Neutral Citation Number: [2013] EWCA Civ 1192

Case No: C5/2013/0398

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER
UPPER TRIBUNAL JUDGE STOREY &
UPPER TRIBUNAL JUDGE COKER
DA009162010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2013

Before:

THE MASTER OF THE ROLLS
LORD JUSTICE DAVIS
and
LADY JUSTICE GLOSTER

- -

Between:

MF (NIGERIA)	**Respondent**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Lisa Giovannetti QC and **Neil Sheldon** (instructed by **Treasury Solicitor**) for the **Appellant**
Raza Husain QC, Duran Seddon and **Navtej Singh Ahluwalia** (instructed by **Wilson Solicitors LLP**) for the **Respondent**

Hearing dates: 16 & 17 July 2013

- -

Judgment

Master of the Rolls:

Introduction

1. This is the judgment of the court.

2. In what circumstances is the deportation of a foreign national criminal contrary to article 8 of the European Convention on Human Rights ("the Convention")? This question has been the subject of much public debate and many judicial decisions in recent years. Until rules 398, 399 and 399A ("the new rules") were introduced into the Immigration Rules HC 395 in 2012, the question was governed entirely by case law. The new rules introduced for the first time a set of criteria by reference to which the impact of article 8 in criminal deportation cases was to be assessed. This appeal raises important questions as to the proper interpretation of the new rules.

3. Section 3(5) of the Immigration Act 1971 provides 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 32(4) and (5) of the UK Borders Act 2007 ("the 2007 Act") provides that, subject to section 33, the Secretary of State must make a deportation order in respect of a "foreign criminal". A foreign criminal is a person who is not a British citizen, is convicted in the United Kingdom of an offence and is sentenced to a period of imprisonment of at least 12 months. Section 33 provides that section 32(4) and (5) do not apply where the removal of the foreign criminal in pursuance of the deportation order would breach his Convention rights.

4. The previous law was stated in a number of decisions of the ECtHR including *Boultif v Switzerland* [2003] 33 EHRR 1179, *Uner v Netherlands* [2006] 3 FCR 229 and *Maslov v Austria* [2008] GC ECHR 1638/03. The essence of the approach required by that law was summarised by the House of Lords in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167. Giving the opinion of the appellate committee, Lord Bingham said at para 16:

> "The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain; the need to discourage fraud, deception and deliberate breaches of the law; and so on."

5. At para 18, he said:

> "The reported cases are of value in showing where, in many different factual situations, the Strasbourg court, as the ultimate guardian of Convention rights, has drawn the line, thus guiding national authorities in making their own decisions. But the main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved. Proportionality is a subject of such importance as to require separate treatment."

6. He then discussed proportionality concluding at para 20:

> "In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in Razgar, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed

> under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test."

7. It is not in dispute that the case law provides that an appeal in a removal or deportation case involves two stages. The first is to assess whether the decision appealed against is in accordance with the immigration rules; and the second is to determine whether the decision is contrary to the appellant's article 8 rights. As the House of Lords made clear at para 17 of *Huang*, the rules in force at that time were not required to guarantee compliance with article 8 and did not strike the balance: "it is a premise of the statutory scheme enacted by Parliament that an applicant may fail to qualify under the rules and yet may have a valid claim by virtue of article 8". It is against this background that the new rules must be considered.

The new rules

8. The new rules provide as follows:

> "**Deportation and Article 8**
>
> 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 4 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 4 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 7 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."

9. On 13 June 2012, the Home Office issued a statement entitled "Immigration Rules on Family and Private Life: Grounds of Compatibility with Article 8 of the European Convention on Human Rights". It stated at paragraph 5 that:

> "[u]sually, the Courts show deference to the judgement of the decision-maker. However, in the context of immigration decisions on A8, the Courts are impeded from doing so by the failure of the Immigration Rules to reflect any consideration of proportionality under A8."

10. Paragraph 20 of this statement stated that:

> "The intention is that the Rules will state how the balance should be struck between the public interest and individual right, taking into account relevant case law, and thereby provide for a consistent and fair 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 A8."

11. In the course of discussing "the new 10-year route to settlement for those whose removal would breach Article 8" the statement declared at paragraph 67:

> "Bringing A8 within the Rules will ensure consistency, fairness and transparency in decision-making. We will retain discretion to grant leave outside the Rules in genuinely exceptional cases where it is considered that the Rules will produce a disproportionate result. However, it is considered that those cases will be rare since the new Rules reflect the Government's view – which Parliament will be invited to endorse – of how the balance should be struck between individual rights under A8 and the public interests in safeguarding the UK's economic well-being in controlling immigration and in protecting the public from foreign criminals."

