IAC-FH-GJ-V2

Upper Tribunal
(Immigration and Asylum Chamber)

MF (Article 8 – new rules) Nigeria [2012] UKUT 00393(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 18 September 2012	

Before

UPPER TRIBUNAL JUDGE STOREY
UPPER TRIBUNAL JUDGE COKER

Between

MF

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Ahluwalia, instructed by Wilsons Solicitors LLP
For the Respondent: Mr P Deller, Senior Home Office Presenting Officer

i. Prior to the new immigration rules (HC 194) introduced on 9 July 2012, cases involving Article 8 ECHR ordinarily required a two-stage assessment: (1) first to assess whether the decision appealed against was in accordance with the immigration rules; (2) second to assess whether the decision was contrary to the appellant's Article 8 rights.

ii. *The new immigration rules set out a number of mandatory requirements relating to claims reliant on Article 8 ("Article 8 claims") which make clear that if such requirements are not met, the Article 8 claim under the rules must be refused. They also contain related provisions which confer discretion but it is discretion to grant leave in response to an Article 8 claim only if the new mandatory requirements are met.*

iii. *Whenever the new rules have application judges are obliged to consider whether an appellant can show he meets the relevant requirements (s.86(3)(a) of the Nationality, Immigration and Asylum Act 2002). Where the new rules afford some related discretion, judges are obliged to consider whether that discretion should have been exercised differently (s. 86(3)(6)). However, what judges are doing when they are conducting this exercise is simply applying the rules: the rules are the rules: see paragraph 10 Mahad [2009] UKSC 16. The fact that these rules in part refer expressly to Article 8 or to certain Article 8 concepts is incidental. The fact that as a result of these changes the rules are longer and incorporate some of the vocabulary of Article 8 makes no difference.*

iv. *Because for most purposes the immigration rules must be given legal effect (see Odelola [2009] UKHL 25), <u>their</u> requirements for applicants making an Article 8 claim to show "exceptional circumstances" or "insurmountable obstacles" are to be understood as legal requirements in the same way as any other mandatory requirements of the rules.*

v. *However, the new rules only cover Article 8 claims brought under some, not all, Parts of the Rules and only accommodate certain types of Article 8 claims.*

vi. *Even if a decision to refuse an Article 8 claim under the new rules is found to be correct, judges must still consider whether the decision is in compliance with a person's human rights under s.6 of the Human Rights Act (see s.84(1)(c), (g) and (e) and s.86(2) and (3) of the 2002 Act) and, in automatic deportation cases, whether removal would breach a person's Convention rights (s.33(2) UK Borders Act 2007). Thus in the context of deportation and removal cases the need for a 2 stage approach in most Article 8 cases remains imperative because the new rules do not encapsulate the guidance given in Maslov v Austria App no.1683/03 [2008] ECHR 546, which has been endorsed by the higher courts.*

vii. *When considering Article 8 in the context of an appellant who fails under the new rules, it will remain the case, as before, that "exceptional circumstances" is not to be regarded as a legal test and "insurmountable obstacles" is to be regarded as an incorrect criterion.*

viii. *However, as a result of the introduction of the new rules, consideration by judges of Article 8 outside the rules must be informed by the greater specificity which they give to the importance the Secretary of State attaches to the public interest. For example, the new rules set out thresholds of criminality by*

reference to terms of imprisonment so that Article 8 private life claims can only succeed if they not only have certain periods of residence but can also show their criminality has fallen below these thresholds.

DETERMINATION AND REASONS

1. This is a decision to which both members of the panel have contributed. The appellant is a citizen of Nigeria. He is a foreign criminal as defined by s.32(1) of the UK Borders Act 2007 and his appeal lies against a decision by the respondent dated 28 October 2010 to make a deportation order against him pursuant to s.32(5) of that Act. We shall set out further particulars of his case shortly. His name and that of his family are anonymised solely in the interests of his daughter, F, who is aged 16.

2. This appeal raises issues under the new immigration rules, HC 395 (as amended from 9 July 2012[1]) which seek, inter alia, to set forth a new framework for reaching decisions on claims based on Article 8 of the ECHR. We suspect that the issue of the status and meaning of the new rules will preoccupy Tribunal and higher court judges for some time to come and doubtless, as case law about the new rules develops, a fuller understanding will be reached than that offered here. But we must make a start and indeed the higher courts will expect to have the benefit of Tribunal thinking in a range of cases. The present panel is able to speak with some knowledge as to how the tribunal judiciary has dealt with Article 8 cases hitherto.

The previous position

3. The position as regards Article 8 cases prior to these new rules was relatively straightforward. Following the coming into force of the Human Rights Act 1998 ("HRA") on 1 October 2000, in early reported decisions of the former Immigration and Asylum Tribunal, for example *Nhundu and Chiwera* IAT [2001] 01/TH/1603, a structured approach was adopted which ensured that Article 8 claims were analysed in the same way as enjoined by Strasbourg jurisprudence. The validity of a structured approach was confirmed by the higher courts, in particular by the House of Lords in *R (Razgar)* [2004] UKHL 27. Reported cases also highlighted the importance of deciding Article 8 cases by reference to the criteria set out by the ECtHR in *Boultif v Switzerland* 54273/00 [2003] 33 EHRR 1179 as developed in the Grand Chamber cases, *Uner v Netherlands* 46410/99 [2006] 3 FCR 229 GC ECHR and *Maslov v Austria* [2008] GC ECHR 1638/03. As our higher courts began to develop fuller guidance on various aspects of Article 8, it was not always obvious to the tribunal judge that theirs was entirely consistent with that of the Strasbourg

[1] By HC194 (9 July 2012), CM8423 (20 July 2012), HC514 (30 July 2012), HC565 (6 September 2012).

Court (e.g. whereas the ECtHR has for a long time applied tests of "exceptional circumstances" and "insurmountable obstacles", the House of Lords in *Huang* [2007] UKHL 11 and the Court of Appeal in cases such as *VW (Uganda*) [2009] EWCA Civ 5 have proscribed the use of such tests). But that was unproblematic because, although s.2 of the HRA requires all judges to "take account of" Strasbourg jurisprudence, it does not give it binding effect and under our doctrine of judicial precedent decisions of our higher courts are binding on us.

4. What, however, has always been uncontroversial from the beginning is that our human rights jurisdiction is rooted in primary legislation. By s.6 of the HRA we are obliged to act in compliance with a person's Convention rights. As already noted, by s.2 of the same Act, although Strasbourg jurisprudence does not bind us, we are under an obligation to take it into account. Further, domestic primary legislation has identified specific human rights grounds of appeal: s.84(1)(c) and (g) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). These grounds are in addition to s.84(1)(e) ("that the decision is otherwise not in accordance with the law"), a ground that is distinct from and (as is made clear by s.86(3)(a)) wider than s.84(1)(a) ("that the decision is not in accordance with the immigration rules"). In relation to immigration decisions affecting foreign nationals, s.33(2) of the UK Borders Act 2007 provides, as one of the statutory exceptions (Exception 1) to the automatic deportation regime, "…where removal of the foreign criminal in pursuance of a deportation order would breach (a) a person's Convention rights".

