Case No: C5/2013/1864

Neutral Citation Number: [2014] EWCA Civ 1292

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
JUDGE LATTER and JUDGE KEKIC
IA097392008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/10/2014

Before :

LORD JUSTICE AIKENS
SIR COLIN RIMER
and
SIR STANLEY BURNTON

- -

Between :

YM (Uganda)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Stephen Knafler QC & Patrick Lewis (instructed by **Lawrence Lupin Solicitors**) for the **Appellant**
Jonathan Hall QC (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date : 19/06/2014

- -

Judgment

Lord Justice Aikens :

I. Synopsis

1. YM was born in Uganda on 24 June 1984. He came to the UK with his mother and siblings in 1991 when he was aged six. He obtained indefinite leave to remain in the UK in 2001 when he was 16. His mother and siblings have obtained British nationality, but YM has not. That is because he started to commit crimes when he was 14, his age when he was convicted of robbery. He was subsequently convicted of assault occasioning actual bodily harm when he was 15, of three assaults on constables, committed when he was 18, and of aggravated burglary when he was 19. For this last offence he was sentenced in Croydon Crown Court on 5 September 2003 to 3 years 6 months in a Youth Offender Institution ("YOI"). On 11 November 2004 YM was warned in a letter from the Secretary of State for the Home Department ("SSHD") that a serious view was taken of the aggravated burglary offence and that YM was at risk of being deported if he should "come to adverse notice in the future".

2. Whilst in detention in the YOI, YM began seriously to practice Islam, the religion to which he was born. On the day of his release, 18 March 2005, YM married J, a British citizen, in an Islamic marriage ceremony. They have remained married and have had 3 children, who were born, respectively, in December 2005 (IS), October 2009 (AQ) and 25 December 2011 (IL). J, who converted to Islam before marrying YM, is a trained midwife who works part-time.

3. After YM's release on licence in 2005 he used to attend the Croydon Mosque and that led him to go to meetings at the house of a man called Hamid, whom YM subsequently admitted was a fanatical Islamist. These encounters resulted in YM attending two terrorist training camps in the New Forest in 2006. He was arrested in September 2006 and charged on two counts of offences under ***section 8(2)(a)*** of the ***Terrorism Act 2006.*** Broadly speaking this sub-section makes it an offence for anyone to attend a place, in the UK or elsewhere, where he has instruction or training in (for short) activities that can be used for terrorist purposes or in the use of weapons, where instruction or training is wholly or partly for purposes connected with terrorism. Under ***section 8(2)(a)*** it has to be proved that the offender knew or believed that instruction or training is being provided at the particular place "wholly or partly for purposes connected with the commission or preparation of acts or terrorism or Convention offences". YM pleaded guilty to the two counts and on 26 February 2008, in the Crown Court at Woolwich, Pitchers J sentenced YM to 3 years 5 months imprisonment on each count, the sentences to run concurrently. Because YM had been in custody since his arrest, he was actually released on licence in June 2008.

4. Meanwhile on 22 May 2008 YM was served with a deportation notice by the SSHD which stated that, as a result of his convictions and sentences for the terrorist offences, the SSHD deemed it to be conducive to the public good to make a deportation order against him pursuant to ***sections 3(5)(a)*** and ***5(1)*** of the ***Immigration Act 1971*** as amended. A letter dated 23 June 2008 set out the SSHD's reasons. It stated that "it was not accepted" that the decision to deport would give rise to any interference with the family life of YM within the terms of

Article 8 of the ***European Convention on Human Rights*** (ECHR), or, if there was any such interference, it "could be justified in the circumstances" of his case.

5. YM appealed the deportation decision and on 1 July 2009 the Asylum and Immigration Tribunal (AIT) allowed his appeal both on human rights grounds under ***Article 8*** and on immigration grounds under paragraph 364 of the ***Immigration Rules (HC 395)*** as amended. In August 2009 YM was warned for having contacted a co-defendant to the terrorist charges. (Non-contact was a condition of YM's licence). In December 2009 YM was recalled to prison at the same time as being arrested on suspicion of handling stolen goods. Those charges were not pursued and in January 2010 YM was released on licence again. Then on 5 October 2011 he was given a caution as a result of a "road rage" incident. In June 2012 YM was arrested on a charge of fraud in connection with an application for motor insurance. He subsequently pleaded guilty and was sentenced to a 12 month community supervision order and disqualified from driving for 12 months.

6. The SSHD appealed the AIT's decision and on 22 June 2011 the Upper Tribunal (UT) set aside the determination of the AIT for error of law and directed that the UT should re-make the decision. At the re-determination hearing on 22 February 2013 the UT heard oral evidence from YM, his wife J, YM's mother and also J's mother. It had before it written evidence from various witnesses in support of YM's case. It also had expert written evidence from Professor Silke, someone the UT described as having "considerable expertise" on terrorism generally and terrorist psychology in particular,[1] and Professor Allen, an expert on East African and Ugandan affairs and professor at the London School of Economics. Lastly, the UT had reports from an independent social worker who had twice visited YM, J and their family to observe and comment upon the family relationships and the possible consequences if YM were to be deported.

7. The UT promulgated its decision on 2 May 2013 and allowed the SSHD's appeal. In summary, it rejected arguments advanced by Mr Lewis of counsel that there was a real risk that YM's rights under ***Article 3*** of the ECHR would be breached if he were to be returned to Uganda.[2] The UT also rejected the argument that, with regard to YM's ***Article 8*** rights, the case should be dealt with on the basis of the revised Immigration Rules that had come into force on 9 July 2012.[3] However, the UT also found that YM could not have satisfied their terms even if they were applicable. Further, whilst the UT accepted that the deportation of YM would interfere with his ***Article 8*** rights, it concluded that there were very serious reasons justifying deportation despite YM's long residence in the UK and the impact deportation would have on his family life. The UT was satisfied that "the decision to deport the appellant is necessary and proportionate to a legitimate aim within ***Article 8(2)***".[4] The effect was that, in re-making the AIT's decision, it dismissed YM's appeal based on ***Article 3*** and ***Article 8*** grounds "as well as on humanitarian protection and immigration grounds".[5] Therefore the SSHD's decision to deport was upheld.

