Neutral Citation Number: [2014] EWCA Civ 1636

Case No: C5/2013/3288

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2014

Before :

LORD JUSTICE SULLIVAN
LORD JUSTICE SALES
and
MR JUSTICE NEWEY

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
AJ (ANGOLA)	**Respondent**

- -
- -

MR NEIL SHELDON (instructed by **The Treasury Solicitor**) for the **Appellant**
MS SHAZIA KHAN (instructed by **Ison Harrison Solicitors**) for the **Respondent**

Case No. C5/2014/0086

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
AJ (GAMBIA)	**Respondent**

MR NEIL SHELDON (instructed by **The Treasury Solicitor**) for the **Appellant**
MR DAVID MEDHURST (instructed by **The Legal Resource Partnership**)
for the **Respondent**

Hearing dates: 2 and 4 December 2014

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Approved Judgment

LORD JUSTICE SALES :

Introduction

1. This is the judgment in respect of two appeals, AJ (Angola) and AJ (Gambia), both of which raise issues regarding the proper approach for the Tribunal to adopt in dealing with deportation of foreigners who have committed crimes while in the United Kingdom. The individuals concerned are foreign criminals, as defined by section 32 of the UK Borders Act 2007.

2. In each of the cases before the court, the Secretary of State made a deportation order in respect of the individual concerned, who appealed (hence I refer to the individuals as "the appellants"). In due course, the Upper Tribunal (Immigration and Asylum Chamber) allowed the appeals. The Secretary of State appeals against those decisions to this Court.

3. Amendments to the Immigration Rules were introduced in July 2012 in an effort to emphasise the strength of the public interest regarding the desirability of deporting foreign criminals from the United Kingdom and to secure a degree of consistency in approach on the part of the Secretary of State's officials, the First-tier Tribunal ("FTT") and the Upper Tribunal. The new rules were contained in paragraphs 398, 399, 399A and 399B of the Immigration Rules ("the new rules").

4. The proper approach for the Secretary of State, the FTT and the Upper Tribunal to adopt in relation to considering orders to deport foreign criminals in the light of the new rules was the subject of a judgment by this Court in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544. In a judgment handed down on 8 October 2013, the Court held that the new rules comprised a complete code regulating how the question of possible expulsion of a foreign criminal should be addressed. Where the new rules did not expressly provide for leave to remain in the United Kingdom to be granted to a foreign criminal falling within certain defined categories of case, they nonetheless stated that such leave could be granted "in exceptional circumstances" (paragraph 398). The Court held that this rubric covered any claim by the foreign criminal to remain in the United Kingdom on the grounds that his Convention rights under the Human Rights Act 1998 prevented his removal. The Upper Tribunal in that case, in its decision at [2012] UKUT 393 (IAC), had erred by treating a foreign criminal's claim to remain in the United Kingdom based on Convention rights (specifically, the right to respect for family and private life under Article 8) as a matter to be considered separately from application of the new rules.

5. In each of the present appeals, the Upper Tribunal wrote its decision before the judgment of the Court of Appeal in *MF (Nigeria)* was handed down. In AJ (Angola) the decision was promulgated by the Upper Tribunal (Upper Tribunal Judge Lane, sitting alone) on 24 June 2013. In AJ (Gambia), the decision was finalised by the Upper Tribunal (Lord Bannatyne and Upper Tribunal Judge Kopieczek) on 26 September 2013, although it was eventually issued via the Tribunal secretariat on 16 October 2013. In neither case, therefore, did the Upper Tribunal have the benefit of the important guidance given by the Court of Appeal in *MF (Nigeria)*. Instead, in each the Upper Tribunal considered application of Article 8 outside the framework of the new rules.

6. In each of the cases before us, the Upper Tribunal cannot be blamed for failing to appreciate what the correct approach to application of the new rules was, as later set out by the Court of Appeal in *MF (Nigeria)*. In particular, it is difficult to criticise the Upper Tribunal in AJ (Gambia) for following the approach set out in the Upper Tribunal decision in *MF (Nigeria)*, which at the time of its decision was the most up-to-date and authoritative guidance regarding the interpretation of the new rules. However, in light of the Court of Appeal's judgment in *MF (Nigeria)*, I consider that it is clear that the approach that was adopted by the Upper Tribunal in both the present cases was wrong in law.