5. Subject to transitional provisions, most of the new rules came into effect on 9 July 2012. During the period October 2000 to 8 July 2012 the immigration rules made no specific references to Article 8. Paragraph 2 imposed a duty on all primary decision-makers (Immigration Officers, Entry Clearance Officers and all staff of the relevant Home Office Directorate) to "carry out their duties in compliance with the provisions of the Human Rights Act 1998". There were specific rules in Part 13 dealing with deportation and administrative removal which specified that decisions on such matters are subject to the requirement that they not be contrary to the European Human Rights Convention (e.g. old paragraph 364, paragraphs 380, 395D). Some of the changes made to the immigration rules from time to time appeared to be the result of developments in Strasbourg jurisprudence, one example being paragraph 246 which provides for limited leave in order to ensure parental contact with a child; but they were essentially changes in the policy of the Secretary of State influenced by Strasbourg jurisprudence, no more than that.

Two-stage approach

6. Against this backdrop the judicial task was relatively straightforward. Cases involving Article 8 ordinarily[2] required a two-stage assessment: (1) first to assess whether the decision appealed against was in accordance with the immigration rules; (2) second to assess whether that decision was contrary to the appellant's Article 8 rights. (In a very significant number of cases, where the appellant fell outside the immigration rules (e.g. because he was an overstayer), the only issue was (2)); and in considering (2) there was no reason to think that the rules had any decisive bearing on the conduct of the Article 8 balancing exercise. Under this two-stage approach the only way in which human rights considerations arose under (1) was in the context of ensuring that their interpretation was consistent with the obligation imposed by s.3 of the HRA but the higher courts saw little turning on that. Further, it was not generally considered that failure to meet the requirements of the rules was determinative of whether an appellant had a realistic prospect of success in their Article 8 claim, although the expectation was that it would only be a small minority of cases that would succeed.

7. If there were any doubts about whether this two-stage model of assessment (where applicable) was valid, they were dispelled by the higher courts in a series of cases beginning with *Huang* [2007] UKHL 11 in which the House of Lords made clear:

(i) that the immigration rules are not required to guarantee compliance with Article 8 and they do 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" (*Huang*, paragraph 17);

(ii) "the [immigration rules] include no overarching implicit purposes" (Laws LJ in *AM (Ethiopia) v Entry Clearance Officer* [2009] Imm AR 2 paragraph 38);

(iii) for decision-makers the principal effect of s.6 HRA is that they are obliged to have regard to and give effect to an applicant's Article 8 rights; "In exercising her powers, whether *within or outside* (emphasis in judgment) the rules of practice, the Secretary of State must have regard and give effect to applicants' convention rights ….The immigrant's Article 8 rights will be (must be) protected by the Secretary of State and the court, whether or not that is done

[2] This two-stage approach was seen to require modification in relation to deportation appeals both under the statutory regime in place prior to the coming into force of the UK Borders Act 2007 and thereafter in relation to non-automatic deportations: see *Bah (EO(Turkey) –liability to deport*) [2012] UKUT 00196 (IAC).

> through the medium of the Immigration Rules…" (Sir Anthony May in *Syed and Patel* [2011] EWCA Civ 1059, paragraph 35)

8. It was also evident from the decision letters made by primary decision-makers that where applicable they too applied a two-stage approach.

The new rules

9. The critical question of course is what difference the new rules HC 395 (as amended from 9 July 2012) make to assessment of claims reliant on Article 8 ("Article 8 claims").

10. Prior to the publication of the new rules, the Home Office published its "Statement of Intent: Family Migration", June 2012 which summarised the changes made in respect of Article 8 as follows:

> "First, we shall end the situation where those claiming the right to enter or remain in the UK on the basis of ECHR Article 8 –the right to respect for private and family life – do so essentially without regard to the Immigration Rules. The new rules will fully reflect the factors which can weigh for or against an Article 8 claim. They will set proportionate requirements that reflect, as a matter of public policy, the Government's and Parliament's view of how individual rights to respect for private or family life should be qualified in the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public from 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".

11. At paragraph 31 of the Statement it is said that:

> "The new Immigration Rules will unify consideration under the rules and Article 8, by defining the basis on which a person can enter or remain in the UK on the basis of their family or private life. They will have to meet clear, transparent requirements on the face of the rules, e.g. that they have no significant criminality, are in a genuine relationship, and meet the minimum income threshold and English language requirements. …"

12. The Home Office also issued a statement dated 13 June 2012, "Immigration Rules on Family and Private Life: Grounds of Compatibility with Article 8 of the European Convention on Human Rights". Observing 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"

paragraph 20 of this statement identifies that:

> "The intention is that the Rules will state how the balance should be struck between the public interest and individual rights, 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."

13. In the course of discussing "the new 10-year route to settlement for those whose removal would breach Article 8" the statement declares 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. "

14. The statement concludes 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".

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

> "7.2 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 from 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."

16. Since the publication of the new rules UKBA has also issued Immigration Directorate Instructions (IDIs) and (since 5 October 2012) Modernised Guidance to caseworkers on how to operate them. For the most part they direct caseworkers to decide Article 8 claims by reference to the new criteria

set out in the rules. However, there are also passages that reflect acceptance that this exercise is not necessarily conclusive. Thus in the IDI headed "Long residence and private life" (dated 28 August 2012) under the subhead "Exceptional circumstances" it was stated:

> "If the applicant does not meet the requirements and there are no exceptional circumstances which would mean that even though the applicant does not meet the requirements of the rules, refusal and requirement to leave the UK would be a breach of Article 8 (see related link: Exceptional circumstances) the application should be refused."

17. Without seeking here to analyse these materials, it is readily apparent that both the June 2012 Statement of Intent document, the 13th June 2012 statement by the Home Office and the recent IDIs and Modernised Guidance reflects a tension between two positions regarding the implications of the new rules for assessment of Article 8 claims. On the one hand, e.g. when the Statement of Intent talks at paragraph 31 about the new rules "unify[ing] consideration under the rules and Article 8" and the Home Office statement of 13 June states that "the new Rules on family and private life are compatible with ECHR Article 8", they appear to adopt the position that for decision-makers the Article 8 assessment must or can be done wholly within the new rules. On the other hand, when they state that failure to meet the new rules will "normally" mean failure to establish an Article 8 claim "other than in exceptional cases", they appear to embrace the position that the new rules are not conclusive as to assessment of an Article 8 claim: see paragraph 7 and 11 of the Statement of Intent, the latter of which states that if an applicant fails to meet the requirements of the new rules, "it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK would breach Article 8" (see also paragraph 35). Similar references can be found in the Home Office statement of 13th June: see paragraphs 20, 37, 67 and 70.

18. Whilst these materials form part of the background to our consideration of the meaning of the rules themselves they can be no more than that. In our approach to the meaning of immigration rules we must adhere to the firm guidance of the Supreme Court in *Mahad v ECO* [2009] UKSC 16 which makes clear that the task of the judges must be to discover from the words used in the rules themselves what the Secretary of State must be taken to have intended and that the IDIs (or similar internal instructions or guidance) are not to be taken as a gloss on their meaning. As stated by Lord Brown at paragraph 10:

> 10….Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The respondent's counsel readily accepted that what

she meant in her written case by the proposition "the question of interpretation is . . . what the Secretary of State intended his policy to be" was that the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under section 3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament which then has the opportunity to disapprove them. True, as I observed in *Odelola* (paragraph 33): "the question is what the *Secretary of State* intended. The rules are her rules." But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions (IDIs) issued intermittently to guide immigration officers in their application of the rules. IDIs are given pursuant to paragraph 1(3) of Schedule 2 to the 1971 Act which provides that:

> "In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (*not inconsistent with the immigration rules)* as may be given them by the Secretary of State . . ." (emphasis added).