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[1] UT decision [47]
[2] UT decision [67].
[3] UT decision [83].
[4] UT decision [86].
[5] UT decision [88].

8. Permission to appeal to this court was given by Sir Stephen Sedley. At the hearing on 19 June 2014 it was accepted on behalf of the SSHD that the relevant revised Immigration Rules that had came into force on 9 July 2012 ("the 2012 Rules") must be applied by this court in determining whether the UT had erred on a point of law in relation to YM's ***Article 8*** appeal**.** However, there was a dispute during oral argument as to precisely how the new rules were to be applied in an appeal context, particularly in relation to YM's age, which is a key factor in the 2012 Rules and could be a key factor in YM's case, because he was under 25 when the SSHD made her decision in 2008, but he is now just over 30. YM maintained his appeal on the ***Article 3*** ground as well.

9. The issues on the appeal divide neatly into those under ***Article 8*** and those under ***Article 3***. In the oral argument before us the ***Article 8*** issues were taken first, and it seems to me more sensible to deal with those issues before dealing with those under ***Article 3***. It is therefore convenient to set out the statutory framework relating to the deportation of "foreign criminals" and the relevant 2012 Rules which came into force on 9 July 2012, as a result of the Statement of Changes in Immigration Rules (HC 194). Those Rules were intended to encapsulate the SSHD's current policy with regard to a foreign criminal's ***Article 8*** rights when he would otherwise be faced with a mandatory deportation order. This appeal has been made more complicated by the fact that relevant provisions of the ***Immigration Act 2014*** and Immigration Rules 2014 came into force on 28 July 2014, that is after the oral hearing but whilst this judgment was being prepared.

II. The statutory framework including the new provisions of the *Immigration Act 2014* concerning a foreign criminal's *Article 8* rights when he is faced with a deportation order and the relevant Immigration Rules

10. First, I will refer to the statutory framework relating to deportation of non-EEA nationals who have committed offences in the UK which were in force at the time that the deportation notice was served. At that time the matter was governed by the ***Immigration Act 1971*** (as amended by the ***Immigration and Asylum Act*** 1999 – together the 1971 Act) and paragraph 364 of the Immigration Rules then current. ***Section 3(5)(a)*** of the 1971 Act provided that a person "who is not a British citizen is liable to deportation from the United Kingdom if – (a) the Secretary of State deems his deportation to be conducive to the public good…". ***Section 5(1)*** of the 1971 Act provided then, and continues to provide, that where a person is, under ***section 3(5)*** (or ***section 3(6)***), "liable to deportation", then the SSHD may make a deportation order against him, subject to the further provisions of that section. ***Paragraph 364*** of the then current Immigration Rules stipulated that when a person was "liable to deportation" the presumption was that the public interested required deportation. However the SSHD would take all relevant factors into account, including the Convention rights of a person when deciding whether or not to make the order.[6]

[6] This regime has, of course, since been replaced by the provisions of ***sections 32*** and ***33*** of the ***UK Borders Act 2007,*** dealing with the "automatic deportation" of "foreign criminals", but the "automatic deportation" is subject to various statutory exceptions, including breach of a person's Convention rights: see ***section 33(2)(a).*** The 2007 Act had been passed when the deportation order was made on 22 May 2008, but the relevant provisions only came into force on 8 August 2008. The SSHD made her decision in his case under the 1971 Act regime, not the 2007 Act regime.

11. Thus, in the case of YM, when the SSHD made her decision on whether to deport YM, she had to consider whether the public interest in his removal would be outweighed by the interference his ECHR rights, which for present purposes, includes in particular those under ***Article 8.*** As Lord Dyson MR pointed out in ***MF(Nigeria) v SSHD,***[7] in recent years the question of when the deportation of a foreign criminal would be contrary to his ***Article 8*** rights had been the subject of "much public debate and many judicial decisions". Until the introduction of the new Immigration Rules 398, 399 and 399A in the ***Statement of Changes of Immigration Rules (1994) (HC 395)*** by virtue of the ***Statement of Immigration Rules (2012) (HC 194)*** - "the 2012 Rules" - this issue was governed entirely by case law. However, in Lord Dyson's words: "The [2012 Rules] introduced for the first time a set of criteria by reference to which the impact of ***Article 8*** in criminal deportation cases [is] to be assessed".

12. The relevant 2012 Rules did not last long before they were themselves modified when the ***Immigration Act 2014*** was passed. As I have noted, the relevant parts of that Act came into force on 28 July 2014, that is after the oral argument had taken place and whilst this judgment was in preparation. ***Section 19*** of the 2014 Act introduced into the ***Nationality, Immigration and Asylum Act 2002*** a new ***Part 5A*** containing new ***sections 117A-D.*** This new Part is headed "Article 8 if the ECHR: Public Interest Considerations". The new ***sections 117A-D*** set out statutory guidelines that must be applied when a court or tribunal has to decide whether an immigration decision to remove someone from the UK would be in breach of his ***Article 8*** rights. The new ***section 117A*** is headed "Application of this Part"; the new ***section 117B*** is headed "Article 8 public interest considerations in all cases" and the new ***117C*** is headed "Article 8 additional considerations in cases involving foreign criminals".

13. We decided that we should ask the parties for written submissions on the effect (if any) of these new provisions on the ***Article 8*** appeal. I will come to the arguments in due course. It is, I think, necessary to set out all of the new ***sections 117A-D.*** They provide:

> **117A** *Application of this Part*
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> > (a) breaches a person's right to respect for private and family life under Article 8, and
> > (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> > (a) in all cases, to the considerations listed in section 117B, and

[7] ***[2014] 1 WLR 544*** at [2]

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B *Article 8: public interest considerations applicable in all cases*

(1)The maintenance of effective immigration controls is in the public interest.
(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.
(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.
(4) Little weight should be given to—
(a) a private life, or
(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C *Article 8 additional considerations in cases involving foreign criminals.*

(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where—
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a

qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within themeaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who –

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or (c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

14. ***Section 73(1)*** of the 2014 Act provides that: "The Secretary of State may, by order, make such transitional, transitory or saving provision as the Secretary of State considers appropriate in connection with the coming into force of any provision of this Act". ***Paragraph 3(o)*** of the ***Immigration Act 2014 (Commencement No 1, Transitory (****sic****) and Savings Provisions) Order 2014*** (SI 1820 of 2014) simply provides that 28 July 2014 is the day appointed for ***section 19*** of the 2014 Act to come into force. There is nothing in the 2014 Act (particularly ***Schedule 9*** which is headed "***Transitional and Consequential Provisions"***) to indicate whether the new statutory rules are to apply to cases or appeals that are pending before a court or tribunal.