7. The question which then arises in each case is what the consequence of the Upper Tribunal's erroneous approach with respect to the new rules should be. In AJ (Gambia), if this Court concludes that the Upper Tribunal erred in its approach, the parties are agreed that the appeal should be allowed and the case remitted to the Upper Tribunal to take a fresh decision. There has been some passage of time, and the appellant's rights under Article 8 have to be considered with reference to evidence about the current position in respect of those rights. Moreover, the new rules have themselves been replaced by a new version of the paragraphs of the Immigration Rules governing foreign criminals, which came into effect on 28 July 2014 (see *YM (Uganda) v Secretary of State for the Home Department* [2014] EWCA Civ 1292 for a description of the changes which have been made), and relevant new statutory provisions have been enacted, as Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). It is common ground that any decision regarding deportation of the appellant should be made under this new version of the relevant paragraphs of the Immigration Rules and with reference to Part 5A of the 2002 Act.

8. In AJ (Angola), on the other hand, Ms Khan, counsel for the appellant, submits that any error of approach by the Upper Tribunal was not material and that the Secretary of State's appeal should be dismissed. Mr Sheldon, who appeared for the Secretary of State in both appeals, submits that the appeal should be allowed and that the case should be remitted to the Upper Tribunal for a fresh decision to be made.

The new rules

9. Paragraphs 398 to 399B of the Immigration Rules provide as follows:

> **"Deportation and article 8**
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> "398. Where a person claims that their deportation would be contrary to the UK's obligations under article 8 of the Human

Rights Convention , and (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least four years; (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least 12 months; or (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

399. This paragraph applies where paragraph 398(b) or (c) applies if— (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and (i) the child is a British citizen; or (ii) the child has lived in the UK continuously for at least the seven years immediately preceding the date of the immigration decision; and in either case (a) it would not be reasonable to expect the child to leave the UK; and (b) there is no other family member who is able to care for the child in the UK; or (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and (i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and (ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

399A. This paragraph applies where paragraph 398(b) or (c) applies if— (a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

399B. Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave

> shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted."

The facts and the Upper Tribunal decision in AJ (Gambia)

10. The appellant was born on 8 September 1990 and is a citizen of Gambia, although he was born in Norway. Between the ages of 2 and 9 he lived in Gambia with his mother. He arrived lawfully in the United Kingdom on 30 July 2000, at the age of 9, with his mother and brother. He was granted indefinite leave to remain on 19 December 2008 after successive extensions of his leave. His mother and brother were granted indefinite leave to remain on the same date.

11. On 18 April 2009, the appellant struck an opponent in a football match, in what the sentencing judge described as an unprovoked attack, and fractured his jaw. He was 19 at the time. He pleaded guilty. On 18 June 2010, he was sentenced to a term of 14 months' imprisonment for that offence, together with an additional one month's imprisonment for doing acts tending to pervert the course of justice, to run consecutively - a total of 15 months' imprisonment. Allowing for time spent on remand, he was released from the Young Offenders' Institution in August 2010.

12. The appellant had no previous convictions, but was reprimanded in July 2007, when he was 16, in respect of an allegation of battery.

13. On 10 December 2010, the Secretary of State made a deportation order in respect of the appellant. The appellant appealed against that order and sought leave to remain in the United Kingdom based, in particular, on his family and private life here.

14. The appellant maintains that, for reasons to do with her health, his mother is dependent on him.

15. There is also an issue regarding the degree of connection which the appellant has with Gambia.

16. The appellant is in paid employment, working as a packing supervisor in a food outlet. He has not re-offended.

17. The appeal was dismissed by the FTT in a determination promulgated on 14 February 2011. The FTT found on the evidence before it that the appellant had connections to Gambia and could be expected to resettle there. It also found that the relationship between the appellant and his mother was not one of dependence, and did not amount to "family life" for the purposes of Article 8.

18. On 22 December 2011, having exhausted all of his rights of appeal against the deportation order, the appellant lodged an application for further leave to remain which, together with additional representations contained in a letter dated 13 July 2012, the Secretary of State treated as an application for revocation of the deportation order.

19. By letter dated 17 December 2012, the Secretary of State refused this application, and the appellant brought a further appeal. This second appeal was heard by the FTT on 29 April 2013, and its decision was promulgated on 31 May 2013. On this occasion, the FTT allowed the appeal, essentially on the ground that, contrary to the view of the FTT in its first determination, the appellant had no ties with Gambia and so fell within the scope of paragraph 399A of the new rules, and therefore ought to be granted leave to remain.

