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Case Nos: C5/2015/0317, C5/2015/2012,
C5/2014/3750, C5/2014/3754

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2016

Before :

LORD JUSTICE JACKSON
LADY JUSTICE SHARP
and
LORD JUSTICE SALES

- -

Between :

NA (Pakistan)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**
and	
Secretary of State for the Home Department	**Appellant**
-and-	
KJ (Angola)	
WM (Afghanistan)	
MY (Kenya)	**Respondents**

- -
- -

Nazir Ahmed (instructed by **Genesis Law Associates Solicitors**)
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for the **Secretary of State for the Home Department**
and
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Zia Nasim (instructed by **Crown and Mehria Solicitors)** for the **Respondent MY (Kenya)**

Hearing dates: 15th and 16th June 2016

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JUDGMENT

LORD JUSTICE JACKSON :

Lord Justice Jackson delivered the judgment of the court.

1. This judgment is in 5 parts, namely:

Part 1. Introduction
Part 2. The relevant statutory provisions and Immigration Rules
Part 3. Interpretation of the legislation
Part 4. The individual cases
Part 5. Conclusion

PART 1. INTRODUCTION

2. This is the judgment of the court to which all members have contributed.

3. This is a group of four appeals, each of which raises the question whether a foreign criminal is entitled to resist deportation by reliance upon Article 8 of the European Convention on Human Rights ('ECHR'). In NA (Pakistan) and in WM (Afghanistan) it is relevant to examine that question under the legislative regime applicable up to 27 July 2014. In NA (Pakistan) it is also relevant to examine that question under the new legislative regime which came into effect on 28 July 2014. In KJ (Angola) and MY (Kenya) it is the new legislative regime which is relevant.

4. In this judgment we shall refer to individuals resisting deportation as 'claimants.'

PART 2. THE RELEVANT STATUTORY PROVISIONS AND IMMIGRATION RULES

5. Section 32 of the UK Border Act 2007 ("the 2007 Act") provides, so far as material:

"**Automatic deportation**

(1) In this section "foreign criminal" means a person-

(a) who is not a British citizen,

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

(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that-

(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c.41) (serious criminal), and

(b) the person is sentenced to a period of imprisonment.

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.
(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).

(6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless-

(a) he thinks that an exception under section 33 applies,

(b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or

(c) section 34(4) applies."

6. Section 33 of the 2007 Act provides, so far as material:

"**Exceptions**

(1) Section 32(4) and (5)-

(a) do not apply where an exception in this section applies (subject to subsection (7) below), and

(b) are subject to subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach-

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention.

(3) Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction.

(4) Exception 3 is 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."

7. The Immigration Rules set out how the Secretary of State and her officials will exercise the powers conferred by the 2007 Act. Between 9 July 2012 and 27 July 2014 the Immigration Rules provided:

"**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."

8. On 28 July 2014 the Immigration Act 2014 ("the 2014 Act") came into force. That Act applies to all decisions taken by the Secretary of State or a tribunal on or after that date: see *YM (Uganda) v Secretary of State for the Home Department* [2014] EWCA Civ 1292 at [12]. The 2014 Act provided that a new Part 5A should be inserted into the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). That Part provides, so far as material:

"PART 5A

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

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

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

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

(1)The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,
that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

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

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

117D Interpretation of this Part

(1) In this Part—
"Article 8" means Article 8 of the European Convention on Human Rights;
"qualifying child" means a person who is under the age of 18 and who—
(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;
"qualifying partner" means a partner who—
(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

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

(a) who is not a British citizen,

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

(c) who—

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

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

(iii) is a persistent offender.

…"

9. On 28 July 2014 (the same date as the 2014 Act came into force) the Immigration Rules were amended so as to harmonise with Part 5A of the 2002 Act. Since 28 July 2014 paragraphs 398-399B of the Immigration Rules have read as follows:

"**Deportation and Article 8**

398. These rules apply where:
(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

399B. Where an Article 8 claim from a foreign criminal is successful:

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

(b) in the case of a person who has not been served with a deportation order, any limited leave to enter or remain may be curtailed to a period not exceeding 30 months and conditions may be varied to such conditions as the Secretary of State considers appropriate;

(c) indefinite leave to enter or remain may be revoked under section 76 of the 2002 Act and limited leave to enter or remain granted for a period not exceeding 30 months subject to such conditions as the Secretary of State considers appropriate;
(d) revocation of a deportation order does not confer entry clearance or leave to enter or remain or re-instate any previous leave."

10. We shall refer to the Immigration Rules as they were between July 2012 and 27 July 2014 as "the 2012 rules". We shall refer to the Immigration Rules as they have been since 28 July 2014 as "the 2014 rules".