15. The 2012 Rules were modified by ***Statement of Changes to the Immigration Rules of 10 July 2014 (HC 532)*** which were laid before Parliament on 10 July 2014. I will call these the 2014 Rules. I have set out below the relevant 2012 Rules, as amended by the 2014 Rules. I have put the new 2014 provisions in square brackets and I have crossed through the provisions of the 2012 Rules which are deleted by the 2014 Rules, in the hope that both the 2012 Rules and the 2014 Rules modifications can be plainly seen:

> A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at [28 July 2014] are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.'
>
> …
>
> 397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention . Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.
>
> [A.398. These rules apply where:
>
> (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under ***Article 8*** of the Human Rights Convention;
>
> (b) a foreign criminal applies for a deportation order made against him to be revoked.]
>
> 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 [and in the public interest] 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 [and in the

public interest] because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or (c) the deportation of the person from the UK is conducive to the public good [and in the public interest] 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~~ [the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.]

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~~ [it would be unduly harsh for the child to live in the country to which the person is to be deported]; and (b) ~~there is no other family member who is able to care for the child in the UK~~ [it would be unduly harsh for the child to remain in the UK without the person who is to be deported]; or (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, [or] 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~~ [(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported].

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.~~

[(a) the person has been lawfully resident in the UK for most of his life; and (b) he is socially and culturally integrated in the UK; and (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported].

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.~~

[where an ***Article 8*** claim from a foreign criminal is successful:

(a) in the case of a person who is in the UK unlawfully or whose leave to enter or remain has been cancelled by a deportation order, limited leave may be granted for periods not exceeding 30 months and subject to such conditions as the Secretary of state considers appropriate;

…….]

[399C. Where a foreign criminal who has previously been granted a period of limited leave under this Part applies for further limited leave or indefinite leave to remain his deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave.]

[339D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances].

16. The *Statement of Changes in the Immigration Rules HC 532* said, under the heading "Implementation", that the changes set out in paragraphs 14 to 30 of this statement would take effect on 28 July 2014 and would apply to all ECHR Article 8 claims from foreign criminals which were to be decided on or after that date. The changes in paragraphs 14 to 30 include the new 2014 Rules I have set out above.

17. An explanatory memorandum was attached to the Statement of Changes made to create the 2012 Rules. It set out the view of the Government on the relationship between the 2012 rules and ***Article 8.*** Paragraph 4.3 stated:

> "These changes to the Immigration Rules will come into force on 9 July 2012, except as in paragraph 4.4 below.[8] However, if an application is made before 9 July and the application has not been decided before that date, it will be decided in accordance with the rules in force on 8 July 2012, regardless of the date that [the] decision is made. The assessment of Article 8 in deportation proceedings will follow the rules in place on the date on which that consideration is made, regardless of when a person was notified of the Secretary of State's intention to deport them."

18. Paragraph 7.2 stated, in part:

> "…The rules will set proportionate requirements that reflect the Government and Parliament's view on how individuals' ***article 8*** rights should be qualified in the public interest to safeguard the economic well-being of the UK by controlling

[8] Para 4.4 relates to changes that are not relevant to this case.

immigration and to protect the public against foreign criminals. This will mean that failure to meet the requirements of the rules will normally mean failure to establish an ***article 8*** claim to enter or remain in the UK and no grant of leave on that basis. Outside exceptional cases, it will be proportionate under ***article 8*** for an applicant who fails to meet the requirements of the rules to be removed from the UK".

19. An explanatory memorandum was also attached to the Statement of Changes made to create the 2014 Rules. Paragraphs 3.4 , 3.5 and 4.7 provide:

> "3.4. The changes relating to family and private life will come into force on 28 July 2014, in line with the commencement of section 19 of the Immigration Act 2014. The Home Office regrets that it was not possible to finalise this Statement of Changes on a basis that, consistent with normal practice, would have allowed the changes to be laid at least 21 days prior to their coming into force. This is because many of the changes to the Immigration Rules need to coincide with the coming into force of sections 17(3) and 19 of the Immigration Act 2014 on 28 July 2014.
>
> 3.5. However, the substance of those changes which concern the alignment of the Immigration Rules relating to family and private life with sections 117B, 117C and 117D of the Nationality, Immigration and Asylum Act 2002, inserted by section 19 of the 2014 Act, along with section 94B of the Nationality, Immigration and Asylum Act 2002, were extensively debated by both Houses of Parliament during the passage of the Immigration Act.
>
> 4.7. The changes set out in paragraphs 14 to 30 of this statement take effect on 28 July 2014 and apply to all ECHR Article 8 claims from foreign criminals which are decided on or after that date."

Paragraphs 14 to 30 of the statement contain the amendments to the provisions of the 2012 Rules that I have set out above, ie. the 2014 Rules.

20. On 13 June 2012 the Home Office had issued a statement entitled "Immigration Rules on Family and Private Life: Grounds of Compatibility with ***Article 8*** of the European Convention on Human Rights". This statement said at paragraph 20 that:

> "The intention is that the rules will state how the balance should be struck between the public interest and private right, taking into account relevant case law, and thereby provide for a consistent and faire decision-making process. Therefore, if the rules are proportionate, a decision taken in accordance with the rules will, other than in exceptional cases, be compatible with ***article 8.***"

21. Paragraph 67 of the same document accepted that there could be cases where a discretion might be used to grant leave to remain outside the new rules. However, it was considered that those cases would be rare, since the new rules reflected the Government's view on how the balance should be struck "between individual rights under ***article 8*** and the public interests in safeguarding the UK's economic well-being in controlling immigration and in protecting the public from foreign criminals".