20. The Secretary of State appealed to the Upper Tribunal. In its decision, the Upper Tribunal held that the FTT had made an error of law in dealing with the issue of the appellant's ties with Gambia, and therefore held that it (the Upper Tribunal) should re-make the decision on the evidence as it stood before the FTT. It is the fresh decision of the Upper Tribunal which is the subject of the appeal to this Court.

21. The Upper Tribunal concluded that deportation would be in breach of the appellant's rights under Article 8, and accordingly allowed his appeal against the Secretary of State's decision. The Upper Tribunal reasoned as follows:

    i) It upheld the findings in the first FTT decision, that the appellant does have ties with Gambia within the meaning of the new rules. Therefore, the appellant could not bring himself within paragraph 399A(b) of the new rules (paras. [26]-[29]);

    ii) It then applied the "exceptional circumstances" rubric in paragraph 398, and held that there were no exceptional circumstances to justify the grant of leave to remain under the Rules (paras. [29]-[31]). At para. [29], the Upper Tribunal made the rather Delphic comment, "The search for exceptional circumstances is illegitimate under a pure Article 8 consideration but is legitimate in terms of the Immigration Rules." It seems likely that this was a reference to the strictures of the House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167 regarding an attempt by the Secretary of State to argue that a test of exceptionality applied in relation to analysis of the circumstances in which leave to remain should be granted under Article 8 outside the Immigration Rules as they stood at the time of that decision;

    iii) At paras. [32]-[50], the Upper Tribunal considered the appellant's case based on Article 8, outside the Immigration Rules. At para. [46], it had regard to the well known judgment of the Grand Chamber of the European Court of Human Rights in *Maslov v Austria* [2009] INLR 47, in particular at para. [75] of that judgment, where the Court said:

> "the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

    iv) The Upper Tribunal observed at para. [47] that the appellant was a settled migrant who had spent the major part of his childhood and youth in the United

Kingdom; that although he had connections with Gambia he had not been there since he was very young; and although his offences were not committed when he was a juvenile "he was still only 18 at the time" of the offences;

v) At para. [36], the Upper Tribunal noted that "It is necessary to take into account that the 'Article 8' Immigration Rules are an expression of the Secretary of State's view of the circumstances in which it is appropriate to deport an individual who has committed criminal offences which result in a particular length of sentence", in accordance with the decision of the Upper Tribunal in *MF (Nigeria)*. At para. [45], the Upper Tribunal referred to *N (Kenya)* [2004] EWCA Civ 1094 and noted the public policy need to deter and to express society's revulsion of the seriousness of the criminality in question. These were the only references made by the Upper Tribunal to the significance of and weight to be given to the public interest in deportation of foreign criminals. The Upper Tribunal made no separate reference to the UK Borders Act 2007;

vi) At para. [49], the Upper Tribunal concluded that, "balancing all relevant factors", the removal of the appellant would amount to a disproportionate interference with his right to private life, including in particular his relationship with his mother. At para. [50], the Upper Tribunal said that, "Taking full account of the considerations weighing in favour of the appellant's removal" (a reference back to the matters mentioned at paras. [36] and [45], and its assessment at para. [48] that there was a medium risk of him re-offending), his removal would amount to a disproportionate interference with his private life; therefore, the appeal was allowed under Article 8;

vii) At para. [51], consequent upon its ruling under Article 8, the appellant's appeal was also allowed under paragraph 390 of the Immigration Rules. (It is not suggested on the appeal before us that the issue under paragraph 390 has any force apart from the Upper Tribunal's reasoning in relation to Article 8).

22. It is clear from the Upper Tribunal's decision that it first sought to apply the new rules, and then looked to see if there were other reasons under Article 8, outside the new rules, why leave to remain should be granted. This was reasoning on the model suggested by the decision of the House of Lords in *Huang*.

23. However, as the judgment of this Court in *MF (Nigeria)* explains, this was an error, because the new rules, promulgated after *Huang*, constitute a complete code for consideration of foreign criminal cases contained *within* the Immigration Rules. In this regard, the new rules constitute a discrete section of the Immigration Rules unlike other parts of the Rules, in relation to which the Secretary of State retains a discretion which may be exercised outside the Rules: see *Huang* and *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin).