11. It is evident that IDIs have on occasion been issued *in*consistently with the Rules as interpreted by the courts. A plain instance of this was an instruction issued in April 2001 stating in relation to rule 281 that support for a married couple from their families in the UK "would not satisfy the Rules, which require the couple to maintain themselves", an instruction flatly contrary to Collins J's unappealed decision some 18 months earlier in *Arman Ali*. Whilst I would readily ascribe such an inconsistency to a regrettable lack of coordination rather than characterise it (as the appellants suggest) as "a matter of great constitutional concern", for my part I found the series of IDIs canvassed before us (in any event incomplete for want of any retained archive of such instructions, another thing to be regretted) singularly unhelpful on the issue of construction."

19. We also have to bear in mind that for most purposes the immigration rules have the force of law: see *Odelola v Secretary of State for the Home Department* [2009] UKHL 25 paragraph 6 (Lord Hoffman) and paragraph 27 (Lord Brown); *Pankina* [2010] EWCA Civ 719.

20. Considering the new rules in the light of this guidance, we cannot say that we find it easy to regard everything that is said about Article 8 within the new rules as part of a coherent whole. At the very least, there appears to be tensions within them (similar to those we discern in the Statement of Intent and the IDIs and Modernised Guidance) between an approach which sees them as a complete code for dealing with Article 8 claims and an approach which sees them as requiring decision-makers sometimes to go beyond the rules. What can be said, however, is that there are a number of provisions which either refer to Article 8 or to some of its elements (for convenience we shall refer to these as "Article 8-specific "or "Article 8-related" provisions) and which set out mandatory requirements making clear that if such

requirements are not met, the Article 8 claim under the Rules must be refused. Consider, for example, the following examples:

> "326B. Where the Secretary of State is considering a claim for asylum or humanitarian protection under this Part, she *will consider any Article 8 elements of that claim in line with* the provisions of Appendix FM (family life) and paragraphs 276ADE to 276DH (private life) of these Rules. (emphasis added)
>
> …
>
> 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 9 July 2012 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served." (emphasis added)

Paragraph 398 of the new rules also stipulates that:

> "398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 …
>
> …
>
> (c) … 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." (emphasis added)
>
> (See also on administrative removal paragraph 400.)

21. Appendix FM (Family Members) stipulates that it is to apply to all applications both to those by family members (as defined within the Appendix) and to those falling under Part 8 except as otherwise set out in paragraphs A277-A280. The ability of Appendix FM to govern Part 8 is effected by paragraph A278: "The requirements to be met under Part 8 after 9 July 2012 may be modified or supplemented by the requirements in Appendix FM". The Appendix also contains Section GEN which expressly identifies that the purpose of the new FM "route":

> "… reflects how, under Article 8 of the Human Rights Convention, the balance will be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the

economic well-being of the UK; the prevention of disorder and crime; the protection of health or morals; and the protection of the rights and freedoms of others. It also takes into account the need to safeguard and promote the welfare of children in the UK".

22. Complementing the "Family Member" ("FM") route, the new rules create a "Private Life" route to long residence, and they likewise make this route subject to precise criteria related to residence, age, extent of ties to the country of return, etc.

23. Whilst, by virtue of their setting out specific requirements that have to be met in order for claims brought under the new family life or the private life heads to succeed, it might be thought that the legal effect of these new rules is to provide a complete code for assessing Article 8 claims, we do not see that this is, or can be, the case for a number of reasons. First the new rules only cover Article 8 claims brought under specific Parts of the rules. For example, both Part 8 and the new Appendix FM (to which Part 11 on asylum cross-refers) only seek to cover all those seeking to enter or remain as family members through the migration route and this is extended to applicants for asylum or humanitarian protection by Part 11 on Asylum. They do not include all those who seek to stay in the UK on family life grounds. Similarly, the new private life provisions modifying Part 7 only make provision for certain types of private life claims and the private life exception insofar as it relates to offenders only allows for specified categories of offenders to qualify. There are no specific provisions in the new rules for those seeking leave to enter or remain under Parts 1-6, much of Part 8 or most of Part 9 (as amended). Thus, if a primary decision maker is deciding a claim brought under Part 2 by a person seeking to enter or remain as a visitor for private medical treatment under paragraphs 51-56, and in that claim also raises Article 8, none of the new provisions appear to regulate how the Secretary of State is to assess such a claim, although the new Article 8-specific provisions might be thought to have analogous application. Essentially in this type of case the primary decision-maker will still have to undertake much the same type of two-stage process of assessment described earlier and to do so ungoverned by any Article 8 - specific criteria set out in the rules. Second, even within the routes they establish, the new provisions clearly do not seek to accommodate all possible types of Article 8 claims based on family life or private life. Thus, for example, the definition of "family life" as contained in Appendix FM only provides a route to those who have a family life with a person who is settled in the UK, a British citizen or has limited leave as a refugee or person in need of humanitarian protection: see GEN.1.1. It is also confined to applicants who are here lawfully: see R-LTRP.1.1. Only certain types of claims to private life are covered by the new Private Life route for long residence. Moreover, by strictly demarcating "family life" and "private life" heads of claim, it is not clear how the decision-maker is to consider in any individual case the cumulative impact of these.

24. Thirdly, some of the rules (continue to) require the decision-maker to act in accordance with legal norms outside the rules themselves. Thus paragraph 397 states that:

> "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".

(It is not entirely clear how this is to be reconciled with paragraph 398, which sets out mandatory requirements that must be met by a person claiming their deportation would be contrary to the UK's obligations under Article 8, unless paragraph 397 is taken to be addressing the wider position under primary legislation).

25. The last example brings us to the fundamental reason why we think that (whatever the intention) these rules cannot be construed as providing a complete code for Article 8 claims. Primary decision-makers are as much bound by s.6 of the HRA as judges are. Further, and unsurprisingly, the new rules maintain the paragraph 2 obligation on primary decision-makers to act "in compliance with" Article 8 (and indeed all provisions of the European Human Rights Convention). And in relation to deportation cases, even primary decision-makers remain obliged by the terms of s.33(2) to consider whether deportation of a foreign criminal "would breach (a) a person's Convention rights" and paragraphs 397 and 400 which deal with deportation and administrative removal also refer directly to obligations under the European Human Rights Convention.

26. The Upper Tribunal and the higher courts can be expected to develop a fuller understanding of the new rules, but we must now grapple with those aspects having a potential bearing on this appeal. It seems to us in this regard that several features are of particular importance. First, as already intimated, many of them mandate primary decision-makers to assess Article 8 claims according to certain criteria. If the specified criteria are not met, then an application must be refused: see e.g. paragraphs 276BE, 276CE, 276DH (which relate to private life), and paragraphs A362, 397, 400 (which relate to deportation and removal) and the numerous provisions dealing with partners, victims of domestic violence, children, parents and adult dependent relatives. One consequence of the inclusion of these provisions is that decision-makers can no longer proceed on the assumption that Article 8 claims are generally to be dealt with wholly outside the rules. On the contrary, the Article 8-specific rules have to be applied wherever they now apply.