22. This document has apparently not yet been revised in the light of the 2014 Rules.

23. At the time of the 2012 Rules the SSHD also issued immigration directorate instructions, chapter 13 of which is stated to explain how decision makers consider claims that the deportation of a foreign criminal would be in breach of his ***Article 8*** rights. The chapter is entitled "Criminality Guidance for ***article 8*** ECHR cases". The latest version (5.0) is dated 28 July 2014 and is clearly intended to reflect government thinking on how the new ***sections 117A-D*** and the 2014 Rules should be interpreted by case workers when they have to apply these provisions.

III. Two Threshold Questions

24. Having become aware that the 2014 Act had come into force and that the 2014 Rules were effective as from 28 July, it seemed to me that two new threshold questions now arose: first, what relevance, if any, are the new provisions in ***Part 5A*** of the 2014 Act to the ***Article 8*** ground of appeal? Secondly, what relevance, if any, are the 2014 Rules to the ***Article 8*** appeal? We invited further written submissions from the parties on these issues and these were duly provided by early September.

25. In summary, the appellant submitted that the task of this court is to decide whether the UT had made an error on a point of law in reaching its decision.[9] That exercise meant that this court had to consider the law as it was when the UT made its decision and therefore did not require this court to consider the new statutory provisions in ***sections 117B-D*** as inserted in the 2002 Act in deciding whether there had been such an error of law. However, the new provisions in the 2014 Act and the 2014 Rules could be relevant in interpreting the 2012 Rules. Further, if the court were to conclude that the UT had made an error of law, then the new statutory provisions and the 2014 Rules would come into play, whether this court remade the decision or it decided to remit the matter to the UT.

26. The SSHD agreed with the first of these propositions. The SSHD also agreed that if this court concluded that the UT had erred in law, then this case had to be remitted to the UT to reconsider the case on the facts. However, the SSHD submitted that the 2012 Rules remained the relevant ones. Neither the new ***sections 117A-D*** nor the 2014 Rules could be used as aids to the proper construction of the 2012 Rules and so were irrelevant to the issues of construction on the 2012 Rules that arose in the oral hearing.

IV. The decision of the UT on the *Article 8* ground in some more detail

27. The UT considered first the "best interests of the children" and concluded that if YM were to be deported his separation would have a serious impact on the family and in particular on the children. However, the birth of IS in December 2005 had not stopped YM from committing the "terrorist" offences and so he thereby undermined the stability of the family by his own behaviour. The UT then considered YM's history of offending. It rejected his evidence (and that of his wife and mother) that he did not know what was happening at the training camps. Even if YM himself did not intend to take part in terrorist activities, the seriousness of the offences lay in the encouragement, support and approval given to those who did intend to take part by virtue of his presence.

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[9] ***Section 14(1), Tribunal, Courts and Enforcement Act 2007.***

28. Next the UT considered the risk of YM re-offending and the report of Professor Silke on this topic. It noted that Professor Silke had concluded that YM presented a "medium risk" of re-offending. The UT regarded Professor Silke's assessment of a "low risk" of terrorist offending as being undermined by YM's failure to acknowledge the nature of his "terrorist" offences by refusing to accept he had any idea about the true nature of the camps and their purpose.

29. Lastly, the UT considered the ties that YM had with Uganda and whether or not there would be "insurmountable obstacles" to YM's family moving to Uganda. The UT had rejected YM's mother's evidence on her own ties with Uganda as being "unreliable". It concluded that YM could not demonstrate that he had no ties, including social, cultural or family, with Uganda.

30. The conclusions of the UT on the ***Article 8*** issue were: (1) the 2012 Rules did not apply as they had not been in force at the time of the SSHD's decision. Thus "to consider what the position might have been if the [new] rules had been in force at the date of [the SSHD's] decision or applied at the date of the hearing [would be] an artificial exercise", which did not assist. (2) Even if the 2012 Rules did apply, YM would not have been able to meet the test of "insurmountable obstacles to family life with that partner continuing outside the UK" under paragraph 399(b)(ii). (3) Nor could he have satisfied the test that he had no ties, social, cultural, family or otherwise, with Uganda if Rule 399A(b) applied.[10] (4) Applying the law without regard to the 2012 Rules, the question was whether, taking all relevant matters into account, there were very serious reasons requiring YM's deportation despite the impact that it would have on his family life and in particular the life of his children. Taking account of the criminal record of YM, the UT concluded:

> "we are satisfied that the public interest in deterrence and expressing society's revulsion at those who, even if not intending to commit acts of terrorism themselves, provide support and encouragement to those who do by attending events where they know the purpose is to provide training for such activities clearly outweighs the interference with the appellant's private and family life and that of his partner and children. There are very serious reasons justifying deportation despite the appellant's long residence and the impacte on his family life. We are satisfied that the decision to deport the appellant is necessary and proportionate to a legitimate claim within ***Article 8(2)".***[11]

31. The UT therefore dismissed YM's ***Article 8*** appeal.

V. The arguments of the parties on the *Article 8* ground of appeal

32. Mr Stephen Knafler QC, for YM, argued first that the UT erred in law in failing to judge the ***Article 8*** issues by reference to the 2012 Rules. He submitted that YM's case fell within Rule 398(b) because he had been convicted of an offence for which he had been sentenced to a period of imprisonment of less than 4 years and it was not correct to try and aggregate the two concurrent sentences for the two "terrorist" offences or for those offences and the aggravated burglary offence to arrive at a total

[10] All these conclusions are in [84] of the UT's determination and reasons.

[11] See [86].

of more than 4 years. Secondly, on that basis, he accepted that YM's case did not come within any of the categories spelt out in Rule 399, because YM could not fulfil all the relevant conditions. However, his case fell within Rule 399A(b), because YM was (at the relevant time, viz. the decision of the SSHD) under 25 years, he had spent more than half his life living continuously in the UK (even taking account of the time spent in prison) and he had no ties, social, cultural or family with the country to which he would have to go if required to leave the UK, viz Uganda. Thirdly, the UT had erred in concluding that YM *himself* had ties with Uganda. They had to be personal ties, not those of his mother or other relatives. All this amounted to an error of law on the part of the UT.