The facts and the Upper Tribunal decision in AJ (Angola)

24. The appellant in this case was born on 24 October 1970. He is a citizen of Angola.

25. The appellant arrived in the United Kingdom on 3 March 2009, having travelled from Lisbon, and presented a false passport. He was arrested and charged with an offence under section 25 of the Identity Cards Act 2006. On 19 March 2009, he pleaded guilty and was sentenced at Lewes Crown Court to 12 months in prison.

26. In April 2009 the appellant made an application to be returned to Angola under the facilitated returns scheme, but he later withdrew it in September 2009 and claimed asylum instead, on grounds of an alleged fear of persecution if he were returned to Angola.

27. Meanwhile, on 8 June 2009 the Secretary of State made a deportation order in respect of the appellant.

28. On 29 March 2010, the Secretary of State rejected the appellant's claim for asylum and issued a fresh deportation order. The appellant appealed. His appeal was dismissed in a decision of the FTT promulgated on 23 September 2010. The appellant appealed to the Upper Tribunal.

29. By a decision dated 14 March 2011, the Upper Tribunal found that the FTT had erred and set aside its decision. The Upper Tribunal then itself undertook a fresh hearing of the appeal.

30. By the time of the hearing of the appeal in the Upper Tribunal, a further ground of appeal had been added to the claim for asylum, based on Article 8 and relationships the appellant had formed with a Ms J and her young son, A, and her daughter by the appellant, B.

31. At the end of March 2011, the appellant met Ms J and began a relationship. This was at a time when both he and Ms J appreciated that his immigration status and right to be in the United Kingdom were precarious. According to the appellant's chronology, in June 2011 he moved to Leeds to live with Ms J and A; on 10 September 2011 the appellant married Ms J; and on 10 October 2012 their daughter B was born. The appellant has developed a family life within this family unit.

32. The Upper Tribunal dismissed the appellant's claim for asylum. It found that the appellant was an economic migrant who had knowingly used a false passport to try to enter the United Kingdom. But the Upper Tribunal upheld his appeal on Article 8 grounds. Its consideration of Article 8 is set out in two paragraphs of the decision, as follows:

> "23. I have also considered Article 8 ECHR. The appellant's circumstances have changed since the date of his last appeal to the First-tier Tribunal. I accept (as did Mr Diwnycz on behalf of the respondent) that the appellant is in a genuine subsisting relationship with [Ms J], that he is the father of [B] (who is now aged 8 months) and the stepfather of [Ms J's] son, [A]. [Ms J] and [B] are British citizens. The outcome of the appeal on Article 8 grounds depends upon the Tribunal's assessment of the proportionality of the immigration decision to remove the appellant. Mr Diwnycz did not argue that it would be reasonable for [Ms J] or the children to accompany the

> appellant to Angola (see *ZH (Tanzania)* [2011] UKSC 4). Indeed, having regard to Section 55 of the Borders, Citizenship and Immigration Act 2009 and considering the best interests of the children as a primary consideration, I find that the appellant is an active father and stepfather and that his presence in the lives of the children is of considerable benefit to them. It is not in the best interests of any of the children (including [A]) to be separated from the appellant. His removal to Angola would, in my opinion, constitute a very serious interference with the enjoyment of family life of the appellant, his wife and the children.
>
> 24. It is also important, however, that I seek to identify the public interest concerned with the appellant's removal. The respondent seeks to remove the appellant for the legitimate aim of preserving public order and preventing crime and maintaining a system of immigration control. I do not seek to diminish the seriousness of the appellant's offence but it was not an offence of violence or of a sexual nature nor did it involve the sale or use of drugs. The appellant has not committed any further offence since he was released from prison. I find that the appellant is likely to have used a false passport to facilitate his entry to the United Kingdom because he had come to seek work here and was aware that he did not have a legitimate reason (including that of seeking asylum) to enter. I am aware that he may now and only by virtue of his relationship with [Ms J] and the children gain the right to remain here. However, if he is granted leave to remain and work in this country, then equally any incentive to commit a similar would be removed entirely. Consequently, I find that his risk of re-offending is low. I find it is likely that, if he is granted permission to remain in the United Kingdom, the appellant will seek legitimate work with a view to supporting his family. On balance, therefore, I find that the interference which would be caused by the appellant's removal to Angola to the private and family lives of the appellant himself and his other family members would be disproportionate. Consequently, I allow the appeal on Article 8 ECHR grounds."