PART 3. INTERPRETATION OF THE LEGISLATION

11. We shall deal first with the effect of the 2007 Act. Section 32(4) of that Act sets outs out the clear proposition that deportation of a foreign criminal (defined as any foreign person whose criminal conduct results in a sentence of 12 months' imprisonment or more) is conducive to the public good. That is a statement of public policy enacted by the legislature, which the courts are obliged to respect. Parliament has drawn the dividing line at 12 months' imprisonment. Section 32(5) of the 2007 Act requires the Secretary of State to make a deportation order in respect of every foreign criminal, as so defined. This is subject to the exceptions set out in section 33 of that Act.

12. In *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550; [2014] 1 WLR 998, Laws LJ neatly distilled this principle at [53], a paragraph with which we agree:

> "The importance of the moral and political character of the policy shows that the two drivers of the decision-maker's margin of discretion – the policy's nature and its source – operate in tandem. An Act of Parliament is anyway to be specially respected; but all the more so when it declares policy of this kind. In this case, the policy is general and overarching. It is circumscribed only by five carefully drawn exceptions, of which the first is violation of a person's Convention/Refugee Convention rights. (The others concern minors, EU cases, extradition cases and cases involving persons subject to orders under mental health legislation.) Clearly, Parliament in the 2007 Act has attached very great weight to the policy as a well justified imperative for the protection of the public and to reflect the public's proper condemnation of serious wrongdoers. Sedley LJ was with respect right to state that "in the case of a 'foreign criminal' the Act places in the proportionality scales a markedly greater weight than in other cases …".

13. As noted in that paragraph, section 33 of the 2007 Act carves out a number of exceptions. It not infrequently happens that the Secretary of State and her officials have to determine whether a foreign criminal falls within exception 1 (as identified in section 33 of the 2007 Act) by reason of the criminal's rights under ECHR Article 8. For the purpose of that exercise they turn to the Immigration Rules.

(i) The position under the 2012 rules

14. The 2012 rules gave clear guidance as to how the Article 8 rights should be assessed. Foreign criminals were divided into two categories: those with sentences of between one and four years' imprisonment and those sentenced to four years or more. For simplicity, we shall refer to the first category as 'medium offenders' and the second category as 'serious offenders'.

15. Medium offenders could escape deportation if they came within paragraph 399 ('parent/partner provisions') or paragraph 399A ('long residence provisions'). We shall refer to those provisions collectively as 'the safety nets'. The last part of rule 398 provided that if a medium offender did not come within either of the safety nets, he could only escape deportation on Article 8 grounds "in exceptional circumstances".

16. Serious offenders could not escape deportation by bringing themselves within either, or indeed both, of the safety nets. The last part of rule 398 provided that a serious offender could only escape deportation on Article 8 grounds "in exceptional circumstances".

17. One obvious question which arose under the 2012 rules was whether paragraphs 398-399B constituted a complete code in relation to Article 8 defences or whether there was room for a free standing Article 8 analysis in cases where a foreign criminal could not escape deportation by relying on the rules. In a series of decisions this court has held that rules 398 to 399B constituted a complete code. If a foreign criminal failed under those provisions, he could not mount any other Article 8 defence to deportation. See *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544; *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ1310 and *Secretary of State for the Home Department v AJ (Angola)* [2014] EWCA Civ 1636.

18. A second important question which arose under the old rules was what the phrase "exceptional circumstances" in para. 398 meant and how it should be applied. *MF (Nigeria)* provided a definitive answer to that question. Lord Dyson MR, delivering the judgment of the court stated at [42]-[46]:

> "42. … 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."

19. A third question which arose under the 2012 rules was whether a foreign criminal seeking to establish "exceptional circumstances" could rely upon any matters of the kind referred to in paras. 399 or 399A. A medium offender might want to do this, if (although he could not satisfy the full requirements of either of those rules) he had a partner or children in the UK, alternatively he had lived here for a long time. A serious offender might want to do this because paras. 399 and 399A were not available to him as a substantive Article 8 defence. The answer is that a foreign criminal was entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in paras. 399 or 399A, or falling outside the circumstances described in those paragraphs, which made his claim based on Article 8 especially strong.