33. For the SSHD, Mr Jonathan Hall QC accepted that the UT should have applied the 2012 Rules. He submitted, however, that its failure to do so was legally immaterial because it would have reached the same result even if it had applied those Rules. In Mr Hall's submission, YM fell into Rule 398(a), not (b), because there had been sequential offending which resulted in a total period of imprisonment of well over four years. That was the spirit of that Rule. Alternatively, if the words "an offence" in Rule 398(a) referred to a single offence, then YM's case was outside Rule 398 altogether. Either way, the policy behind the 2012 Rules should not lead either the UT or this court to the conclusion that YM has to be treated as if he had only committed the later two "terrorist" offences.

34. If, contrary to these submissions, YM fell within Rule 398(b), then his age has to be taken as at the time of the hearing of the UT. When the original decision was taken the 2012 Rules were not in force. The Rules are a guide only. As for "ties" , a tie can be indirect as well as direct. The important point is whether the person will be able to make a life in the country to which he is to be deported. If Rule 399 does not apply, then, effectively, the last phrase of Rule 398 must apply, because these Rules were intended to be a "complete code" on foreign criminals and ***Article 8*** rights. Therefore, in accordance with [40] and [41] of ***MF(Nigeria) v SSHD,***[12] it will only be exceptionally that a foreign criminal will succeed in showing that his rights under ***Article 8(1)*** of the ECHR will trump the public interest in his deportation. Mr Hall accepted that this meant that this involved a balancing exercise which involved the application of a "proportionality test" as stated in [44] of ***MF (Nigeria).*** But the UT's careful analysis and balancing exercise could not be impugned.

VI. The Issues to be decided on the *Article 8* ground of appeal.

35. In my view, the following issues have to be decided on the ***Article 8*** appeal: (1) on the "threshold issues", do the provisions of the 2014 Act and the 2014 Rules have any relevance to this appeal and, if so, at what stage? (2) Assuming that the appeal has to be decided by reference to the statutory provisions prevailing *before* the 2014 Act and 2014 Rules applied, how are the 2012 Rules to be applied to this case? (3) Did the UT err on a point of law in making its decision? (4) If the UT did err on a point of law, should this court remake the decision or should it be remitted to the UT to do so.

VII. The Threshold issues.

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[12] ***[2014] 1 WLR 544***

36. By ***section 14(1)*** of the 2007 Act, when the Court of Appeal has to consider an appeal from the Upper Tribunal, its first task is to decide whether "the making of the decision concerned involved the making of an error on a point of law". This Court's task, therefore, must be to consider the law as it had to be applied at the time of the UT's decision. It cannot be to consider the law as it has subsequently developed. Thus, in my view, both the new Part 5A to the 2002 Act and the 2014 Rules are irrelevant to the first task that we are faced with.

37. If, however, this Court considers that the UT's decision did involve "the making of an error on a point of law", there are further decisions to make. This Court can, but is not obliged to, set aside the decision of the UT: see ***section 14(2)(a)*** of the 2007 Act. If it does so, then the matter can either be remitted to the UT or this Court can re-make the decision itself: see ***section 14(2)(b)(i)*** and ***(ii).*** If this court were to set aside the decision of the UT and either remit the matter or re-make the decision itself, then, at that stage I think that both the new statutory provisions and the 2014 Rules would become relevant.

38. So far as the new ***Part 5A*** of the 2002 Act is concerned, ***section 117A*** is in force as from 28 July 2014. There is no guidance anywhere as to whether the new provisions are to be applied to cases in which the SSHD has already made a decision and the matter has been appealed through the tribunal system. But ***section 117A*** itself says that the new ***Part 5A*** applies "where a court or tribunal is required to determine whether a decision made under the Immigration Acts" breaches a person's ***Article 8*** rights and would so be unlawful under ***section 6*** of the ***Human Rights Act 1998.*** Either this Court or the UT would, at the stage where the decision is being remade, have to determine whether a decision to deport YM is a breach of his ***Article 8*** rights, so it would have to apply the statutory provisions applicable to that determination that are then in force. To my mind that does not involve any issue of "retrospectivity". Even if it did, it seems to me that the relevant question to ask is that posed by Lord Mustill (in the context of a new statutory provision) in ***L'Office Cherifien des Phosphates v Yamashita-Shinnohon Steamship Co Ltd***:[13] what does fairness require? This test was adopted by the House of Lords in ***Odelola v SSHD***[14] in the context of changes in the Immigration Rules between the date of an application for leave to remain and the time the application was determined by the SSHD. To my mind there is no unfairness in applying the new statutory provisions to a decision that has now to be made by a tribunal or court. The decision should reflect the balance that has been struck, which has some benefits and, perhaps, some drawbacks for the person concerned.

39. So far as the 2014 Rules are concerned, it is clear from the provisions of Rule A362 itself, as well as the statement under "implementation" in the Statement of Changes and paragraphs 3.4 and 4.7 of the Explanatory Memorandum, that the 2014 Rules are to be applied to all decisions concerning ***Article 8*** claims that are made after 28 July 2014. As Lord Hoffmann said in the ***Odelola case*** at [7], the Immigration Rules are

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[13] ***[1994] 1 AC 486*** at ***525.*** That case concerned a new statutory power entitling arbitrators to strike out a claim for want of prosecution. The House of Lords held that it applied to an arbitration that had been started before the new provisions had come into force.

[14] ***[2009] 1 WLR 1230.*** See the speech of Lord Brown of Eaton-under-Heywood at [32]-[33]. Lords Hope of Craighead and Scott of Foscote specifically agreed with the speech of Lord Brown. Lords Hoffmann and Neuberger of Abbotsbury agreed in the result but for slightly different reasons.

a statement by the SSHD of how she will exercise powers of control over immigration. Thus, in the absence of any statement to the contrary, the most natural reading of the Rules is that they apply to decisions taken by the SSHD until such time as she promulgates new rules, after which she will decide according to the new rules. The same applies to decisions by tribunals and the courts: that is why in ***MF (Nigeria) v SSHD***[15] (hereafter "***MF(Nigeria)***"), the Court of Appeal held that both the UT and it were obliged to apply the 2012 Rules to MF, despite the fact that the SSHD had taken her original decision in 2010 under the pre-existing rules.