12. The statement concluded at paragraph 89 that "[i]t is the Department's view that the new Rules on family and private life are compatible with ECHR Article 8".

13. Attached to the new rules themselves is an Explanatory Memorandum. At paragraph 7.2 under the sub-heading "Approach to ECHR Article 8" it stated that:

> "The new Immigration Rules will reform the approach taken as a matter of public policy towards ECHR Article 8 – the right to respect for family and private life – in immigration cases. The Immigration Rules will fully reflect the factors which can weigh for or against an Article 8 claim. The rules will set proportionate requirements that reflect the Government's and Parliament's view of how individuals' Article 8 rights should be qualified in the public interest to safeguard the economic well-being of the

> UK by controlling 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 requirement of the rules to be removed from the UK."

14. The Secretary of State also issued a document entitled "Criminality Guidance for Article 8 ECHR Cases". The latest version of this document was issued in March 2013 to assist caseworkers in applying the new rules. At this stage, it is sufficient to refer to what is said about the phrase "exceptional circumstances" where it appears in rule 398:

> "In determining whether a case is exceptional, decision-makers must consider all relevant factors that weigh in favour and against deportation.
>
> "Exceptional" does not mean "unusual" or "unique". Decision makers should be mindful that whilst all cases are to an extent unique, those unique factors do not generally render them exceptional. For these purposes, exceptional cases should be numerically rare. Furthermore, a case is not exceptional just because the exceptions to deportation in Rule 399 or Rule 399A have been missed by a small margin. Instead, "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that deportation would not be proportionate. That is likely to be the case only very rarely."

15. The picture that emerges from these statements is by no means entirely clear. The statement of 13 June 2012 says that in most cases the rules produce a proportionate result, but in those "genuinely exceptional" cases (which are not defined) where the result is disproportionate, the discretion to grant leave *outside* the rules will be retained to ensure that article 8 rights are respected.

16. On the other hand, the document issued in March 2013 defines exceptional circumstances and states that, in determining whether a case is exceptional, all relevant factors in favour of and against deportation are to be considered under the new rules. On this approach, it is difficult to see what scope there is for any consideration outside the new rules: ie they provide a complete code.

The facts

17. MF is a citizen of Nigeria who entered the UK illegally in March 1998. In September 2006, he claimed asylum. On 20 November 2009, he was convicted of handling stolen goods and possession and/or use of a false instrument. He was sentenced to 18 months' imprisonment. He was, therefore, a "foreign criminal" as defined by the 2007 Act. Accordingly, by section 32(5) of the 2007 Act, the

Secretary of State was required, subject to section 33, to make a deportation order against him.

18. On 28 March 2009, he married SB. This was at a time when it was known by all concerned that his immigration status was precarious and probably at a time when he had already been charged with the offences. Like F (her daughter by another man), SB is a British citizen. On 29 June 2009, MF applied for leave to remain in the UK on the basis of that marriage. The application was rejected by the Secretary of State in March 2010 (and a further application was similarly rejected in September 2010). The Secretary of State also refused MF's asylum claim and on 28 October 2010 she made a deportation order against MF under section 32(5) of the 2007 Act.

19. MF appealed to the First-tier Tribunal ("FTT") on asylum and human rights grounds. The appeal was dismissed. By a decision of 10 July 2012, the Upper Tribunal (UT Judge Storey and UT Judge Coker) ("UT") found that the FTT had erred in law in a number of respects and its decision in relation to article 8 was set aside.

The decision of the UT

20. The decision of the UT is careful and closely reasoned. It is an impressive piece of work. At para 25, they said that the new rules could not be construed as providing a complete code for article 8 claims. Primary decision-makers are as much bound by section 6 of the Human Rights Act 1998 ("the 1998 Act") as judges are. The new rules maintain the obligation on primary decision-makers to act "in compliance with" all the provisions of the Convention. In relation to deportation cases, even primary decision-makers remain obliged by the terms of section 33(2) of the 2007 Act to consider whether deportation of a foreign criminal would breach a person's Convention rights. But even if the new rules furnish a near-complete code for dealing with article 8 claims, they still leave scope for individual assessment (para 28). For example, in specifying that for certain categories there is an exceptional circumstances test, they still contemplate that, when applying this test, decision-makers will have to conduct a fact-sensitive assessment of proportionality: they do not seek to prescribe the outcome of any particular case.