20. Jackson LJ, giving the lead judgment in this court in *Secretary of State for the Home Department v JZ (Zambia)* [2016] EWCA Civ 116, explained the reasons as follows:

> "28. Mr Pilgerstorfer submits that the first task of the First-tier Tribunal in a case such as this is to consider whether the

> claimant can bring himself within rules 399 or 399A. If he cannot, then matters of the character described in those two rules drop out of the picture. Thus matters such as length of residence in the UK and lack of ties with Zambia cannot form part of the aggregation of matters which collectively constitute "exceptional circumstances" within the meaning of rule 398.
>
> 29. I do not accept this argument for two reasons. First, as a matter of construction, rules 398, 399 and 399A do not either expressly or impliedly "ring fence" the 399/399A factors in the way that Mr Pilgerstorfer suggests. Rule 398 first requires the Secretary of State to see whether the proposed deportee falls into the safety net of rule 399 or 399A. If he/she does not, then rule 398 requires the Secretary of State to consider whether there are exceptional circumstances which outweigh the public interest in deportation. Obviously there is no "near miss" principle. A deportee who has a sentence slightly longer than 4 years or who fails by a small margin to satisfy 20 years' residence requirement cannot say that that fact alone constitutes "exceptional circumstances". But it would be bizarre if the Secretary of State were required to ignore such matters altogether when considering whether there were "exceptional circumstances".
>
> 30. In my view, rule 398 requires the Secretary of State (and on appeal the First-tier Tribunal) to consider all relevant matters in deciding whether there are "exceptional circumstances" which outweigh the public interest in deportation. In the vast majority of cases the answer will be no. But the Secretary of State cannot take a shortcut to arrive at that answer by ignoring every circumstance of the character mentioned in rules 399 and 399A."

21. The Secretary of State was originally minded to argue that that approach was wrong in relation to the code in the 2012 rules and also wrong in relation to the new regime in sections 117A to 117D in the 2002 Act (as inserted by the 2014 Act) and in the 2014 rules. She no longer pursues these arguments. Mr Robin Tam QC, for the Secretary of State, accepted in opening this appeal that the approach in *JZ (Zambia)* is correct. This concession (which seems to us entirely correct) has eliminated one of the major issues in the current appeals.

(ii) The position under the 2002 Act, as amended by the 2014 Act, and the 2014 rules

22. Section 117C(1) of the 2002 Act, as inserted by the 2014 Act, re-states that the deportation of foreign criminals is in the public interest. The observations of Laws LJ in *SS (Nigeria)* concerning the significance of the 2007 Act, as a particularly strong statement of public policy, are equally applicable to the new provisions inserted into the 2002 Act by the 2014 Act. Both the courts and the tribunals are obliged to respect

the high level of importance which the legislature attaches to the deportation of foreign criminals.

23. Section 117C(2) to (7) of the 2002 Act deals with foreign criminals who resist deportation on Article 8 grounds. The general scheme is similar to that set out in the 2014 rules. Medium offenders can escape deportation if they come within the safety net of Exception 1 (long residence provisions) or Exception 2 (parent/partner provisions). Serious offenders cannot make use of those safety nets, but section 117C(6) provides that they can resist deportation if "there are very compelling circumstances, over and above those described in Exceptions 1 and 2".

24. A curious feature of section 117C(3) is that it does not make any provision for medium offenders who fall outside Exceptions 1 and 2. One would have expected that sub-section to say that they too can escape deportation if "there are very compelling circumstances, over and above Exceptions 1 and 2". It would be bizarre in the extreme if the statute gave this right to serious offenders, but not to medium offenders. Furthermore, the new rule 398 (which came into force on the same day as section 117C) proceeds on the basis that medium offenders do have this right.

25. Something has obviously gone amiss with the drafting of section 117C(3). In *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, HL, at 592-593, Lord Nicholls (with whom the other members of the Appellate Committee agreed) explained the circumstances in which the courts in interpreting statutes can correct obvious drafting errors. In our view the lacuna in section 117C(3) is an obvious drafting error. Parliament must have intended medium offenders to have the same fall back protection as serious offenders. Mr Tam invited us so to rule.

26. In reaching this conclusion it is important to bear in mind that the new Part 5A of the 2002 Act is framed in such a way as to provide a structured basis for application of and compliance with Article 8, rather than to disapply it: see the title of Part 5A, the general scheme of the provisions in that Part and, in particular, section 117A(1). If section 117C barred medium offenders from asserting any Article 8 claim other than provided for in subsections (4) and (5), that would plainly be incompatible with Article 8 rights (either their own or Convention rights of individuals in their family) in some cases. Equally plainly, it was not Parliament's intention in enacting Part 5A to disapply or require violation of Article 8 in any case. We also place reliance on section 3(1) of the Human Rights Act 1998. That provision requires courts to construe legislation in a way which is compatible with Convention rights, if it is possible to do so. It is possible to do so here. In accordance with the guidance given by Lord Nicholls, the words which need to be read into section 117C(3) so as properly to reflect Parliament's true meaning are clear, namely the same words as appear in sub-section (6) and in para. 398 of the 2014 rules, which came into effect at the same time as part of an integrated and coherent code in primary legislation and the Immigration Rules for dealing with deportation cases.