VIII. How should the 2012 Rules be applied in this case?

40. Both sides agreed that the UT should have applied the 2012 Rules, even though the UT had held that it should not. I agree with that view. Although this means that, in making its decision, the UT made an error on a point of law, that will not matter if the same result would have obtained had the UT applied the 2012 Rules. So how do the 2012 Rules apply to YM's case?

41. In ***MF(Nigeria)*** this court held that the 2012 Rules were a "complete code" for dealing with a person who is faced with deportation under the Immigration Acts and who claims that this would be contrary to his ***Article 8*** rights.[16] It must follow that all cases will come within one of the three categories set out in Rule 398(a), (b) or (c). That is implicit in the last phrase of Rule 398 itself and is the effect of this court's decision in ***MF(Nigeria).*** Therefore, the first question is: into which sub-paragraph of Rule 398 does YM fit? Mr Hall's argument is that it is clear that Rule 398(b) does not apply to this case, so it must either fall into Rule 398(a) or YM's case must fall outside Rule 398 altogether. In either case the approach of the UT cannot be faulted. Mr Knafler's argument is that Rule 398(b) applies.

42. The truth is that YM's case does not fit neatly into either Rule 398(a) or (b). We had some elaborate arguments on whether the ***Interpretation Act 1978*** applied to the Rules, despite the fact that they are neither a statute nor a statutory instrument, strictly speaking. The argument was that "an offence" in Rule 398 should be construed so as to include the plural, so that if all YM's offences are considered, he has been sentenced to a total of well over 4 years, so his case falls within Rule 398(a). Mr Hall also relied on the wording of the SSHD's decision letter of 23 June 2008 which refers to all the convictions of YM, not just the "terrorist" offences.

43. The wording of Rule 398 in its 2012 version is unsatisfactory because, although it is meant to be part of a "complete code" it does not deal with the very many different possible circumstances that might arise. Nonetheless, the wording refers to "an offence" not more than one. Even if the singular included the plural, it would be necessary to import more words into Rule 398(a) if the aim was to take account of all the person's offences historically, then tot up all the sentences of all those offences, so as to make a grand total of a period of imprisonment which, in total for a number of different offences on different occasions, amounted to at least four years. I am not prepared to manipulate the wording of Rule 398(a) to such an extent to produce that result. We have to construe the words sensibly in their normal and natural meaning.

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[15] ***[2014] 1 WLR 544.***

[16] See [44] of ***MF(Nigeria).***

44. Therefore, in my view, only one offence at a time has to be taken into account and the only question is whether, for that particular offence, the sentence was more than 4 years. If that is the correct approach, then YM's case has to be regarded as falling within Rule 398(b) within this "complete code".

45. If that is correct, then the next question is whether YM can rely on Rule 399A(b), as Mr Knafler contends. As far as Rule 399(b) is concerned, YM could, at the time of the UT's decision, demonstrate that he has a genuine and subsisting relationship with a partner in the UK who was (and is) a British citizen. YM could also show that, at the time of the UT decision, he had lived continuously in the UK for at least 15 years (minus periods of imprisonment) prior to the decision of the UT, as that tribunal appears to have accepted. However, in my view the words "immigration decision" in Rule 399(b) must have the same meaning as that given in ***section 82(2)(j)*** of the ***Nationality, Immigration and Asylum Act 2002.*** This stipulates that, for the purposes of that Part of that Act, an "immigration decision" includes a decision to make a deportation order under ***section 5(1)*** of ***The Immigration Act 1971.*** In short, it refers to the original decision of the SSHD, not that of the UT. YM cannot show that he had lived at least 15 years in the UK with valid leave continuously for 15 years prior to the SSHD's decision to deport on 22 May 2008. At that time YM had lived in the UK for 17 ½ years in all. He had been sentenced to a total of 7 years and 3 months detention in a YOI or imprisonment. His actual time in custody would have been half that, viz 3 years 7.5 months. So, even assuming that the correct construction of "period of imprisonment" in Rule 399(b)(i) refers to the actual time in custody, YM could not satisfy the 15 year residence period.

46. On this basis, the other requirement, in Rule 399(b)(ii), that there are "insurmountable obstacles to family life with that partner continuing outside the UK" is not relevant. The UT did not have the benefit of the view of the UT in ***Izuazu v SSHD***[17] on what those words meant: they do not mean literally "insurmountable", but something less stringent than that in order to comply with ***Article 8.*** In ***MF(Nigeria)*** this court "inclined to the view" that that view was correct.[18] The UT probably made an error of law at [83] in describing that test as "stringent" and one that YM could not meet in this case. But if, as Mr Knafler conceded, YM cannot meet the 15 year requirement, then that error is immaterial.

47. Can YM satisfy the requirement of Rule 399A(b)? There are two issues: first, at what date does "the person" have to be under 25; is it the date of the original "immigration decision" or the date of the decision by the tribunal that is considering his case under the 2012 Rules? The second issue, assuming YM satisfies the age requirement, is whether he has "no ties" with Uganda. The UT did not consider the first issue, which was raised by members of this Court during oral argument; the UT found against YM on the second point.

48. On the "age at decision" question, matters are made more difficult because the wording of Rule 399A(b) is not precisely drafted. A sensible, construction has to be given to the Rules, according to the natural and ordinary meaning of the words, bearing in mind that these are statements of the SSHD's administrative policy.[19] Even

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[17] ***[2013] UKUT 45 (IAC).***

[18] At [49].

[19] See the statement of Lord Brown of Eaton-under-Heywood in ***Mahad v ECO [2009] UKSC*** at [16].

adopting that approach I have found this point difficult. Logically, the person's age should be taken as that at the time the original "immigration decision" was made, or else (assuming that the Rules themselves do not change), different results will obtain depending on how much time elapses before the relevant tribunal or court's decision. So, if the relevant time for calculating the person's age was that of the last decision to be taken, then a person could be under 25 at the time of the original immigration decision, but over 25 at the time of an appeal to the FTT or to the UT or to the Court of Appeal. Rule 399A(b) might apply at one or more of the earlier stages but not do so at a later stage. On the other hand, the wording says "the person ***is*** 25" and the Rule goes on to refer to a specific time from which the continuous residence is to be calculated.