21. At para 32, they said that the new rules do not replace the existing binding law. The duties imposed on the tribunal under primary legislation were no less than they were before. They were required by section 6 of the 1998 Act not to act contrary to a person's Convention rights and by section 2 to take account of the Strasbourg jurisprudence. They were still bound to reach decisions on specific human rights grounds of appeal under section 84 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and section 33 of the 2007 Act. They were still required to consider not just whether (where applicable) a decision was in accordance with the immigration rules, but also whether to allow an appeal under section 84(1)(c), (g) or (e) of the 2002 Act. They therefore concluded that the method of assessment must ordinarily remain a two-stage one (first, the application of the rules and secondly, application of article 8).

22. In amplification of this, they said:

> "37. Before, however, the judge can complete his or her judicial task it remains to assess whether the decision under the

> rules (if it is negative) is contrary to the appellant's Convention rights and that remains a (stage 2) question that must be asked by taking account of Strasbourg jurisprudence and, more importantly, domestic higher court authority as to what that jurisprudence means. Hence, if the application under the new rules of an "exceptional circumstances" (or an "insurmountable obstacles") test results in an appellant losing under the rules, it is still incumbent on us to ask whether that is consistent with his Convention rights as interpreted by our higher courts. If, in an Article 8 case, the decision-maker rejected the application under the new rules, having applied the "insurmountable obstacles" test, but the applicant shows that family life cannot "reasonably" be continued abroad, then our duty is to allow the appeal on human rights grounds. We are bound by higher court authority that the proper test for Article 8 purposes is "reasonableness": see *VW (Uganda).* The fact that the Strasbourg Court's jurisprudence continues to see "insurmountable obstacles" as a proper criterion does not alter this fact. As already noted, our duty is only to take account of Strasbourg jurisprudence and, whether the former might be thought by us to be inconsistent with higher court precedent binding on us, matters not.
>
> 38. Whilst for the above reasons we consider that we are obliged by primary legislation to continue (ordinarily) to adopt a two-stage approach, we acknowledge that in practice where Article 8 -specific provisions of the rules have application, the second stage assessment will take a different hue. It will now resemble that conducted under the rules to a greater or lesser extent. Clearly, if the new rules perfectly mirrored Strasbourg jurisprudence as interpreted by our higher courts, the second stage judicial exercise would largely cover the same canvas. The difficulty is that the new rules do not obviously constitute a perfect mirror. We do not seek in this decision to gauge the extent of the difference, but one particular difference is of great importance in the present case. This relates to their methodology. They do not set out in full the *Boultif* criteria (*Boultif v Switzerland,* 54273/00; [2001] ECHR 497) as restated by the Grand Chamber in *Maslov v Austria* 1683/03; [2008] ECHR 546 (see Appendix A). It is possible to read the new rules as encompassing some of these criteria, but the decision-maker is not mandated or directed to take all of them into account."

23. Finally, they addressed the question of the respect in which the new rules affect the second-stage article 8 assessment:

> "42.....Previously judges' understanding of the weight the Secretary of State attaches to the public interest side of the Article 8 balancing exercise had largely to be gleaned from the

> submissions of the Secretary of State in leading cases. It has fallen very much to the judicial system to give it form and content. In deportation cases involving foreign criminals s.32 of the 2007 Act gave clear parliamentary expression to the particular importance the Secretary of State attached to their deportation: see *MK (deportation-foreign criminal-public interest)* Gambia [2010] UKUT 281 (IAC); *AP (Trinidad and Tobago)* [2011] EWCA Civ 551 per Carnwath LJ; *Gurung v Secretary of State for the Home Department* EWCA Civ 62. Now more generally, greater specificity is given in the new rules as to what circumstances are seen to attract the greatest weight in respect of the public interest; the Secretary of State has now herself told us what factors she considers relevant and what weight at the general level she attaches to them. In particular, in the context of deportation of foreign criminals, the new rules set out thresholds of criminality (by reference to length of terms of imprisonment) so that the Article 8 private life claims brought by foreign criminals can only succeed (unless there are exceptional circumstances) if they not only have certain periods of residence but can also show their criminality has fallen below these thresholds.
>
> 43. That must and should properly inform our Article 8 assessment made in compliance with our s.6 obligations under the HRA. Whereas previously it has been open to judges, within certain limits, to reach their own view of what the public interest is and the weight to be attached to it, the scope for doing so is now more limited."