27. For all these reasons we shall proceed on the basis that fall back protection of the kind stated in section 117C(6) avails both (a) serious offenders and (b) medium offenders who fall outside Exceptions 1 and 2. On a proper construction of section 117C(3), it provides that for medium offenders "the public interest requires C's deportation

unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2."

28. The next question which arises concerns the meaning of "very compelling circumstances, over and above those described in Exceptions 1 and 2". The new para. 398 uses the same language as section 117C(6). It refers to "very compelling circumstances, over and above those described in paragraphs 399 and 399A." Paragraphs 399 and 399A of the 2014 rules refer to the same subject matter as Exceptions 1 and 2 in section 117C, but they do so in greater detail.

29. In our view, the reasoning of the Court of Appeal in *JZ (Zambia)* applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute "very compelling circumstances, over and above those described in Exceptions 1 and 2", whether taken by themselves or in conjunction with other factors relevant to application of Article 8.

31. An interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament's intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having regard to the guidance given by the ECtHR in *Maslov v Austria* [2009] INLR 47, and hence highly relevant to whether

there are "very compelling circumstances, over and above those described in Exceptions 1 and 2."

32. Similarly, in the case of a medium offender, if all he could advance in support of his Article 8 claim was a "near miss" case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.

33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.

34. The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in *Secretary of State for the Home Department v CT (Vietnam)* [2016] EWCA Civ 488 at [38]:

> "Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation."

35. The Court of Appeal said in *MF (Nigeria)* that paras. 398 to 399A of the 2012 rules constituted a complete code. The same is true of the sections 117A-117D of the 2002 Act, read in conjunction with paras. 398 to 399A of the 2014 rules. The scheme of the Act and the rules together provide the following structure for deciding whether a foreign criminal can resist deportation on Article 8 grounds.

36. In relation to a medium offender, first see whether he falls within Exception 1 or Exception 2. If he does, then the Article 8 claim succeeds. If he does not, then the next stage is to consider whether there are "sufficiently compelling circumstances, over and above those described in Exceptions 1 and 2". If there are, then the Article 8 claim succeeds. If there are not, then the Article 8 claim fails. As was the case under the 2012 rules (as explained in *MF (Nigeria)*), there is no room for a general Article 8 evaluation outside the 2014 rules, read with sections 117A-117D of the 2002 Act.

37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6).

38. Against that background, one may ask what is the role of the Strasbourg jurisprudence? In particular, how does one take into account important decisions such as *Űner v Netherlands* (2007) 45 EHRR 14 and *Maslov v Austria*? Mr Southey QC, who represents KJ and WM, rightly submits that the Strasbourg authorities have an important role to play. Mr Tam rightly accepted that this is correct. The answer is that the Secretary of State and the tribunals and courts will have regard to the Strasbourg jurisprudence when applying the tests set out in our domestic legislation. For example, a tribunal may be considering whether it would be "unduly harsh" for a child to remain in England without the deportee; or it may be considering whether certain circumstances are sufficiently "compelling" to outweigh the high public interest in deportation of foreign criminals. Anyone applying these tests (as required by our own rules and legislation) should heed the guidance contained in the Strasbourg authorities. As we have stated above, the scheme of Part 5A of the 2002 Act and paras. 398-399A of the 2014 rules is to ensure compliance with the requirements of Article 8 through a structured approach, which is intended to ensure that proper weight is given to the public interest in deportation whilst also having regard to other relevant factors as identified in the Strasbourg and domestic caselaw. The new regime is not intended to produce violations of Article 8.

39. Even then it must be borne in mind that assessments under Article 8 may not lead to identical results in every ECHR contracting state. To the degree allowed under the margin of appreciation and bearing in mind that the ECHR is intended to reflect a fair balance between individual rights and the interests of the general community, an individual state is entitled to assess the public interest which may be in issue when it comes to deportation of foreign criminals and to decide what weight to attach to it in the particular circumstances of its society. Different states may make different assessments of what weight should be attached to the public interest in deportation of foreign offenders. In England and Wales, the weight to be attached to the public interest in deportation of foreign offenders has been underlined by successive specific legislative interventions: first by enactment of the 2007 Act, then by promulgation of the code in the 2012 rules and now by the introduction of further primary legislation in the form of Part 5A of the 2002 Act and the new code in the 2014 rules. Statute requires that in carrying out Article 8 assessments in relation to foreign criminals the decision-maker must recognise that the deportation of foreign criminals is "conducive to the public good" (per section 32(4) of the 2007 Act) and "in the public interest" (per section 117C(1) of the 2014 Act).

40. Mr Tam submits that tribunal judges are sometimes losing sight of the principles discussed above. On the basis of the material which we have seen in the present group of appeals, that does appear to be the case. We now turn to examine the detail of the four appeals before us.

