulations from which extracts are quoted above. The Preamble to the Directive sets out at some length the purposes of the Directive. Recital (23) of the preamble sets out the considerations which ought to be taken into account in reaching decisions on expulsion, including the extent to which the person whose expulsion is being considered has become genuinely integrated into the host Member State. The Tribunal could not accept that Chindano had become integrated. The tribunal also ruled that although residence was a matter of fact, it was necessary in this context that there should be a mental intention of the person concerned that he should wish to stay in a particular Member State.

8 Although the Tribunal concluded that the appellant did not qualify as a resident for the reasons set out in the previous paragraph, it nevertheless concluded also, on its interpretation of the Directive, that he had acquired a right of permanent residence after five years in the UK and therefore it was incumbent on the Home Secretary to show that the decision to expel the appellant could be justified on grounds of public policy, public security or public health. No question of public health arises, but in relation to public policy or public health the Tribunal had regard to the wording of Article 3 of the Directive, which so far as relevant states:

> "Article 3
> 1. Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned.
> 2. Previous criminal convictions shall not *in themselves* [emphasis supplied] constitute grounds for the taking of such measures."

Although the appellant had been convicted of murder, that fact alone did not justify his expulsion. The conviction was a material fact which must be taken into account but what was needed was an assessment of his likelihood of offending again if allowed to remain in the United Kingdom after his release from prison. As several commentators in the Press have pointed out, the Tribunal had to make the same kind of judgement on the appellant which the Parole Board will be called upon to make early in 2008 when the appellant applies for release on parole after completion of 12 years of his life sentence. In paragraph 88 of its determination the Tribunal comments on the evidence presented to it on which it had to base its judgement:

"In the revised reasons for deportation letter it is noted that it is unlikely that the appellant will re-offend, and that he accepts his responsibility for his offences and has undertaken courses for anger management. It notes however that his current behaviour and actions and day-to-day life are very closely monitored. There is reference there to

one escorted visit, though we accept that the evidence is in fact that he has been on two escorted visits and three unescorted visits. The point is also made in the refusal letter that the court has deemed that the appellant's crime is of such severity that he will always continue to be a threat to the community such that his release on licence would be on the basis that he might be recalled to prison at any moment for any breach of his conditions. The point is made that he has been assessed and that he is subject to the highest level of multi-agency public protection arrangements……. The letter does note that risk factors might increase because of media and public scrutiny that the appellant might receive. It also comments that the OAsys report [a report on the appellant which was in evidence before the Tribunal] notes that there are occasions where the appellant has overacted to situations and there are severe concerns with finding him appropriate accommodation on release if allowed to remain in the United Kingdom. He would need to be excluded from certain parts of the country, community integration would be a problem on release and he might suffer a backlash. The letter states that the appellant's notoriety might make him feel excluded from society as he had been before and there was a significant risk that his previous disregard for authority and the law might resurface and result in him coming to adverse attention. As a consequence it was considered that he posed a continuing risk to the public and that his offences were so serious that he represents a genuine and present and sufficiently serious threat to the public in principle such as to justify his deportation."

9 The Tribunal referred also to other aspects of the appellant's history which fell to be taken into account in considering whether expulsion could be justified on public policy grounds. The appellant came to the UK when he was six years old and has lived here since then. Although he is still an Italian national he does not speak the language and has no ties with Italy. His parents were divorced and his mother, who lives in the UK, has remarried. His father's whereabouts are uncertain; he may be in gaol in Italy or in Spain. The appellant has no contact with him. **The Tribunal concluded that there was no evidence to support a finding that there were any grounds of public policy which would justify his exclusion from the UK.**

10 The Tribunal also had to consider objections to removal based on Article 8 of the European Convention on Human Rights (ECHR) which states:

> "Article 8
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the protection of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Tribunal quoted case law of the European Court of Human Rights which decided that it was only in exceptional circumstances that this Article could be invoked in the case of an adult appellant and his mother and siblings. However, a balancing exercise had to be undertaken. The Tribunal concluded as follows in paragraph 103 of its determination:

> "We accept that family life exists. The relationship between the appellant and his mother and brothers transcends normal emotional ties…. The impact on the appellant of long-term imprisonment has meant that his family ties have remained fundamentally important to his private and social existence beyond his eighteenth birthday, and of course being in prison has denied him the normal opportunities to lead an independent life once he turned eighteen.. In the instant case, the appellant has a very supportive family, who will have an important role on his release, to protect him as far as possible from notoriety. When it comes to the assessment of whether his removal would be disproportionate, we consider that there have been shown to be insurmountable obstacles to the family living together in Italy. The family have been living lawfully in the United Kingdom for twenty-one years and are established here. In Italy the appellant has no home, family, language, connection or support. In the United Kingdom where he has spent all but three or fours years of his life, the appellant has a home, a supportive family, supportive agencies and language skills. **We conclude that the Secretary of State has not shown that the breach of the Article 8 right to family life that would be occasioned by the appellant's removal to Italy would be proportionate**." [Emphasis supplied]

11 The case is complex and controversial, but it is clear that the Tribunal considered the evidence and relevant law with the utmost care. Ministers and opposition spokesmen alike have reacted to the Tribunal's decision in an emotional and intemperate manner. It is, however, worth making the point that the Tribunal was in the case of the EEA considerations applying recent legislation, the Citizens' Directive which was adopted by all Member States, including the UK, as recently as 2004. The Human Rights Act, making the European Convention on Human Rights directly enforceable in the UK courts, was passed in 1998 and brought into force in 2000. Politicians appear to be trying to blame the judges for the consequences of recent legislation for which they themselves are responsible.

12 Leaving aside for a moment the legal considerations, it is almost fortuitous that the appellant still had an Italian passport although he had been living in Britain for nine years, could not speak Italian and had no real connection with Italy. If he had acquired British citizenship there would be no possibility of deportation. Furthermore, one should perhaps ask whether it would be compatible with comity between Member States of the Union to impose on the Italian authorities a man recently released from gaol, with a serious criminal record, no connections with the country and no acquaintance with its language. Finally, even if the appellant were to be deported to Italy, there would be no impediment to his returning to the UK at any time, and as a Union citizen he would not need leave to enter. That, however, is a problem which could arise in any case of expulsion from one Member State to another.

13 The government has announced its intention of appealing against the decision and I have already noted that in accordance with section 103E of the Nationality, Immigration and Asylum Act 2002, the appeal lies to the Court of Appeal and must be on a point of law. Also, permission to appeal is required, which means that the government must first satisfy either the Tribunal itself or the Court of

appeal that it has an arguable case. We do not yet know on what grounds the government will be appealing and it may be in difficulty in finding an arguable case. The most likely ground seems to me to be that the Tribunal has reached conclusions which are not supported by the evidence. There may well be scope for argument that the Tribunal should not have concluded on the evidence that the appellant would be unlikely to re-offend after his release on parole. In this connection, the determination notes at paragraph 88 that the Home office deportation letter itself concedes that this is unlikely. However, paragraph 94 discusses the appellant's limited education and literacy, his lack of work experience because of his years in gaol. The Tribunal says:

> "On his own admission the appellant experienced difficulties in integrating into British society, which led him to become involved in a gang around the age of thirteen. Integration into society on release would clearly pose difficulties for the appellant given his previous problems and the young age at which he went to prison and the notoriety surrounding the offences for which he was convicted."

The appellant's notoriety has now given rise to speculation that if released he would need to be given a different identity and special protection similar to that given to Ian Huntley's former mistress. This must inevitably make integration into British society even more difficult. Whether or not such protective measures are taken there must be a risk that the appellant, having little education, no work experience and no employable skills, would revert to crime. A further possible ground of appeal arises in relation to Article 8 of the ECHR and the finding that there are exceptional grounds which justify the engagement of that Article, even though as a general rule it would not be engaged in the case of an adult male's links with mother and siblings.

14 The Tribunal's decision does not have any immediate consequences, as the appellant will not be eligible for release on parole for several months yet. In considering his application the Parole Board will have to decide whether the appellant is likely to offend again if released and in so doing must consider the same evidence which the Tribunal has considered. I do not suggest that the Board's judgement in the matter would be infallible, but it has much more experience than the Asylum and Immigration Tribunal in deciding whether a particular convicted criminal is likely to revert to a life of crime and pose a threat to the security of society. If it decides against releasing him he remains in gaol. The Parole Board bears a heavy responsibility and if it decides in his favour there must be a strong probability that it has taken the right decision. The Tribunal's decision has given rise to a great deal of controversy and anxiety, but it does not have the last word in deciding whether the appellant is fit to be released.

15 The facts of the case are unusual and the question arises whether it is to be regarded as a "one off". In view of the large influx of immigrants from Eastern European Member States since May 2004, there must be a strong possibility that the question of the expulsion after completion of their sentences of EU nationals who have been convicted of serious crimes will arise more often than hitherto.

Harry Mitchell QC
29 August, 2007