27. A second important feature is that although (as was a feature under the old Part 8) several provisions of the new rules confer a discretion, it is only a discretion to allow a claim if all mandatory requirements are met. For example, although paragraph 276ADE sets out mandatory requirements to be met by an applicant for leave to remain on the grounds of private life, the decision as to whether to grant leave to remain is discretionary: "[l]imited leave … may be granted …" (It would appear that even the mandatory list of requirements specified in paragraph 276ADE imports a discretionary element when there has been refusal of an earlier application: this rule contains a closing sentence which presupposes that consideration of this paragraph entails a balancing exercise: "In considering applications under this paragraph, the Secretary of State shall attach less weight to private life in the UK established following refusal of an earlier application for leave to remain made under paragraph 276ADE").

28. It is also important to flag one thing the new rules do not do. Even if (contrary to our understanding) they were thought to furnish a near-complete code for dealing with Article 8 claims, they still leave considerable scope for individual assessment. For example, in specifying that for certain categories there is an exceptional circumstances test, they still clearly contemplate that when applying this test decision-makers will have to conduct a fact-sensitive assessment of proportionality. We cannot see that they seek to prescribe the outcome of any particular case.

29. As to whether the new rules embody legislative as distinct from executive policy (see below), we see nothing in principle illegitimate about the Secretary of State seeking to make specific provisions within the immigration rules as to how Article 8 claims are to be assessed. We are told by Mr Ahluwalia that there may be challenges brought on judicial review against the new rules based on arguments alleging that reform of this kind is inherently illegitimate. Whether that is so is not our concern. However, so far as our own statutory functions are concerned, we cannot see that the mere enterprise of establishing Article 8-specific rules can be criticised. The ECHR is based on the principle of subsidiarity and one of the legislative purposes of the HRA was to "bring rights home". If there was nothing amiss in the UK Government introducing specific human rights provisions in primary legislation (the HRA, s.84 of the 2002 Act and s.33(2) of the UK Borders Act 2007), we cannot see that there is anything amiss in publishing rules relating to assessment of Article 8 claims. Indeed (leaving aside for the moment whether they succeed in their stated aims) such steps would appear to promote the principles of legal certainty and transparency. "Consistency, fairness and transparency in decision-making" (see the Home Office statement of 13 June 2012 cited above at paragraph 13) are surely laudable objectives.

30. The remaining features of importance are best dealt with in the context of their particular relevance to judges.

The new rules and judges

31. Our essential task as judges is confined to deciding the significance of the new rules for the exercise our statutory functions under the Immigration Acts. We remind ourselves (as noted earlier) that for most purposes the immigration rules have the force of law, see *Odelola* [2009] UKHL 25, *Pankina* [2010] EWCA Civ 719. Judges must give legal effect to them. That must be as true of the new rules as of the old.

32. It might be thought that one could deduce from the proposition that immigration rules very often have the force of law the position that insofar as the new rules regulate how Article 8 claims are to be assessed, judges must apply them in the same way as primary decision-makers, so that the old two-stage assessment (rules; Article 8) is for most purposes collapsed into a one-stage assessment (rules). But that would be wrong. The rules do not and cannot replace the law that is binding upon us. Our duties under primary legislation are no less than they were before. We are still required by s.6 of the HRA not to act contrary to a person's Convention rights and by s.2 to take account of Strasbourg jurisprudence. We are still bound to reach decisions on specific human rights grounds of appeal under s.84 of the 2002 Act and s.33 of the UK Borders Act 2007. We are still required to consider not just whether (where applicable) a decision is in accordance with the immigration rules but also whether to allow an appeal under s.84(1)(c),(g) or indeed s.84(1)(e) of the 2002 Act: see s.86(2). For this reason our method of assessment must ordinarily remain a two-stage one (rules; Article 8).

33. That is not to say that when the new rules apply the first stage of the assessment is the same as before. Plainly now there are some rules which specify what requirements have to be met in order for the Secretary of State to be satisfied a claim based on Article 8 can succeed under the rules. Whenever the new rules have application, we are obliged to consider whether an appellant can show he meets the relevant requirements: see s.86(3)(a). Where the new rules afford some discretion, we are obliged to consider whether that discretion should have been exercised differently (s.86(3)(b)).

34. However, what judges are doing when they are conducting this exercise is simply applying the rules: the rules are the rules: see paragraph 10 *Mahad* [2009] UKSC 16. The fact that these rules in part refer expressly to Article 8 or to certain Article 8 concepts is incidental. The fact that as a result of these changes the rules are longer and incorporate some of the vocabulary of Article 8 makes no difference.

35. A corollary of the fact that the new rules often have the force of law (see above) is that we must treat its requirements of "exceptional circumstances" and "insurmountable obstacles" as legal tests. If the requirement of "most exceptional compassionate circumstances" as set out in existing immigration rules dealing with dependent relatives is a legal requirement, there is no logical basis for saying the new "exceptional circumstances" criterion is any less of a legal requirement (albeit it may be a somewhat nebulous one).

36. Equally, however, it is important to note that as these tests arise in the new rules they are context-specific. In particular it would be wrong to describe the new rules as imposing an exceptionality test in all cases. Paragraph 398 makes clear that if a person meets the requirements of 399 or 399A, he succeeds without having to show exceptional circumstances.

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.

39. It may be argued that there is no reason to think that the decision-maker applying the new rules would not have regard to such factors, but it can be seen that the Article 8-specific mandatory requirements do not include them and most of the discretionary provisions of the new rules only apply to those who meet the mandatory requirements (i.e. they do not assist if those requirements are not met). We remind ourselves that the ECtHR has made clear that these criteria must be treated as relevant considerations. For example, in *Alim v Russia* 39417/07, 27 Sept 2011 at paragraph 80 the First Section stated that the *Maslov* criteria "are meant to facilitate the application of Article 8 in expulsion cases." Our higher courts have agreed: see *JO (Uganda)* [2010] EWCA Civ 10 (paragraph 21); *RS (Uganda)* [2011] EWCA Civ 1749; albeit for one caveat see *D* [2012] EWCA Civ 39, paragraph 32.

40. This impacts on the need for how any Article 8 assessment under the new rules must address the particular circumstances of the individual. Obviously decision-makers applying the new Article 8-specific or Article 8-related rules consider the particular circumstances of the individual applicant, but they are mandated to do this through the medium of specific requirements. Strasbourg jurisprudence, by contrast, does not circumscribe fact-sensitive assessment beyond requiring the *Maslov* criteria to be treated as relevant considerations. Thus the above quotation from *Alim v Russia* continues with the observation:

> "… the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case."

41. Our conclusion is that the need for a two-stage approach in most Article 8 cases remains imperative because the new rules do not fully reflect Strasbourg jurisprudence as interpreted by our higher courts and in particular they do not encapsulate the *Maslov* criteria.

New rules and the public interest

42. There is, however, at least one important respect in which the new rules affect the second-stage Article 8 assessment. 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.

44. From the above it will be clear what we think is new about the immigration rules, but the degree to which these new rules change our interpretation of the "public interest" should not be exaggerated. Even under the old rules it has never been legitimate to treat the public interest in a narrow and restrictive fashion: see *N (Kenya)* [2004] EWCA Civ 1094, *OH (Serbia)* [2008] EWCA Civ 694, *UE (Nigeria)* [2010] EWCA Civ 975.