49. Given this ambiguity, it seems to me that the fair and practical construction is that the person has to be 25 at the time of the original decision of the SSHD. This would fit in with the other provisions in Rules 399 and 399A, which require periods of residence in the UK of 15 or 20 years prior to the relevant "immigration decision". Looked at in that context, taking half a person's life, that is a period of 12.5 years (discounting periods of imprisonment) for a person of just under 25 at the time of the original decision of the SSHD shows a kind of progressive scale overall.

50. On that basis, YM would satisfy this requirement. He was just under 24 when the SSHD made her decision on 22 May 2008. On that basis, the last issue arises: did YM have no ties (including social, cultural and family) with Uganda? Before us, the parties assumed that this question had to be decided as at the time that the UT re-made the decision. It concluded that YM could not meet this "stringent" requirement.[20] However, when making its determination the UT did not have the benefit of the decision of the UT in ***Ogundimu (Article 8 – new rules)(Nigeria) v SSHD.***[21] In that case the UT stated, at [123], that:

> "The natural and ordinary meaning of the words 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation and removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless".

I agree with that construction.

51. The UT in that case went on to recognise that the test was an exacting one. However, the exercise that had to be conducted was a "rounded assessment of all the relevant circumstances", which were not to be confined to "social, cultural and family" issues. The UT concluded, on the facts, that Mr Ogundimu did not have ties with Nigeria, the country to which he would have been deported. It noted that his father

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[20] [83] of the Decision.

[21] ***[2013] UKUT 00060 (IAC).*** The UT consisted of The President, Blake J, and UT Judge O'Connor.

might have ties but they were not the ties of Mr Ogundimu himself "or any ties that could result in support to [him] in the event of his return [to Nigeria]".[22]

52. I agree with the analysis of the UT in ***Ogundimu.*** Whether this is a "hard –edged" factual enquiry, or a question of "evaluation", [23] the question in this case is: what ties does YM himself have with Uganda and would they support him in the event of a return there. Ties of other relatives, particularly YM's mother, are irrelevant.

IX. Did the UT err on a point of law in making its decision?

53. Mr Hall accepted that the UT made an error of law in not applying the 2012 Rules. But that would not have mattered if the error was immaterial. The UT made an error of law in its construction of "insurmountable obstacles" for the purposes of Rule 399(b)(ii), but, for the reasons I have set out above, and as Mr Knafler accepted, that was an immaterial error. The UT did not specifically consider the issue of the point at which YM's age was to be calculated for the purposes of Rule 399A(b). That was an error, but the UT seems to have assumed the point in YM's favour, so that too would be an immaterial error.

54. In my view, however, the UT did make one error of law that is material: that is on the question of whether YM had satisfied the UT that he had no ties with Uganda. The relevant passage of the UT's decision is at [74]. It recognised that YM himself had been away from Uganda for 21 years. It then referred to evidence of YM's mother, which it found "unreliable", so that the UT disbelieved her evidence on her links with her family there. It then concluded that "the appellant does not satisfy us that he would not have extended family [in Uganda]". There are three errors of law in this passage. First, the UT assumed that ties of YM's mother are either equivalent to ties of YM himself or that they go a long way to proving that he has ties. But that is not the nature of the enquiry that has to be undertaken: it is YM's ties that count. Secondly, the UT did not conduct a "rounded assessment of all the relevant circumstances" concerning possible ties of YM with Uganda. It did not conduct any assessment at all of YM's circumstances, as opposed to those of his mother. Thirdly, the UT did not ask itself the question: did YM have a continued connection with life in Uganda, such that he would have support were he to be returned there. It should have done.

55. The consequence of that error, in my view, is that the decision of the UT has to be set aside.

X. Given that the UT has made a material error of law and its decision must be set aside, should this court re-make the decision or should the matter be remitted to the UT?

56. Even if the 2012 Rules were still applicable, I would have wished to remit this matter to the UT to conduct a proper factual enquiry and evaluation of the ties that YM has with Uganda. But, for the reasons that I have set out above, in my view the 2012 Rules will not apply to any further decision on YM's ***Article 8*** rights. Both the new

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[22] See [124].

[23] The phrases used by Lord Dyson MR in ***MF(Nigeria)*** at [35] to describe the nature of the investigation to be carried out under Rules 398, 399 and 399A.

statutory provisions and the 2014 Rules must be applied. In those circumstances, I would allow the appeal on the ***Article 8*** ground, set aside the UT's decision and remit this matter to a differently constituted UT to reconsider the facts and make the necessary findings and evaluations in the light of the new statutory provisions and the 2014 Rules.

X1. The *Article 3* ground of appeal: the decision of the UT

57. The UT first set out the findings of the AIT on this issue. It found that the UK authorities had informed the Ugandan authorities in a letter dated 10 February 2009 that YM had been charged with counts of "receiving terrorist training". The AIT had commented that this might have been construed by the Ugandan authorities as meaning YM had been convicted under of the more serious offence, under ***section 6(2)*** of the 2006 Act, of receiving training in (broadly) terrorist skills at a time when he intended to use those skills for or in connection with acts of terrorism or in assisting others in that connection. The AIT had noted that the UK authorities could inform the Ugandan authorities of the true nature of YM's convictions and also of the latest OASYs report on him which the AIT said revealed a "lower risk assessment". The AIT had concluded that it did not know precisely what information had been disclosed to the Ugandan authorities by the UK authorities, nor what information would be disclosed if YM were to be deported to Uganda, but it accepted that, on the basis of the disclosure already made and Professor Allen's reports, there could be "adverse consequences" for YM were he to be deported to Uganda. The AIT had concluded, however, that YM was unlikely to engage in any Islamic activism or political activities if he were returned to Uganda. Therefore, although YM might be interrogated and monitored and even harassed and discriminated against, any such action would "not be of such duration or severity or both as to amount to ill-treatment sufficient to engage obligations on the part of the UK in relation to ***article 3*** of the European Convention".[24]

58. The UT itself found that it would be open to the UK authorities to notify the Ugandan authorities of the true nature of YM's convictions under ***section 8(2)(a)*** of the ***Terrorism Act 2006*** and that there was "no reason to believe that they would not do so".[25] The UT noted Professor Allen's concerns about what might happen to YM if he were returned to Uganda and if he came to the "adverse attention" of the authorities there, but the UT concluded that this would only happen if YM engaged in terrorist activities. Taking Professor Allen's reports as a whole, particularly his comments that official Ugandan behaviour towards YM would be constrained by the possibility of international scrutiny "and by the fact of the involvement of the UK authorities' the UT concluded:

> "….we are not satisfied that the absence of guarantees from the Ugandan authorities means that it would not be safe for him to be returned or that the high threshold is met for showing that he would be at real risk of a breach of ***article 3*** on his return".[26]

XII. The arguments of the parties on the *Article 3* issue.

[24] Conclusion of the AIT as set out at [66] of the UT decision.
[25] UT decision [67].
[26] UT decision [67].