Discussion

33. Mr Sheldon, for the Secretary of State, submits in relation to each decision that the Upper Tribunal erred in law in two ways: (i) it failed to interpret and apply the new rules correctly; and, in any event, (ii) it also failed properly to balance the factors relevant to an assessment under Article 8.

34. As I have already indicated, in my view the first ground of appeal is made out in each case. The second ground of appeal is very much bound up with the first, and is also made out in each case.

35. The question of the immigration treatment of foreign criminals who claim entitlement to remain in the United Kingdom has long been identified by successive governments as a matter of public concern. Section 32 of the UK Borders Act 2007 provides that for certain categories of foreign criminal, including those convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least 12 months, their deportation "is conducive to the public good" for the purpose of section 3(5)(a) of the Immigration Act 1971 (section 32(4)) and that, subject to section 33, it is obligatory for the Secretary of State to make a deportation order in respect of them (section 32(5)). Section 33 provides for exceptions to this obligation, including where removal of the foreign criminal would breach a person's Convention rights (section 33(2)(a)); but section 33(7) provides that section 32(4) continues to apply in such a case (i.e. as a factor relevant to the balancing exercise required under any relevant Convention right, including Article 8).

36. The significance of sections 32 and 33 of the 2007 Act for assessment of a claim by a foreign criminal based upon Article 8 to be granted leave to remain in the United Kingdom was considered by the Court of Appeal in *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550; [2014] 1 WLR 998. In that case, the appellant was a Nigerian national who was in the United Kingdom without leave. In 2008 he became engaged to a British citizen and they had a son. In 2011 he was convicted of serious drugs offences and sentenced to concurrent terms of three years' imprisonment. The Secretary of State considered that she was obliged by section 32(5) of the 2007 Act to make a deportation order in respect of the appellant, as a foreign criminal whose removal was conducive to the public good. The FTT upheld his appeal, holding that his removal would have a disproportionate effect on the private and family life of the appellant, his partner and their son, and so would be in breach of their Convention rights under Article 8. The Upper Tribunal allowed the Secretary of State's appeal, holding that in the circumstances of the case the interests of the appellant's partner and son were outweighed by the public interest in removing the appellant, having regard to the seriousness of his offences and the risk he posed to society. The appellant appealed, on the ground that the Upper Tribunal had accorded insufficient weight to the interests of his son. The Court of Appeal dismissed the appeal. Although the child's best interests were to be treated as a primary consideration (i.e. a consideration of substantial importance), they were outweighed by the public interest in deportation of the appellant, which was informed by the way in which Parliament had made that public interest clear by primary legislation in the form of section 32 and section 33(7) of the 2007 Act. The strength of the public interest in removal of foreign criminals, as declared by Parliament, meant that leave to remain would only be justified under Article 8 "by a very strong claim indeed": see paras. [48]-[55], in particular at [54].

37. In July 2012, the Secretary of State promulgated the new rules as a self-contained code within the Immigration Rules for foreign criminals.

38. In *MF (Nigeria)*, the Court of Appeal held that the Upper Tribunal in that case had misapplied the new rules by treating the consideration of the "exceptional circumstances" rubric in paragraph 398 as something distinct from consideration of a claim based on Article 8. The Court of Appeal said this at paras. [38]-[46]:

> "38. The first point to make is that paragraph 398 expressly contemplates a weighing of "other factors" against the public

interest in the deportation of foreign criminals. It has long been recognised by the European court that states are entitled to decide that there is generally a compelling public interest in deporting foreign criminals. Article 8 requires a decision-maker to weigh the factors which favour deportation against those which do not. This is inherent in the proportionality test that, according to the Strasbourg jurisprudence, is demanded by article 8. The central question is whether the use of the phrase "exceptional circumstances" means that the weighing exercise contemplated by the new rules is to be carried out compatibly with the Convention.

39. Ms Giovannetti has made it clear on behalf of the Secretary of State that the new rules do not herald a restoration of the exceptionality test. We agree. It is true that, as the UT pointed out at para 38 of their determination, the new rules are not a perfect mirror of the Strasbourg jurisprudence. But Ms Giovannetti concedes that they should be interpreted consistently with it. Mr Husain correctly points out that the rules do not expressly provide for consideration of all questions relevant to article 8 claims, such as what is in the best interests of the child; the age of the offender at the date of entry into the UK and at the date of the offending; the length of time since the offence; the offender's subsequent conduct and so on. But the rules expressly contemplate a weighing of the public interest in deportation against "other factors". In our view, this must be a reference to all other factors which are relevant to proportionality and entails an implicit requirement that they are to be taken into account.