24. They then proceeded to apply this approach to the facts of the appeal. Having set out the material facts, they recorded at para 56 an important concession made by Mr Deller, the Senior Home Office Presenting Officer. He said that he did not wish to argue that it would be a "viable option" for the appellant's wife and daughter to relocate to Nigeria and in that way maintain family life ties with the appellant. He also apparently was prepared to accept that, in the circumstances of this case, the combination of her working commitments, her daughter's schooling, the need for her to ensure proper care of her mother and father and her and her daughter's British citizenship, amounted to "insurmountable obstacles" making that option "unreasonable" so far as she was concerned. We express no view as to whether this concession was rightly made.

25. Leaving aside a retrospectivity argument with which we are not concerned**,** it was conceded on behalf of the appellant before the UT that he could only succeed under the new rules if he could show that his case involved "exceptional circumstances" within the meaning of para 398.

26. At para 64, the UT said that there was nothing "unique" about this case. The appellant was an illegal entrant who, after arriving in the UK became involved in a stable relationship, committed a crime for which he was sentenced for a term of more than 12 months' imprisonment and was liable to deportation as a foreign criminal.

That his family members may suffer is "part of the matrix that occurs in many such cases".

27. The UT's assessment of the article 8 claim under the new rules is set out at paras 68 to 80 of the determination. They noted that it was not in dispute that the appellant had private as well as family life in the UK, although the weight to be accorded to these rights was "somewhat" reduced by the fact that they had been built up while his immigration status had been "precarious" (para 68). As regards proportionality, it was necessary to conduct a distinct best interests of the child assessment (para 69). The reasons weighing in favour of deportation bore considerable weight. The new rules were an index of the enhanced importance the Secretary of State attaches to the public interest in the deportation of foreign criminals. The fact that the appellant had failed to meet the requirements of the new rules was a "very significant consideration" and his "extremely bad immigration history was also of importance" (para 70). All of the personal ties relied on by the appellant were formed in full knowledge that his immigration status was "precarious". This was a factor which Strasbourg and UK jurisprudence consistently treated as of relevance in assessing the weight to be attached to those ties (para 71).

28. By virtue of the concession that relocation of the appellant's wife and stepchild was not a reasonable option, the scope for the proportionality assessment was "somewhat limited". The UT were left to consider only whether it would be proportionate for the Secretary of State to undertake a deportation that would result in separating the appellant from his family for a very long time, except for visits by them to Nigeria and indirect forms of communication (para 74). On the other hand, the appellant had family ties in Nigeria which he would be able to resume (para 76).

29. The UT considered the position of the wife and her parents, but concluded that the appellant's deportation would not be disproportionate on that account (paras 77 and 78). But they were unable to reach the same conclusion in relation to the best interests of F. They were obliged by section 55 of the Borders, Citizenship and Immigration Act 2009 to treat the best interests of the child as a primary consideration. They continued:

> "79.....We weigh against the appellant's case that it was not until F was around 13 years old that he became involved in her life and so his role as a de facto father must not be exaggerated in terms of her history. But for a child, especially one who has not had any involvement with her birth father for some considerable time, the present is much more important than the past. In our view, a key document in this case is the very recent report dated 15 September 2012 from independent social worker, Peter Horrocks giving his assessment of the importance to F of her relationship with the appellant. We know from the evidence (see in particular her statement of 7 September 2012) that F herself has said she regards the appellant as her de facto father and it seems to us that this recent report, paragraphs 4.8-4.9 in particular, corroborates this fact. This report also emphasises the pressure she would come under to devote time to helping with the care of her two maternal grandparents, both of whom have significant care needs.

> 80 It is our task as judges to seek, pursuant to our duty under s.6 of the HRA, to strike a fair balance. In considering the many factors in play in this case, we attach very significant weight to the serious view taken by the respondent of the appellant's criminality and poor immigration history (albeit, applying the *Maslov* criteria, it is clear that he has not reoffended for nearly 7 years and he has been assessed as being at low risk of re-offending). However, as against that we are confronted with a case in which the respondent has conceded that it would not be reasonable to expect his wife and daughter to accompany him to Nigeria to live as a family there. The case is also one in which the best interests of the child, F, are to have a de facto father as she grows up. Weighing all the evidence in the balance, we are satisfied that it would not be proportionate in 2012 to deport the appellant. It almost certainly would have been proportionate for her to have done so in earlier years before the appellant's relationship with F became established, but, as noted earlier, the Secretary of State did not actively pursue the appellant's deportation earlier which she could have done if his asylum application had been timeously processed."