PART 4. THE INDIVIDUAL CASES

NA (Pakistan)

41. The FTT decision in this case was promulgated on 27 February 2014. The FTT therefore had to apply the 2012 rules and the primary legislation as it stood before the amendment of the 2002 Act by the insertion of sections 117A to 117D, as set out in the 2014 Act. The FTT allowed the claimant's appeal.

42. In a first determination by the Upper Tribunal, promulgated on 7 August 2014, the Upper Tribunal ruled that the FTT had erred in law, that its decision should be set aside and that there should be a further hearing in the Upper Tribunal for the Upper Tribunal to re-make the decision.

43. The Upper Tribunal re-made the decision by a second determination promulgated on 29 August 2014. In re-making the decision, the Upper Tribunal had to apply the new sections inserted into the 2002 Act and the 2014 rules. The Upper Tribunal held that the claimant's appeal should be dismissed.

44. The claimant now appeals to this court. He has two grounds of appeal. First, the claimant submits that the Upper Tribunal was wrong in its first determination in ruling that the FTT had erred in law and that the FTT's decision should be set aside; accordingly, the FTT decision should be reinstated. Secondly, if the first ground is not accepted, then the Upper Tribunal itself erred in applying the new law when re-making the decision in its second determination, with the result that the appeal should be allowed and the case remitted to the Upper Tribunal for a new decision to be made.

45. NA is a citizen of Pakistan, born in 1973. He arrived in the UK aged six months, and the Secretary of State accepted that despite some time spent in Pakistan he is a long term resident of the UK. He has a wife, who is also from Pakistan, and five children. The eldest child was born on 12 March 1999 in Pakistan, and is a citizen of Pakistan; the others were born in the UK between 12 April 2001 and 15 July 2009 and are British citizens.

46. On 26 April 2010 NA was convicted of causing death by dangerous driving, having pleaded guilty, and was sentenced on 7 June 2010 to 7 years and 4 months in prison and disqualified from driving for 10 years. While drunk he drove a large vehicle on the wrong side of the road along a dual carriageway at excessive speed, ignoring red traffic lights, and ploughed into a car, killing the driver, a family man with children. NA was also convicted of using a vehicle whilst uninsured, possessing a controlled drug of class B, driving without a licence and driving while unfit through drink or drugs. The length of NA's sentence means that this is a case to which section 117C(6) applies.

47. A notice of liability for automatic deportation was issued to NA when he went to prison. He made representations relying on Article 8. The Secretary of State considered that a deportation order should be made. NA appealed.

48. The FTT allowed his appeal, on the basis that it considered that exceptional circumstances existed in his case, "principally the enormous disruption which would be caused to his children if the appellant were to be deported" (para. [59]). It also had regard to the facts that NA had lived in the UK since a baby and would find it very difficult to readjust to life in Pakistan; he could have been naturalised as a British citizen, not liable to deportation; the effect on his wife and parents if he were deported; and that it was assessed he represented a low risk of re-offending (para. [60]). The FTT held that NA was entitled to succeed under para. 398 of the 2012 Immigration Rules. The FTT also carried out an examination of NA's case based on Article 8 outside the Immigration Rules, in case its conclusion on exceptional circumstances was mistaken, and concluded that deportation would not be proportionate (paras. [62]-[70]).

49. In its first decision, the Upper Tribunal held that the FTT had erred in law in two respects. First, the FTT lost sight of the legal framework it was supposed to be applying and treated circumstances as "exceptional" which were not exceptional at all; it did not take properly into account the Secretary of State's view of the strong public interest in deportation of foreign criminals who have committed particularly serious crimes, as reflected in the Immigration Rules; it had failed to recognise that the starting point is a compelling presumption in favour of deportation of such foreign criminals (paras. [19]-[20]). Secondly, the FTT had erred by going on to carry out a separate freestanding assessment of the family life claim under Article 8, because assessment of that claim should have been carried out in the context of application of the Immigration Rules applicable to foreign criminals, which constituted a complete code as explained in *MF (Nigeria).*

50. The first ground in NA's appeal to this court is that the Upper Tribunal erred in its first decision in finding that the FTT had erred in its approach. We do not accept that the Upper Tribunal was in error in detecting these defects in the FTT's decision.