40. Does it follow that the new rules have effected no change other than to spell out the circumstances in which a foreign criminal's claim that deportation would breach his article 8 rights will succeed? At this point, it is necessary to focus on the statement that it will only be "in exceptional circumstances that the public interest in deportation will be outweighed by other factors". Ms Giovannetti submits that the reference to exceptional circumstances serves the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paragraphs 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under article 8.1 trump the public interest in their deportation.

41. We accept this submission. In view of the strictures contained at para 20 of the *Huang* case [2007] 2 AC 167, it would have been surprising if the Secretary of State had intended to reintroduce an exceptionality test, thereby flouting the Strasbourg jurisprudence. At first sight, the choice of the

phrase "in exceptional circumstances" might suggest that this is what she purported to do. But the phrase has been used in a way which was not intended to have this effect in all cases where a state wishes to remove a foreign national who relies on family life which he established at a time when he knew it to be "precarious" (because he had no right to remain in the UK). The cases were helpfully reviewed by Sales J in *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin). The fact that *Nagre* was not a case involving deportation of a foreign criminal is immaterial. The significance of the case law lies in the repeated use by the European court of the phrase "exceptional circumstances".

42. At para 40, Sales J referred to a statement in the case law that, in "precarious" cases, "it is likely to be only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8 ". This has been repeated and adopted by the European court in near identical terms in many cases. At paras 41 and 42, he said that in a "precarious" family life case, it is only in "exceptional" or "the most exceptional circumstances" that removal of the non-national family member will constitute a violation of article 8 . In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase "exceptional circumstances" is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals.

43. The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".

44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision-maker is not "mandated or directed" to take all the relevant article 8 criteria into account: para 38.

45. Even if we were wrong about that, it would be necessary to apply a proportionality test outside the new rules as was done by the UT. Either way, the result should be the same. In these

> circumstances, it is a sterile question whether this is required by the new rules or it is a requirement of the general law. What matters is that it is required to be carried out if paragraphs 399 or 399A do not apply.
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> 46. There has been debate as to whether there is a one stage or two stage test. If the claimant succeeds on an application of the new rules at the first hurdle ie he shows that paragraph 399 or 399A applies, then it can be said that he has succeeded on a one stage test. But if he does not, it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. That is an exercise which is separate from a consideration of whether paragraph 399 or 399A applies. It is the second part of a two stage approach which, for the reasons we have given, is required by the new rules. …"

39. The fact that the new rules are intended to operate as a comprehensive code is significant, because it means that an official or a tribunal should seek to take account of any Convention rights of an appellant through the lens of the new rules themselves, rather than looking to apply Convention rights for themselves in a free-standing way outside the new rules. This feature of the new rules makes the decision-making framework in relation to foreign criminals different from that in relation to other parts of the Immigration Rules, where the Secretary of State retains a general discretion outside the Rules in exercise of which, in some circumstances, decisions may need to be made in order to accommodate certain claims for leave to remain on the basis of Convention rights, as explained in *Huang* and *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin).

40. The requirement that claims by appellants who are foreign criminals for leave to remain, based on the Convention rights of themselves or their partners, relations or children, should be assessed under the new rules and through their lens is important, as the Court of Appeal in *MF (Nigeria)* has emphasised. It seeks to ensure uniformity of approach between different officials, tribunals and courts who have to assess such claims, in the interests of fair and equal treatment of different appellants with similar cases on the facts. In this regard, the new rules also serve as a safeguard in relation to rights of appellants under Article 14 to equal treatment within the scope of Article 8. The requirement of assessment through the lens of the new rules also seeks to ensure that decisions are made in a way that is properly informed by the considerable weight to be given to the public interest in deportation of foreign criminals, as declared by Parliament in the 2007 Act and reinforced by the Secretary of State (as the relevant Minister with responsibility for operation of the immigration system), so as to promote public confidence in that system in this sensitive area.