45. Previous case law has held that a proportionality assessment can never treat the public interest as immutable: see *GS (Article 8, public interest not a fixity*) Serbia and Montenegro [2005] UKAIT 000121. Whether the new rules do now (at least in some contexts) treat the public interest as a fixity is a matter likely to need addressing in future cases; for present purposes it will suffice to observe that they certainly do (in most cases) establish an exceptionality threshold for the public interest to be outweighed.

46. In considering whether the new rules help identify the Secretary of State's view of the public interest, Mr Ahluwalia has asked us to decide whether they fully reflect the will of Parliament in much the same way that Carnwath LJ clearly thought the new automatic deportation provisions of the 2007 Act did. Mr Ahluwalia (without demur from Mr Deller) submitted that the negative resolution procedure in use for the immigration rules cannot be equated with debates preceding primary legislation. He highlighted Lord Bingham's statement in *Huang* at paragraph 17 that there was a sharp contrast between housing legislation, which was the product of close parliamentary debate and discussion with the competing interests of landlords and tenants being fully

represented, and the way in which changes in the immigration rules are made.

47. We do not consider we need to address this issue because, whether or not the rules do fully reflect the will of Parliament, they are certainly a statement of executive policy: as Lord Brown stated at paragraph 34 of *Odelola* "… as Mr Ockelton put it in the Tribunal's decision here, 'the immigration rules are essentially executive, not legislative'". And even just as statements of executive policy they now include greater delineation of what the Home Secretary considers to be in the public interest.

48. Thus in our view provisions in the new rules dealing with Article 8 claims have two functions:

(a) They create new provisions which must be given legal effect, although it is left as a matter for the tribunal and courts whether their application is contrary to a person's Article 8 rights; and

(b) They operate to enhance judicial understanding of the "public interest" side of the scales.

The appellant's appeal

49. This appeal is brought by the appellant against a decision of the First-tier Tribunal (FtT) consisting of Judge Elek and Mrs J Holt who dismissed his appeal against a decision by the respondent on 28 October 2010 that s.32(5) of the UK Borders Act 2007 applies. In a decision of 10 July 2012 the Upper Tribunal (Upper Tribunal Judge Coker and Upper Tribunal Judge Reeds) found, with the concurrence of Mr Deller, that the FtT had erred in law in its evaluation of the findings of fact it made for the following reasons:

a. It had failed to consider whether ss.32 & 33 of the UK Borders Act 2007 are incompatible with Article 20 TFEU: the Treaty precludes national measures that have the effect of depriving Union Citizens and their family members of the enjoyment of the substance of their rights.
b. It had failed to give consideration as a primary consideration to the best interests of the child and failed to adequately consider the effect of deportation on the step daughter or that she was a British citizen.
c. It had failed to consider the OASys report.
d. It had inadequately considered the proportionality of the deportation of the appellant as regards his spouse.
e. It had incorrectly considered family and private life as discrete elements with separate conclusions.

50. The decision as regards the findings with regard to Article 8 was set aside (there being no challenge to the findings of the Tribunal as regards the decision to dismiss the appeal on asylum, humanitarian protection or Article 3 grounds). It was specified that the factual findings of the First-tier Tribunal were to form the basis of the resumed hearing.

51. The appellant arrived in the UK from Nigeria in March 1998 as an illegal entrant. Although he claims he tried applying for asylum earlier, there is no record of his doing so until September 2006. On 20 November 2009 he was convicted of handling stolen goods, possession and/or use of a false instrument for which he was sentenced to 18 months. He committed all his offences between late October and late November 2005. Prior to his conviction the appellant obtained (on 6 February 2009) a certificate of approval to marry and on 28 March 2009 he married SB. She, like her daughter F, born 11 August 1996, is a British citizen.

52. On 29 June he applied for leave to remain on the basis of his marriage. On 22 March and again on 9 September 2010 (after another such application) the Secretary of State responded negatively. On 28 October 2010 she made a deportation order under s.32(5) of the UK Borders Act 2007.

53. We heard extremely helpful submissions from both advocates. Both confirmed that no issue was taken with the adverse finding of fact on the appellant's asylum-related claims made by the FtT. Article 8 was stated to be the sole ground.

54. Mr Ahluwalia pointed out that the FtT did not dispute the evidence given at the hearing from the appellant, his wife S and his mother-in-law, Mrs VC. Their evidence was that the couple had begun a relationship in February 2008 and they have lived together since their marriage. Mr Deller did not seek to challenge the further updating given in witness statements of their family situation since the hearing before the FtT in January 2011. That updating noted that the couple continued to live together and that the appellant had assumed the role of Mrs VC's carer. Quite recently Mrs VC's husband, Mr GC, a British citizen who had previously resided in Jamaica, had returned to the UK. He required kidney dialysis daily. The appellant had also become an integral part of his care.

55. Mr Deller confirmed at the hearing that it was the Secretary of State's position that the appellant's appeal on Article 8 grounds fell to be considered under the new immigration rules, notwithstanding that the deportation order was made nearly two years ago (on 28 October 2010). New paragraph A362 reads:

> "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 9 July 2012 are met, regardless of

> when the notice of intention to deport or the deportation order, as appropriate, was served."

56. Mr Deller also said that whether considered under the old or the new rules, the respondent no longer wished 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. 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.

57. Mr Ahluwalia conceded that if the new rules did apply the appellant would only succeed if he could show that his case involved exceptional circumstances. The appellant could not come within paragraph 399 because, even though he had a genuine and subsisting relationship with F; and F had lived in the UK for over 7 years; and it would not be sensible or reasonable to expect F to leave the UK, the appellant could not meet the requirement set out at paragraph 399(b) namely "there is no other family member who is able to care for the child in the UK". Hence his case was governed by paragraph 398 which in its final sentence specified that:

> "… the Secretary of State in assessing [a claim that deportation would violate Article 8] 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 maintaining the deportation order will be outweighed by other factors." (emphasis added)

Retrospectivity

58. Mr Ahluwalia urged us to find that the provisions of the new rules relating to deportation, A362 in particular, are inapplicable to the appellant's appeal because (i) the deportation order was signed almost two years ago, before any plans were made for the introduction of the new rules; (ii) a fortiori the reasons for refusal letter makes no reference to the new criteria; (iii) there has been no new reasons for refusal letter by the respondent; (iv) "it seems particularly unfair that A is subjected to the new rules given that his appeal was heard 18 months ago on 24.1.2011" and that, had the FtT not erred in law, then his appeal would have been dealt with under the old rules.