30. To summarise, the UT decided that what was required was a two stage process of first applying the rules and, if the claimant failed under the rules, secondly applying a proportionality test outside the rules. The same approach was adopted by the Upper Tribunal (Blake J, Lord Bannantyne and UT Judge Storey), in *Izuazu* (Article 8—new rules) [2013] UKUT 000045 (IAC). At para 40 of the determination in that case, the UT said that the first stage was to consider whether a claimant could benefit under the new rules. If so, there was no need to go on to consider article 8 "generally". If not, it was necessary to make an assessment of article 8 "applying the criteria established by law".

The case for the Secretary of State

31. As we have seen (paras 9 to 16 above), the position of the Secretary of State as to the meaning of the new rules and how they should be applied has not always been easy to ascertain. Before the UT in the present case, it was submitted on her behalf that the new rules were an entire code and that there was no need to have regard to the general law on article 8. It was not made clear to the tribunal that it was the Secretary of State's case that the rules required or even permitted a proportionality exercise to be conducted in any circumstances. The hearing before the UT in the present case took place on 18 September 2012 (determination promulgated on 31 October). The hearing in *Izuazu* was on 9 October 2012 and the determination in that case was promulgated on 30 October. The UT in *Izuazu* recorded the Secretary of State's submission in response to the question what difference the new rules had made on the case law on article 8 in these terms:

> "….the Rules make a substantial difference to the case law and essentially restore the exceptional circumstances test disapproved of by the House of Lords in Huang v SSHD [2007] UKHL 11, [2007] 2 AC 167 because their Lordships were considering a set of immigration rules that did not spell

> out the UK's response to Article 8 issues whereas the present rules before us do so."

32. That was a surprising submission to make in view of the round terms in which an exceptionality test was rejected by the House of Lords in *Huang* at para 20: see also *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41, [2009] 1 AC 1159 at paras 8, 12, 18, 20 and 21.

33. But the thrust of the case advanced on behalf of the Secretary of State in the grounds of appeal in the present case was different. These argued:

> "15. The material provisions of the rules reflect the very weighty public interest in favour of the deportation of foreign criminals, as defined in the 2007 Act. At paragraphs 399 and 399A, they identify the specific circumstances in which the weight to be attached to an appellant's family and/or private life are capable of outweighing that public interest.
>
> 16. They also provide that even where the criteria in paragraphs 399 and/or 399A are not satisfied, the public interest in deportation may be outweighed by "*other factors"* in *"exceptional circumstances"* (see paragraph 398).
>
> 17. Thus the rules provide an avenue for consideration of the proportionality of deportation on the individual merits of the specific case, having regard to all the circumstances.
>
> …..
>
> 20 Thus, the SSHD seeks permission to appeal on the basis that the UT erred in law:
>
> (a) in considering there to be a need, or justification, for separate consideration of article 8, outside the context of the rules (" the two-stage test")"

34. At para 4 of the Secretary of State's skeleton argument in the present appeal, it is said that the new rules establish a "comprehensive scheme for the consideration of article 8 in cases concerning foreign criminals….Thus, if a consideration of article 8 within the framework of the rules an appeal falls to be dismissed, there is no legitimate basis for a further and separate consideration of article 8 outside the rules". At the hearing of the appeal, in view of the uncertainty as to the Secretary of State's case, we asked Ms Giovannetti QC to set out it out in writing. The document she produced stated:

> "The new Rules do not seek to change the law. What they seek to do is properly to reflect the Strasbourg jurisprudence when applied to the deportation of foreign criminals. Hitherto, the Secretary of State was concerned that, in some cases, caseworkers and/or the Tribunal were taking decisions which failed properly to reflect the Strasbourg jurisprudence in two main respects: (i) failing adequately to take account of the important public interest in

> deporting foreign criminals, as identified by Parliament; and (ii) failing to apply a sufficiently high threshold when undertaking the Art.8 proportionality balance, given the margin of appreciation afforded to States in this context.
>
> The change implemented by the new Rules is to bring greater clarity and certainty to the decision making process so as to avoid repetition of these errors and achieve consistency of decision making.
>
> The new Rules seek to achieve this objective in two principal ways: (i) by listing, in paragraphs 399 and 399A, categories of case which, on a proper analysis of the Strasbourg jurisprudence, deportation would be disproportionate under Art.8; and (ii) by borrowing from the Strasbourg court the phrase 'exceptional circumstances' which the ECtHR has used to connote a high threshold in certain Art.8 cases, and which, when interpreted in the context of the other provisions of the new Rules, reflects the public interest in deporting foreign criminals in the category of cases to which it applies".