41. In *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ 1310, this Court again emphasised the points made in both *SS (Nigeria)* and *MF (Nigeria)*. It dismissed an appeal from the Upper Tribunal, which had allowed an appeal from the FTT. This Court held that the FTT in that case "clearly erred" in its understanding and application of the new rules, by considering the case of a foreign criminal based on Convention rights outside the new rules (see para. [14]), just as the Upper Tribunal has done in both the cases before us. As in the cases before us, the error had occurred

because the decision of the FTT had been made before the judgment of this Court in *MF (Nigeria)* was handed down. At para. [17], Moore-Bick LJ (giving the leading judgment) said this:

> "Two points of importance emerge from the decisions in *SS (Nigeria)* and *MF (Nigeria)*. First, both emphasise the great weight to be attached to the public interest in the deportation of foreign criminals and the importance of the policy in that regard to which effect has been given by Parliament in the UK Borders Act 2007, a weight and importance neither of which seem to have been fully appreciated by the First-tier Tribunal in this case. The second is that it is wrong to consider the question of infringement of article 8 rights outside the terms of the Immigration Rules, as the First-tier Tribunal did."

42. I turn, then, to the two cases before us.

AJ (Gambia)

43. In AJ (Gambia), the Upper Tribunal clearly failed to apply the new rules properly. It separated out consideration of whether there were "exceptional circumstances" under paragraph 398 of the new rules from consideration of whether the appellant had a good claim for leave to remain based on his Article 8 rights, in the manner held to be incorrect in *MF (Nigeria*).

44. This was a material error of law. As a result of it, the Upper Tribunal failed to assess the appellant's Article 8 case through the lens of the new rules and failed to give full and proper weight to the public interest in the deportation of the appellant, as a foreign criminal. The Upper Tribunal made no reference to the declaration of the public interest set out by Parliament in primary legislation, in sections 32 and 33 of the UK Borders Act 2007. Such references as the Upper Tribunal did make to the public interest in removal of the appellant, in paras. [36] and [45] of its decision, failed to recognise the strength of that public interest. The Upper Tribunal failed to ask itself whether there were "very compelling reasons" such as to outweigh the strong public interest in deportation: see *MF (Nigeria)* at para. [43].

45. Moreover, as a consequence of its error, the Upper Tribunal did not make a proper assessment of the impact of the judgment of the Grand Chamber of the Court of Human Rights in *Maslov v Austria*. At para. [46] of its decision, the Upper Tribunal highlighted para. [75] of the judgment of the Grand Chamber, in which it says that in relation to a settled migrant of the kind described there, "very serious reasons are required to justify expulsion". The Upper Tribunal did not attempt to integrate this guidance within the framework of the new rules, but rather treated it as a free-standing matter of assessment for itself in relation to which it appears to have regarded the relevant approach to be one which imposed a heavy onus on the Secretary of State to show "very serious reasons" justifying expulsion.

46. In my view, the Upper Tribunal should have approached the assessment of the claim under Article 8 by application of the new rules, and in particular (since the appellant could not bring himself within paragraphs 399 and 399A of the new rules) by asking itself whether there were very compelling reasons, within the "exceptional

circumstances" rubric in paragraph 398, to outweigh the strong public interest in deportation in the appellant's case. In addressing that question, the Upper Tribunal should, of course, have given due respect to the guidance from the Grand Chamber in *Maslov* at para. [75] of the judgment (reading it in the context of the general guidance given by the Grand Chamber at paras. [68]-[76] of the judgment), but as a matter to be brought into the overall assessment and balanced against the strong public interest in deportation to which the UK Borders Act 2007 and the new rules give expression. On a proper approach under the new rules, in relation to a person assessed to have active ties to his country of citizenship, without a relevant family life in the United Kingdom and whose serious offending had occurred when he was an adult, I think the more natural conclusion would be that deportation would be found to be justified in a case like this.

47. However, the appellant in AJ (Gambia) wishes to adduce further evidence relevant to the assessment required under Article 8, and on the footing that we came to the conclusion that there had been a material error of law by the Upper Tribunal the parties were agreed that the case should be remitted to the Upper Tribunal for a new decision to be made.

AJ (Angola)

48. The decision of the Upper Tribunal in AJ (Angola) is still more vulnerable on appeal than that in AJ (Gambia). In AJ (Angola) the Upper Tribunal did not refer to the new rules at all, nor to the UK Borders Act 2007. Thus it failed to inform itself regarding the weight to be given to the public interest in deportation of a foreign criminal by reference to the two principal legal instruments binding upon it which gave expression to that interest. Therefore, the Upper Tribunal erred in law in its approach to the case before it.