59. We do not find the arguments on this issue all one way. In *Odelola (FC) (Appellant) v Secretary of State for the Home Department (Respondent*) [2009] UKHL 25 it was held that, unless specified to the contrary, changes in the immigration rules "take effect whenever they say they take effect." (Lord Brown paragraph 39, see also Lord Hope, paragraph 7); see also *R (on the application of Munir and Anor) v the Secretary of State for the Home Department* [2012] UKSC 32. Even though their Lordships in *Odelola* were not agreed as to

whether the common law presumption against retrospectivity applied to the immigration rules, all agreed that the central issue was the fairness of retroactive changes, and that to decide fairness it is necessary to have regard to a range of factors, including the extent to which the value of the rights which the appellant had under the old law or rules is now diminished to any significant extent. If one applied these dicta in the abstract to the context of the new rules on deportation in relation to the appellant, it is difficult to see any significant diminution of the appellant's rights. At the time of the decision he was already subject to s.32(5) of the 2007 Act so that there was a statutory presumption that his continued presence was not conducive to the public good. Further, for reasons given already, we do not consider that the new rules can be exhaustive of the issue of whether the deportation order was contrary to a person's Article 8 rights. Judges have to decide that question by applying existing Strasbourg jurisprudence as interpreted by the higher courts. Under both the pre-9 July 2012 rules (which would have applied if no error of law being found) and the new rules, he was entitled to the protection afforded to him by s.6 of the Human Rights Act which we as judges must always accord.

60. However, whilst for reasons which will become clear the issue is not material to the outcome of this case, we think that the arguments against treating A362 as having retrospective effect carry more weight. In *Odelola* their Lordships were concerned with decisions of the Secretary of State made under the rules in force on or after that date. The case did not establish that new rules are capable of governing appeals heard after that date in respect of decisions taken before it. Since the new rules concern how the Secretary of State decides claims, it would need very clear words to show that A362 was intended to bind courts and tribunals hearing appeals against decisions that were made and appealed before A362 came into force. The wording of the new rule (which refers to "…when the notice of intention to deport or deportation order, as appropriate, was served") is not couched in language one would expect if its retrospective effect was as contended for by Mr Deller; it does not say, for example, "regardless of when the decision was made". We remind ourselves that when s. 85A of the 2002 Act was brought into force, the drafters decided that an elaborate transitional provision was needed, as regards the effect of that section on current appeals: see *Alam* [2012] EWCA Civ 960. If one of the purposes of A362 is to regulate appeals against decisions taken long before 9 July 2012, it is difficult to see that this is within the scope of the enabling power to make rules under s.3(2) of the Immigration Act 1971. Further, If Mr Deller were right then, if the FtT when hearing this appeal had not been found to have erred in law, its determination would have been (and could only have been) made under the old rules, yet solely because an error of law has been found, it would transmogrify into a case under the new rules. For these reasons we are not persuaded that the new rules apply to the decision under appeal in this case. However, in case we are wrong in that

conclusion we shall proceed to address the situation of the appellant under the new rules.

The appellant's case under the new rules: our assessment

61. Mr Ahluwalia's secondary submission was that if the new rules did apply then we should find that the appellant's claim did involve exceptional circumstances under the Article 8-related provisions of the rules dealing with deportation and removal.

62. It seems to us that two features of the new rules dealing with deportation are of signal importance. First, they start from the presumption that the Secretary of State's view is that the person's deportation is deemed to be conducive to the public good (see paragraph 396), proceed to identify certain limited categories of person who may nevertheless be entitled to limited leave subject to their meeting stringent requirements (set out at paragraphs 399, 399A) and then state that for the rest they can only succeed if they can show exceptional circumstances. Second (and perhaps curiously), beyond stipulating that someone in the appellant's situation must establish exceptional circumstances (because he was sentenced to a period of imprisonment of at least twelve months), the new rules tell us very little else about the factors the Secretary of State considers should inform the balancing exercise governed by this criterion. Paragraph 399A might be said to have analogical bearing, although strictly speaking it relates only to those who (unlike the appellant) are able to meet the requirements of paragraphs 399 or 399A. But even considered purely by analogy, they do not on their face greatly assist the appellant because he has not "lived continuously in the UK for at least 20 years"; he is not "aged under 25"; he has been found to have family in Nigeria; and even if he was taken to have no "family" ties (as he has claimed in a recent witness statement) it cannot seriously be contended that he has "no ties (including *social, cultural* or family) with the country to which he would have to go [Nigeria] if required to leave the UK" (emphasis added). These two features already tilt the scales very heavily against a person such as the appellant seeking to resist a deportation order on Article 8 grounds within the new rules.

63. We are aware that the recent IDIs and now the Modernised Guidance contain sections on how caseworkers are to decide whether there are "exceptional circumstances". We did not have submissions on these but in any event we do not think that higher court authority permits us to treat them as a gloss on the meaning of the term within the new rules: see paragraph 18 above. If these (or any other sections) were to be adjudged to contain more generous provisions than the rules, then issues may arise as to legitimate expectation and policy, but neither party has suggested that is the case here.

64. Although the actual factual matrix for this appellant may be described as unique, its context is not: 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 imprisoned for over 12 months and is liable to deportation as a foreign criminal. That his family members may suffer is part of the matrix that occurs in many such cases. In this case, had we found paragraph A362 to have retrospective effect so that it applied to the decision under appeal in this case, our decision would have been that the appellant has failed to show that his circumstances are exceptional and so he does not meet the requirements of the new rules. We are against Mr Ahluwalia on this matter. We would add that Mr Ahluwalia did not seek to argue that the appellant stood to succeed under the old immigration rules[3].

Article 8 judicial assessment

65. We next consider whether even though the appellant is not subject to the new rules, he can succeed in establishing that he falls within Exception 1 as set out in s.33 of the 2007 Act, either on the basis of s.84(1)(c) or (g) (which respectively prohibit action contrary to the Human Rights Act and removal in consequence of the immigration decision) or on the basis of s.84(1)(e) ("otherwise not in accordance with the law"), which must also encompass acts contrary to the Human Rights Act. In considering this ground we are bound by decisions of the higher courts. As already noted, higher court authority on Article 8 in the deportation/expulsion context does not impose a legal test of exceptional circumstances. The higher courts have also made clear that in the context of deportation cases the principles set out by the Grand Chamber of the ECtHR in *Maslov* are to be taken as binding on us: see above paragraph 39 (it is for that reason that we copy the Tribunal decision in *Sanade* in attaching relevant extracts from *Maslov* to our decision).

66. Mr Ahluwalia's argument as to the appellant's Article 8 grounds is essentially as follows:

i. It is not in dispute that the appellant has both "family life" and "private life" within the meaning of Article 8(1). Further, in respect of both heads his claim has a strong factual content supporting this.

ii. The appellant's family life with SB had commenced in February 2008. The respondent had granted them permission to marry. They have been married since March 2009; they have lived

[3] Even under the old rules in force at the date of the decision to make a deportation order in this case (28 October, 2010), the appellant's position was governed by the automatic deportation provisions of ss.32-38 of the UK Borders Act 2007, on which see *MK(deportation-foreign criminal –public interest*) Gambia [2010] UKUT 281 (IAC).

together since marriage. When in prison the appellant received regular visits from his wife and mother in law and kept regular contact through telephone calls, letters and cards. Over a period of five years the appellant has developed a close relationship with F and he is like a father to her (she has no contact with her biological father). She kept in email contact when he was in prison. He helps her with her education. He also assists with the care of his mother in law, taking her to the hospital and doctor (he is her primary daytime carer whilst his wife is out at work). He also helps with his father in law's care, attending to his personal care, with daily dialysis and needs.