Discussion

35. It is common ground that the first step that has to be undertaken under the new rules is to decide whether deportation would be contrary to an individual's article 8 rights on the grounds that (i) the case falls within para 398 (b) or (c) and (ii) one or more of the conditions set out in para 399 (a) or (b) or para 399A (a) or (b) applies. If the case falls within para 398 (b) or (c) and one or more of those conditions applies, then the new rules implicitly provide that deportation would be contrary to article 8. Whether a case satisfies the criteria set out in para 398 (a), (b) or (c) is self-evidently a question of "hard-edged" fact; and whether one or more of the conditions set out in para 399 or 399A applies may also involve a question of "hard-edged" fact. But it may involve a question of evaluation, such as whether it would be reasonable to expect the child to leave the UK (para 399(a)(ii)(a)) or whether there are "insurmountable obstacles to family life" with the partner continuing outside the UK (para 399(b)(ii)). We shall revert to the meaning of "insurmountable obstacles" later in this judgment.

36. What is the position where paras 399 and 399A do *not* apply either because the case falls within para 398 (a) or because, although it falls within para 398 (b) or (c), none of the conditions set out in para 399 (a) or (b) or para 399A (a) or (b) applies? The new rules provide that in that event, "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors". It is the apparent difference between the parties as to the meaning and application of this provision which lies at the heart of the present appeal.

37. At first sight, it appeared that there was a gulf between the rival positions of the parties. On the one hand, the Secretary of State appeared to be saying that the new rules were a "comprehensive code". On the other hand, the case advanced by Mr Husain QC on behalf of MF was that the new rules failed to require consideration of all points relevant to the question whether, on the facts of a particular case, it was proportionate for the purposes of article 8 to deport a foreign criminal. In his

submission, it followed that, in some cases at least, article 8 requires the issue of proportionality to be considered separately from the rules. As we have seen, this was the conclusion reached by the UT. But in our view, during the course of oral argument, it became clear that the differences between the parties were more apparent than real.

38. The first point to make is that para 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 ECtHR 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 paras 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 *Huang*, 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 ECtHR 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 art 8". This has been repeated and adopted by the ECtHR 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 paras 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 paras 399 or 399A do not apply.

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 para 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 para 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. The UT concluded (para 41) that it is required because the new rules do not fully reflect Strasbourg jurisprudence. But either way, it is necessary to carry out a two stage process.

47. Before we come to the decision that was made on the facts of this case, we need to say something about "insurmountable obstacles". It will be recalled that one of the situations in which para 399 applies is where 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 the partner satisfies the condition stated in para 399(b)(i) and "there are insurmountable obstacles to family life with that partner continuing outside the UK".

48. At para 38 of their determination, the UT said that they were bound by authority to hold that the proper test for article 8 purposes is "reasonableness". It is not in dispute that MF has a genuine and subsisting relationship with SB and that SB satisfies the condition stated in para 399(b)(i). As already noted, it was conceded on behalf of the Secretary of State before the UT that it would not be "a reasonable option" for SB and F to be relocated with MF to Nigeria and that there were "insurmountable obstacles" to family life with SB and F continuing outside the UK.

49. In view of the concession made before the UT, the question of the meaning of "insurmountable obstacles" does not arise. We did, however, hear argument on the point. We would observe that, if "insurmountable" obstacles are literally obstacles which it is *impossible* to surmount, their scope is very limited indeed. We shall confine ourselves to saying that we incline to the view that, for the reasons stated in detail by the UT in *Izuazu* at paras 53 to 59, such a stringent approach would be contrary to article 8.

The facts of this case

50. Although we have disagreed with the UT on the question whether the new rules provide a complete code, the differences between our approach and theirs is one of form and not substance. They conducted a meticulous assessment of the factors weighing in favour of deportation and those weighing against. As they said, the factors in favour of deportation were substantial. They properly gave significant weight to the serious view taken by the Secretary of State of MF's criminality and his poor immigration history. On the other hand, they attached considerable importance to the interests of F. The decision was finely balanced and a contrary decision would have been difficult for the appellant to challenge. But they did not take into account any irrelevant factors and they did not fail to take into account any relevant factors. In these circumstances, the UT were entitled to strike the balance in favour of MF. We can find no basis for interfering with their decision.

Conclusion

51. For all these reasons, we dismiss this appeal.