51. In our view, on a fair reading of the FTT's decision it is plain that it failed properly to approach NA's case through the lens of the Immigration Rules applicable to foreign criminals at the time, ensuring thereby that full and proper weight was given to the public interest in deportation of such criminals as reflected in those Rules: see *LC (China)*, [17]; *AJ (Angola)*, [39]-[40]. The FTT said at para. [42], "We regard the question of whether exceptional circumstances exist as being encompassed in the issues which we would have to consider under Article 8 itself". It thereby showed that it did not address the question of the existence of exceptional circumstances properly through the lens of the Immigration Rules. The FTT failed to ask itself expressly or in substance whether there were "very compelling circumstances" such as to outweigh the strong public interest in deportation, in accordance with the requirement under the Immigration Rules explained in *MF (Nigeria)* at para. [43]. The fact that the FTT made a separate assessment of the Article 8 claim outside the Rules is a further indication that it did not properly appreciate the force of the public interest which the complete code in the Rules was intended to reflect. We also agree with the Upper Tribunal that according to the "very compelling circumstances" standard, the

circumstances identified by the FTT were not exceptional at all and were not rationally capable of satisfying the relevant requirement in the Rules.

52. The Upper Tribunal went on to re-make the decision, at a time when it was obliged to apply the 2014 rules and sections 117A to 117D of the 2002 Act. The Upper Tribunal examined first whether NA would have fallen within Exception 1 or Exception 2 had they been open to him, in order then to examine whether there were very compelling circumstances in his case "over and above those described in [those Exceptions]" (section 117C(6)): para. [39].

53. The Upper Tribunal found that NA met the first two requirements of Exception 1, because he has been lawfully resident in the UK for most of his life and is plainly fully integrated (para.[41]); but it found that he could not show that there would be "very significant obstacles" to his integration into Pakistan, because it was clear that he had chosen to retain cultural and other ties with that country, including choosing a wife who remained in Pakistan for 6 years after their marriage and who continues to speak Urdu as her main language, indicating that that language must have remained predominant in NA's home life (para. [42]). There is no challenge to that assessment. We agree with it.

54. As regards Exception 2, the Upper Tribunal found that NA has a genuine and subsisting relationship with a qualifying partner, his wife, and with his qualifying children. However, it found that he did not fall within Exception 2 because the effect of his deportation on his wife and children would not be "unduly harsh": paras. [43]-[46]. They had coped reasonably well with the separation while he was in prison and would be able to do so if he was deported to Pakistan: para. [44]. The public interest in his deportation also meant that the effect upon them could not be regarded as "unduly harsh": para. [46]. Again, there is no challenge to that assessment. We agree with it.

55. Where NA does challenge the decision of the Upper Tribunal is in its approach to application of section 117C(6), in particular regarding the question whether there are very compelling circumstances "over and above those described in Exceptions 1 and 2".

56. The Upper Tribunal said that this language meant "that there must be something more than is required to demonstrate that the appellant would have fallen within one of those Exceptions if that had been open to him" (para. [39]). It added at para. [40]:

> "But, in seeking to establish … very compelling circumstances [for the purposes of section 117C(6)] the appellant cannot rely upon factors he points to in order to establish that he falls within Exceptions 1 or 2 because he would not then have identified very compelling circumstances *over and above* those described in those Exceptions" (emphasis in original).

57. Then, having examined whether NA could bring himself within either Exception 1 or Exception 2 and concluded that he could not, the Upper Tribunal said this:

> "47. In any event, it is plain that this appeal falls to be dismissed. That is because, even if the appellant was able to

> establish that he would face very significant obstacles to integration in Pakistan and/or that the effect upon his children would be unduly harsh he would then need to go on to show something more than that. The effect of s117C(6) is that he needs to show that there are very compelling circumstances over and above what he has relied upon to establish that he would have fallen within Exceptions 1 or 2 had they been open to him.
>
> 48. It seems to us that means that there must be factors not accommodated within those Exceptions, or in addition to what is required to bring him within them, that speak cogently against deportation. In this case the appellant can point to the fact that he has elderly parents living in the United Kingdom. But if separation from his wife and minor children, whose best interests are served by him remaining here, is not sufficient to outweigh the public interest in deportation then plainly disruption of his relationship with his parents will not either. We invited Mr Bashir to identify what factors in particular he relied upon to establish very compelling circumstances over and above that relied upon to qualify for Exception 1 or 2. He said that as the appellant has been here for 39 years since he was 3 months old he should be treated, effectively, as a British citizen. We are unable to accept that submission. The length of his residence has already been taken regard of within the statutory framework we have discussed. The appellant is not a British citizen. That may well be because he began to commit criminal offences in 1998, a Community Service Order being imposed for offences of driving a motor vehicle with excess alcohol and while disqualified and having no insurance. Nor do we accept these matters taken together with the mental upset that he may suffer on being separated from his family, including his elderly parents, combined with the difficulties of establishing himself in Pakistan are of sufficient import to amount to very compelling circumstances."