iii. As regards private life, the appellant has now been in the UK over fourteen years. He arrived illegally when still a minor (aged 17). He has been here nearly half his life. Since his offences committed in 2005 he has sought to better himself through studies at Newton College and Birkbeck University where he is presently doing a BSc degree in Financial Economics with Accounting. Prior to the offences he committed in 2005 he was of good character and had no previous offences. His offences took place over a short period of time. He was not a principal in the index offences. Despite his tax credit offences attracting a possible maximum sentence of fourteen years, he was only given fifteen months (plus 3 months for a passport offence). There was no court recommendation for deportation. He has not re-offended. OASys has confirmed him as at a low risk of re-offending and at a low risk to members of the public. His prison behaviour was exemplary and he used his time there constructively as a mentor and gaining various certificates. He has been released without the need to refer him to a MAPPA.

iv. It is not in dispute that the deportation decision amounts to an interference with his right to respect for his private and family life.

v. It is clear from the previous summary that his family and private life have a strong positive factual content. Given that Mr Deller has conceded that in the appellant's case it was not reasonable to expect his wife or daughter to relocate with him, the sole issue was whether his criminality and immigration wrongdoing were serious enough to make his deportation proportionate, notwithstanding the fact that it would severely limit the family life he presently enjoyed with his wife and her family. His presence in the UK was positively contributing to the ongoing care of his wife's parents, both of whom had serious health problems. Of particular importance was the adverse impact that the appellant's deportation would have on the welfare of F for

whom the respondent accepted that it would not be reasonable to expect her to move to Nigeria. Now 16, she was involved in vital exams; she has just begun her Level 1 NVQ in Applied Science. Lacking contact with her natural father, the appellant has become her de facto father. The appellant's absence would result in more pressure upon her, together with her mother, to assist in her grandparents' care needs; her high degree of trust in the appellant is shown by the fact that she allows him to accompany her to hospital appointments (she requires treatment for spinal curvature requiring her to wear a brace).

67. There is one further matter which was identified by the Tribunal when granting permission and by Mr Ahluwalia in his submissions. It concerns the relevance to the appellant's case of the fact that F is a British citizen and it was contended by Mr Ahluwalia that (i) although F was a stepchild, she would be treated for EU law purposes as a child of the appellant; (ii) as such, the appellant was entitled to be considered under Exception 4 (s.33(4) of the 2007 Act: "where the removal of the foreign criminal from the United Kingdom in pursuance of a deportation order would breach rights of the foreign criminal under the Community treaties") and he was entitled to pray in aid the principles established by the CJEU in Case C-34/09 *Ruiz Zambrano [2011] EUECJ;* Case C-256/11 *Murat Dereci [2011] EUECJ* and by the Upper Tribunal in *Sanade and others (British children - Zambrano – Dereci*) [2011] UKUT 48 (IAC).

Article 8: our assessment

68. We have already found that the appellant's claim could not succeed under the old or new rules (even assuming the latter have retrospective effect, which we have rejected), but that it remains for us, applying Strasbourg jurisprudence as interpreted by our higher courts, to decide whether his deportation would be a proportionate measure such that Exception 1 under s.33 of the UK Borders Act 2007 did not apply. It is not in dispute that the appellant has private as well as family life ties in the UK although the weight to be attached to those is somewhat reduced by the fact that they have built up whilst his immigration status here has been precarious: see *JO (Uganda) and JT (Ivory Coast*) [2010] EWCA Civ 10. It is accepted that the deportation decision against which he appeals constitutes an interference with his right to respect for private and family life. It is uncontentious that the decision is in accordance with the law within the meaning of Article 8(2).

69. Turning to proportionality, we have to consider both the private life and family life elements of his Article 8 claim cumulatively. Given that the appellant's family includes a child (F) we have also to ensure that we conduct a distinct best interests of the child assessment as part of the proportionality assessment: see *MK (best interests of the child*) India [2011] UKUT 00475 (IAC).

70. In our judgement, the reasons weighing in favour of the appellant's deportation bear considerable weight. For reasons already given, we consider that, separately from their own scope of application (and irrespective of whether they have retrospective effect) , the new immigration rules are evidence that the Secretary of State has sought to address the failure of the previous immigration rules to incorporate any consideration of proportionality under Article 8; and they are also an index of the enhanced importance the Secretary of State attaches to the public interest in deportation of foreign criminals. The appellant received a sentence of over 12 months. That he has failed to meet the requirements of the new rules is a very significant consideration and the reasons why he has been found to fail are also relevant when conducting our proportionality assessment. Despite Mr Ahluwalia's attempt to mitigate the seriousness of the offences, the sentencing judge was clear that the appellant knew the extent of the fraud he was involved in and his passport offence was a means to perpetration of his fraud. It is also of importance that, quite separately from his criminal wrongdoing, the appellant has an extremely bad immigration history. He arrived in the UK in 1998 as an illegal entrant. It was only after he had been apprehended in connection with his tax credit fraud that he claimed asylum (in 2006) and that claim was found to be untrue. Hence in his case there are two, not just one, strong public interest reasons in favour of his deportation.

71. Further, his immigration wrongdoing cannot be divorced from the case he makes in respect of his family and private life. All of the personal ties he now relies on were formed in full knowledge that his immigration status was precarious and that is a factor which Strasbourg and UK jurisprudence consistently treats as of relevance in assessing the weight to be attached to those ties. Had he left the UK when he was required to, none of those ties would have formed. On the other hand, the Secretary of State's delay of some four years in making a decision on the appellant's asylum claim does weaken to some extent her claim to now find his deportation imperative.

72. The combination of the appellant's conviction for criminal offences and eighteen months' sentence, coupled with his lengthy history of immigration offending, are strong reasons in favour of his deportation. We are obliged of course, by the *Maslov* criteria to treat as a relevant factor the evident fact that he has not re-offended for nearly seven years and has been assessed as at a low risk of re-offending and as a low risk to members of the public. But it remains that he is someone who is a foreign criminal under s.32(5) of the 2007 Act. At the same time, Mr Deller conceded at the outset of the hearing that by virtue of the family circumstances of the appellant's spouse, a British citizen, and the welfare of her child, F, also a British citizen, it would not be reasonable to expect her or F to relocate to Nigeria. Doubtless Mr Deller's concession reflected the concession the Secretary of State had also made in the case of *Sanade.*

73. In this regard we would note that we have not found it necessary in the event to consider whether the appellant was entitled to succeed on the basis of Exception 3 of s.33 of the 2007 Act by virtue of having a child who was a British citizen and whose right to substantial enjoyment of her rights as a Union citizen would be significantly impaired by the appellant's deportation. (We note that Mr Deller's contention that the appellant did not have any EU rights was not based on the fact that F was only a stepchild – he did not dispute Mr Ahluwalia's submission that F being only the appellant's stepchild made no difference to the application of *Zambrano* and *Dereci* principles and *Sanade* principles. His objections were based on other arguments.)

74. By virtue of Mr Deller's concession that relocation of the appellant's wife and stepchild is not a reasonable option, the scope of our proportionality assessment is somewhat limited. We are 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.

75. When deciding that the FtT had erred in law, the Upper Tribunal ruled that its findings of fact could nevertheless be preserved and at paragraphs 21-22 the FtT found the appellant still had family in Nigeria. Despite Mr Ahluwalia's submissions to the contrary, we see no good reason to revisit that finding and hence we consider that if returned to Nigeria the appellant would be able to resume ties with family members there. Given that he is a mature adult, we do not in any event consider that the lack of such ties is a significant factor.