49. In my judgment, despite the valiant effort by Ms Khan for the appellant to argue to the contrary, that error was clearly a material one. There are two categories of case in which an identified error of law by the FTT or the Upper Tribunal might be said to be immaterial: if it is clear that on the materials before the tribunal any rational tribunal must have come to the same conclusion or if it is clear that, despite its failure to refer to the relevant legal instruments, the tribunal has in fact applied the test which it was supposed to apply according to those instruments. The present case does not fall within either of these categories.

50. In *MF (Nigeria)*, this Court found that the error of law by the Upper Tribunal in its interpretation of the new rules was not a material error of law because the case fell into the second of these categories. At para. [50] of its judgment, the Court held that on the particular facts of that case the difference between the Court's approach to the interpretation of the new rules and that erroneously adopted by the Upper Tribunal was "one of form and not substance". Upon reading the Upper Tribunal's decision, it was clear that it had in fact given the great weight to the public interest in deportation of foreign criminals which proper application of the new rules would have required. It might be said that the Court found that, by luck rather than judgment, the Upper Tribunal had applied the correct test to the case before it. The appeal was therefore dismissed.

51. That is very far from the facts in the present case. Here, the appellant has no good argument that, as a matter of substance rather than form, the Upper Tribunal applied the correct approach to assessment of the Article 8 claim. On the contrary, it is clear from the decision that the Upper Tribunal did not give proper weight to the public interest in favour of deportation.

52. Nor does the appellant have a good argument that any tribunal, properly directing itself on the law, would have been bound to allow his claim for leave to remain based on Article 8.

53. It is important to bear in mind that each family member is an individual with his or her own rights under Article 8. So far as the appellant and his partner are concerned, they entered into their relationship at a time when the appellant's right to be in the United Kingdom was known to both of them to be precarious. Accordingly, if the only Article 8 rights in issue had been those of the appellant and his partner, it would have required "most exceptional circumstances" to justify a conclusion that the appellant should not be deported: see *R (Nagre) v Secretary of State for the Home Department*, para. [40]; *MF (Nigeria)*, para. [42]. Therefore, even apart from the new rules, if the case had only concerned the rights of the appellant and his partner, it would have been obvious that there would be no violation of Article 8 if the appellant were deported. Proper application of the new rules would have made that doubly obvious.

54. However, the Article 8 family connections of the appellant's step-son, A, and daughter, B, did not arise in circumstances where the children could have had any appreciation of, or might be said to have taken the risk of, the precariousness of the appellant's immigration status. Further, in accordance with the guidance in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166 and in *SS (Nigeria)*, the interests of the children are to be treated as a primary consideration when considering what should be done.

55. Ms Khan submitted that, by reason of the interests of the children here, any tribunal would have been bound to grant leave to remain to the appellant. I do not agree. I do not think that the seriousness of the criminal offending of the appellant can be brushed aside quite so readily as the Upper Tribunal said. The sentence imposed is a clear marker of the seriousness of the offending, as is also indicated by both the UK Borders Act 2007 and the new rules. The interests of the children carry substantial weight, but they have to be balanced against the substantial weight of the public interest in the removal of the appellant. If the appellant is deported and the family chooses not to relocate to Angola, the children will continue to have a family life with their mother in the United Kingdom, albeit one which is not so rich as it might be if the appellant were granted leave to remain. It is by no means obvious that the interests of the children here are so strong as to outweigh the public interest in the deportation of the appellant: compare *SS (Nigeria)*, para. [55] (finding the interests of the children in that case to be clearly outweighed by the public interest in deportation of the father, but in relation to more serious offending), and *MF (Nigeria)*, para. [50] (finding that the interests of the child in that case were such as to make the ultimate judgment under Article 8 "finely balanced"). A fresh assessment is required, in which proper weight can be given to the public interest in deportation as well as to the interests of the children.

56. In my judgment, therefore, the appeal should be allowed and the case remitted to the Upper Tribunal.

Conclusion

57. I would allow the appeals in each of AJ (Gambia) and AJ (Angola) and remit the cases to the Upper Tribunal for fresh consideration.

THE HON. MR JUSTICE NEWEY:

58. I agree.

LORD JUSTICE SULLIVAN:

59. I also agree.