58. In our judgment, the Upper Tribunal's approach in relation to section 117C(6) was wrong in law. It is clear from the passages in paras. [39], [40] and [47] quoted above that the Tribunal thought that any matters relevant to the question whether NA fell within the circumstances described in Exception 1 and Exception 2 could not be relied upon in showing that there are "very compelling circumstances" relevant to the test in section 117C(6). For reasons we have given above, that is not correct. Matters relevant to an assessment whether a case falls within Exception 1 and Exception 2 may also be relevant to an assessment under section 117C(6) whether "there are very compelling circumstances, over and above those described in Exceptions 1 and 2." Indeed, Mr Tam for the Secretary of State agrees that this is so.

59. Mr Tam, however, submitted that para. [48] of the Upper Tribunal's decision shows that it did in fact bring into account in its consideration under section 117C(6), whether "there are very compelling circumstances, over and above those described in

Exceptions 1 and 2", matters which were also relevant to its assessment of whether NA's case fell within the circumstances described in Exceptions 1 and 2. We do not agree. Paragraph [48] has to be read alongside paras. [39], [40] and [47], which show this was not the Tribunal's approach. The Tribunal echoed those paragraphs in para. [48] as well, when it said "The length of his residence has already been taken regard of within the statutory framework we have discussed", meaning that it could not properly be brought into account for the purposes of analysis whether "very compelling circumstances" existed for the purpose of section 117C(6).

60. The question then arises whether this is a material error on the part of the Upper Tribunal. At para. [49] of its decision, the Upper Tribunal added this to its analysis: "For the avoidance of any possible doubt, we have looked at everything advanced on the appellant's behalf and it is plain that the same outcome would be delivered by an assessment of the appellant's Article 8 claim even outside the added focus now provided by s. 117 because the appellant's deportation is plainly a proportionate response to the serious crimes he has committed." The Upper Tribunal thereby indicated that it considered NA's offending to be so serious when weighed against the evidence of his private life and family life that, even without the structure of assessment now provided by section 117C, it is clear that deportation is a proportionate response. We agree with this assessment. Mr Ahmed for NA criticised this paragraph of the Upper Tribunal's decision in paragraphs 18 to 21 of his written submissions, but we do not find the criticism at all persuasive.

61. Given this assessment by the Upper Tribunal, and in light of the weakness of NA's case when measured by the yardstick of Exception 1 and Exception 2 and the relative lack of weight in the other factors relied on by him (such as his relationship with his parents), it is in our view clear that even on a proper approach to application of section 117C(6) NA cannot show that there are "very compelling circumstances" indicating that he ought not to be deported. This is so after giving full weight to the guidance of the ECtHR in *Maslov v Austria* at paras. [68]-[76]. Despite his long residence in the UK, NA is a mature man who committed a particularly serious crime in circumstances in which the public interest in his removal has been made especially clear by the 2014 rules and section 117C. Accordingly, it is clear that there are "very serious reasons" which justify his expulsion, in accordance with the guidance given in *Maslov* at [75]. Even though the Upper Tribunal did err in its approach to application of section 117C, that error was not a material one. We therefore dismiss the appeal in NA's case.

KJ (Angola)

62. The FTT decision in this case was promulgated on 30 January 2014. In a first determination, the Upper Tribunal held that the FTT had erred in law. It is common ground that this determination cannot be impugned. As a result of it, the Upper Tribunal proceeded to a further hearing to re-make the decision.

63. The Upper Tribunal re-made the decision by its determination promulgated on 31 October 2014. At that stage the Upper Tribunal had to apply the new sections inserted into the 2002 Act and the 2014 rules. The Upper Tribunal held that the claimant's appeal should be allowed and that the deportation order made against KJ should be set aside. The Secretary of State now appeals to this court.

64. KJ is a national of Angola, born on 2 June 1982. He was brought to the UK in December 1990, aged 8, by a man called Paul Mbala who posed as his father. There was a report when KJ was aged 9 that Mr Mbala had abused him, and he was taken into foster care for a while. But he was then returned to Mr Mbala, who was believed to be his father. There was further abuse by Mr Mbala. At the age of about 13 KJ was taken into care. On 12 November 1997, at the age of 15, he was granted indefinite leave to remain.

65. From 1997 KJ started getting into trouble and began committing offences. In March 1998 he was convicted of possession of an article with a blade and assault occasioning actual bodily harm. In June 1998 he committed a robbery whilst on bail. On 20 July 2000 he was sentenced for an offence of having a bladed article, theft and resisting arrest and sentenced to 15 months' detention in a young offenders' institution. On 7 November 2002 KJ was sentenced to 10 years' detention in a young offenders' institution for a grave offence of aggravated burglary committed with three others, who had together entered a flat during the night, tied up the occupant and assaulted him (one of them stabbing him) in an attempt to make him divulge where money was kept. KJ was 19 at the time he committed this offence. The length of KJ's sentence means that this is again a case to which section 117C(6) applies.