59. Mr Knafler's principal criticism of the UT's decision on ***Article 3*** was that it did not deal accurately with the evidence of Professor Allen, which was not the subject of any challenge or cross-examination on behalf of the SSHD before the UT. Mr Knafler pointed out that Professor Allen had stated in his first report (16 January 2009) that: (1) in his view YM's arrival in Uganda (if deported) would be noted by the Ugandan authorities; (2) official behaviour towards YM would be constrained by the possibility of international scrutiny at least in the short term, particularly if there is communication between officials in the UK and Uganda relating to YM's deportation; (3) YM was likely to be interrogated and monitored but not "overtly abused". In his second report (23 February 2009) Professor Allen referred to references to CPS documents in the two OASYs reports on YM about the risk of re-offending and serious harm that he presented which inferred that the primary aim of training at the camps that YM attended was to prepare men to travel abroad to commit terrorist attacks against "Coalition forces" and that there was a risk that YM might somehow become implicated in this. Professor Allen also noted that the CPS documents also linked YM and his co-defendants to the "London Bombers" involved in the unsuccessful bombing attempt in London on 21 July 2005. Professor Allen commented that if YM were deported to Uganda and there were any indication or suspicion that he had reoffended there or was planning to do so, he would be likely to be detained immediately and Professor Allen hints that, in those circumstances, "extra-judicial responses might occur". In his third report, (26 June 2012, which was before the UT) Professor Allen stated that he understood that the Home Office had not further communicated with the Ugandan authorities since 2006. He also expresses the view that, given the close relationships between Uganda and the UK and their collaboration on anti-terrorism activities, it would be very likely that the Ugandan authorities "would be encouraged" to keep YM under surveillance if he were to be returned to Uganda. Professor Allen said "it also seems very likely that he would be detained and interrogated". He would be treated relatively well if his well-being were to be monitored by the UK but if that were not to occur or to stop then things might change. Professor Allen commented that "detention without trial for terrorist suspects in so-called 'safe houses' in Uganda remains a concern". These 'safe houses' are where Ugandan security services detain suspects without trial. If YM were to end up in such a place, "his whereabouts would be hard to discover and there would be a real possibility that he will be tortured".

60. Mr Knafler emphasised that YM was not a British citizen and that there was no indication from the Secretary of State that if YM were deported to Uganda, his position would be monitored by the UK authorities. There was every possibility that the Ugandan authorities would act on the statement in the OASYs report that there is a danger that YM would engage in terrorist acts. Therefore, in Mr Knafler's submission, there was a real risk that YM would be taken to a 'safe house' and tortured there. Accordingly, the conclusion of the UT at [67] of the decision erred in law because it misinterpreted the evidence.

61. Mr Hall submitted that the summary by the UT of Professor Allen's three reports, as set out at [53]-[55] of its decision, is accurate. Further, the UT was entitled to conclude in [67] that, first, given the close relationship between the Ugandan and UK authorities and their collaboration on anti-terrorism activities, there was "no reason to believe" that the UK authorities would not pass on to Uganda the true nature of the offences of YM if he were to be deported; and, secondly, the fact that YM has

not engaged in any terrorist activities since his release on licence. Accordingly, the UT was correct to conclude that, in those circumstances, it was not demonstrated that there was a "real risk" of a breach of YM's ***Article 3*** rights if he were to be returned to Uganda.

XIII. Conclusion on the *Article 3* issue.

62. In my view neither the conclusion of the AIT nor that of the UT on the ***Article 3*** issue discloses any error of law. The UT in particular summarised accurately the evidence of Professor Allen's three reports. The UT, at [54], considered Professor Allen's view that if the Ugandan authorities were provided with the OASys report then YM might be detained, then released then monitored, but YM might then "disappear" if the UK stopped watching him. The UT regarded that view as speculative. That was a reasonable conclusion for the UT to make. The view is no more than speculation. Equally, Professor Allen's surmise in his third report that, in certain circumstances, YM might be taken to a 'safe house' and tortured is also speculative. The UT was correct to point out that YM has not engaged in any terrorist activity since his release from prison in 2008 and that there is no evidence that this is likely in the future, whether in the UK or in Uganda. On the evidence overall, the conclusion of the UT that it was not satisfied that there was a real risk of a breach of YM's ***Article 3*** rights being breached if he were deported to Uganda was one that it was entitled to reach on the evidence, in particular, on the basis of its conclusions on Professor Allen's three reports. So I would dismiss the appeal on this ground.

XIV. Disposal

63. For the reasons given above, I would allow the appeal on the ***Article 8*** ground, but dismiss it on the ***Article 3*** ground. The matter must be remitted to a differently constituted UT, in order to reconsider the ***Article 8*** issues. The UT will have to re-find the necessary facts and apply them to the new statutory provisions and the 2014 Rules.

Sir Colin Rimer

64. I agree.

Sir Stanley Burnton

65. I agree that this appeal should be allowed and the matter remitted to the Upper Tribunal for the reasons given by Lord Justice Aikens, for whose full and careful judgment I am grateful.

66. I add that in my judgment it would in general be difficult to see that in the case of someone who had committed offences as serious as those of the appellant the lack of ties to his country of nationality would lead to a breach of his ***Article 8*** rights, since the public interest in his deportation is so strong. I am persuaded in this case that the right course is to remit his appeal to the Upper Tribunal by reason of the unfortunate lapse of time since it heard his appeal and the change in the applicable statute law and Immigration Rules.