76. In our view the appellant, notwithstanding creditable efforts to better himself through further education, his evident dedication to his wife, her daughter F and parents remains someone who is a foreign criminal with a poor immigration history. Be that as it may, we cannot overlook the importance in this case of the human rights of these family members, F in particular.

77. We take into account that the appellant's wife, S, has worked for many years as support worker caring for people with learning difficulties, mental health problems and disabled people although she has recently been doing agency work to allow her to better balance her work and domestic responsibilities. However, given the relatively short duration of her tie with the appellant and the fact that both knew from the outset the appellant's immigration status was precarious (a distinct factor identified in *Maslov* paragraph 57) and the fact that there would at least be scope for limited contact in the context of her visiting Nigeria, we do not consider that in terms of their relationship the appellant's deportation would be disproportionate.

78. Nor do we consider that the appellant's current care for his wife's parents strengthens his case significantly, because we are satisfied that in his absence other arrangements could be made with the help of social and health services and the appellant's wife's agency work affords her more flexibility to attend to their needs than would have been possible previously. (We do however accept that care by social and health services would not be considered by those parents as supportive and helpful as that received from the appellant who assists in emotional wellbeing as well as mere physical care.)

79. We cannot, however, reach the same conclusion in relation to the best interests of F. By s. 55 of the Borders, Citizenship and Immigration Act 2009, we are obliged, of course, to treat the best interests of the child as a primary consideration. 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 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.

81. For the above reasons:

The First-tier Tribunal erred in law and its decision has been set aside.

The decision we re-make is to allow the appellant's appeal on Article 8 grounds.

Signed

Upper Tribunal Judge Storey
Immigration and Asylum Chamber

Appendix

Extracts from **Maslov v Austria** (1683/03); [2008] ECHR 546

"(a) General principles

68. The main issue to be determined is whether the interference was "necessary in a democratic society". The fundamental principles in that regard are well established in the Court's case-law and have recently been summarised as follows (see *Üner*, cited above, §§ 54-55 and 57-58):

> "54. The Court reaffirms at the outset that a State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, p. 34, § 67, *Boujlifa v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997 VI, p. 2264, § 42). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see *Dalia v. France*, judgment of 19 February 1998, *Reports* 1998-I, p. 91, § 52; *Mehemi v. France,* judgment of 26 September 1997, *Reports* 1997-VI, p. 1971, § 34; *Boultif v. Switzerland*, cited above, § 46; and *Slivenko v. Latvia* [GC], no. 48321/99, ECHR 2003-X, § 113).
>
> 55. The Court considers that these principles apply regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there. In this context the Court refers to Recommendation 1504 (2001) on the non expulsion of long-term immigrants, in which the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers invite member States, *inter alia*, to guarantee that long-term migrants who were

born or raised in the host country cannot be expelled under any circumstances (see paragraph 37 above). While a number of Contracting States have enacted legislation or adopted policy rules to the effect that long-term immigrants who were born in those States or who arrived there during early childhood cannot be expelled on the basis of their criminal record (see paragraph 39 above), such an absolute right not to be expelled cannot, however, be derived from Article 8 of the Convention, couched, as paragraph 2 of that provision is, in terms which clearly allow for exceptions to be made to the general rights guaranteed in the first paragraph.

...

57. Even if Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled, the Court's case law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision (see, for example, the judgments in *Moustaquim v. Belgium*, *Beldjoudi v. France* and *Boultif v. Switzerland,* cited above; see also *Amrollahi v. Denmark*, no. 56811/00, 11 July 2002; *Yılmaz v. Germany*, no. 52853/99, 17 April 2003; and *Keles v. Germany*, 32231/02, 27 October 2005). In the case of *Boultif* the Court elaborated the relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued. These criteria, as reproduced in paragraph 40 of the Chamber judgment in the present case, are the following:

- the nature and seriousness of the offence committed by the applicant;

- the length of the applicant's stay in the country from which he or she is to be expelled;

- the time elapsed since the offence was committed and the applicant's conduct during that period;

- the nationalities of the various persons concerned;

- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

- whether the spouse knew about the offence at the time when he or she entered into a family relationship;

- whether there are children of the marriage, and if so, their age; and

- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

58. The Court would wish to make explicit two criteria which may already be implicit in those identified in the *Boultif* judgment:

    - the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and

    - the solidity of social, cultural and family ties with the host country and with the country of destination.

    As to the first point, the Court notes that this is already reflected in its existing case law (see, for example, *Şen v. the Netherlands*, no. 31465/96, § 40, 21 December 2001, *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 47, 1 December 2005) and is in line with the Committee of Ministers' Recommendation Rec(2002)4 on the legal status of persons admitted for family reunification (see paragraph 38 above).

    As to the second point, it is to be noted that, although the applicant in the case of *Boultif* was already an adult when he entered Switzerland, the Court has held the '*Boultif* criteria' to apply all the more so (*à plus forte raison*) to cases concerning applicants who were born in the host country or who moved there at an early age (see *Mokrani v. France*, no. 52206/99, § 31, 15 July 2003). Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country

the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the Court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."

69. In the *Üner* judgment, as well as in the *Boultif* judgment (§ 48) cited above, the Court has taken care to establish the criteria – which were so far implicit in its case-law – to be applied when assessing whether an expulsion measure is necessary in a democratic society and proportionate to the legitimate aim pursued.

70. The Court would stress that while the criteria which emerge from its case-law and are spelled out in the *Boultif* and *Üner* judgments are meant to facilitate the application of Article 8 in expulsion cases by domestic courts, the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the applicant's rights under Article 8 pursues, as a legitimate aim, the "prevention of disorder or crime" (see paragraph 67 above), the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities.

71. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family of his own, the relevant criteria are:

- the nature and seriousness of the offence committed by the applicant;

- the length of the applicant's stay in the country from which he or she is to be expelled;

- the time elapsed since the offence was committed and the applicant's conduct during that period;

- the solidity of social, cultural and family ties with the host country and with the country of destination.

72. The Court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether

he or she committed them as a juvenile or as an adult (see, for instance, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A no. 193, p. 19, § 44, and *Radovanovic v. Austria*, no. 42703/98, § 35, 22 April 2004).

73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. This tendency is also reflected in various Council of Europe instruments, in particular in Committee of Ministers Recommendations Rec (2001)15 and Rec (2002)4 (see paragraphs 34-35 above).

74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see *Üner*, cited above, § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there (see *Üner*, § 58 *in fine*).

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

76. Finally, the Court reiterates that national authorities enjoy a certain margin of appreciation when assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued (see *Slivenko v. Latvia* [GC], no. 48321/99, § 113, ECHR 2003 X, and *Berrehab v. the Netherlands*, judgment of 21 June 1988, Series A no. 138, p. 15, § 28). However, the Court has consistently held that its task consists in ascertaining whether the impugned measures struck a fair balance between the relevant interests, namely the individual's rights protected by the Convention on the one hand and the community's interests on the other (see, among many other authorities, *Boultif*, cited above, § 47). Thus, the State's margin of appreciation goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court (see, *mutatis mutandis, Société*

Colas Est and Others v. France, no. 37971/97, § 47, ECHR 2002-III). The Court is therefore empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8. "