66. While in detention, KJ began a relationship with Layla Kanoun, who visited him in prison from about the end of 2003.

67. On 11 December 2007, the Secretary of State made a deportation order in respect of KJ. KJ's appeal against that order was dismissed on 12 November 2007. However, he was not deported at that stage because of difficulties in obtaining a travel document to send him to Angola.

68. In October 2008 KJ was released from immigration detention on bail to reside at the home of Ms Kanoun's mother. Initially he reported in accordance with his bail conditions, but fearing deportation in October 2010 he absconded.

69. In March 2013 Ms Kanoun was pregnant by KJ and KJ's solicitors wrote to the Secretary of State with representations and evidence and offering to report to the immigration authorities on condition that he was not detained. The evidence included a report dated 15 September 2012 from a consultant psychiatrist, Professor Cornelius Katona, which assessed KJ to be suffering from depression, anxiety and post-traumatic stress disorder (PTSD) and to be at risk of suicide if returned to Angola. KJ was sent a reporting notice and on 25 March 2013 commenced reporting again. On 31 March 2013 KJ's and Ms Kanoun's daughter was born.

70. On 12 September 2013 the Secretary of State issued a decision letter by which she refused to revoke the deportation order and gave reasons.

71. KJ brought an in-country appeal against this decision. On the appeal, he adduced a further report from Joanne Lackenby, a forensic psychologist, who assessed his risk of re-offending to be low and stated that the risk of suicide if sent to Angola remained a significant consideration.

72. The FTT allowed KJ's appeal. Amongst other things, it found it probable that KJ has some relatives living in Angola, but since KJ had been in the UK so long it could not be assumed that they would support him to build a new life there (para. [47]).

73. The FTT's determination was set aside by the Upper Tribunal, on the grounds that it had failed to refer to the relevant paragraphs of the Immigration Rules in relation to removal of foreign criminals. The Upper Tribunal proceeded to make the operative decision in this case.

74. The Upper Tribunal directed itself by reference to sections 117A-117C of the 2002 Act. KJ relied upon the principles set out in *Maslov v Austria.* The Upper Tribunal stated that a sentence of 10 years' detention "must be accorded very great weight indeed in the balancing exercise" (para. [34]). It referred to KJ's subsisting relationship with Ms Kanoun and their daughter and noted that his deportation would split the family, since it would not be reasonable to expect Ms Kanoun and the child, who are British citizens, to go to Angola; but stated that those factors of themselves would not be sufficient to counter the public interest in KJ's deportation (paras. [38]-[39]).

75. The Upper Tribunal attached greater weight to the circumstances of KJ's case which fell within Exception 1. He had been in the UK since the age of 8 and had spent most of his life here even at the time the deportation order was made in 2007; he knew no other country than the UK, and could not speak the languages used in Angola; and "There are no familial ties with Angola" (paras. [40]-[41]). The Secretary of State contends that this last statement (which was repeated in para. [44]) is contradicted by para. [47] of the FTT's judgment, referred to above; but in context we do not consider that it is. The FTT's assessment was that even if KJ in fact had some relatives in Angola, he did not know them and they would not assist him. In our view, that is a basis on which the Upper Tribunal could assess that KJ had no familial ties in Angola of any materiality.

76. The Upper Tribunal again directed itself by reference to section 117C(6); noted that the public interest required deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2; and reminded itself that in *SS (Nigeria)* it had been held that a claim based on Article 8 against deportation needs to be a "very strong" one to succeed: para. [42]. Nonetheless, the Tribunal held that there were very compelling circumstances in KJ's case which warranted allowing his appeal against deportation. He had no ties with Angola and no communication skills, so removal there would be to an alien environment without any support system at all; and this had to be added to his mental state, and the risk it would deteriorate, so that he would be at risk of depression, worsening symptoms of PTSD, drug-taking and even committing suicide if deported, as explained by Professor Katona and Ms Lackenby in their reports: paras. [43]-[51].

77. The Tribunal noted that counsel for KJ canvassed the possibility of an Article 3 ECHR claim against deportation by KJ based on his risk of suicide, but did not develop this. The Tribunal noted that the Secretary of State in her decision letter of 12 September 2013 stated that Angola had relevant drugs and medical treatment available, but dismissed this as an answer: "It is hard to see how a man with no

language skills and no familial ties in Angola could avail himself of the limited healthcare there" (para. [47]).

78. The Upper Tribunal correctly directed itself as to the test applicable under section 117C(6). It also correctly recognised that the strength of KJ's claim to fall within Exception 1 could in principle furnish grounds on which it might be said that there were "very compelling circumstances over and above those described in Exceptions 1 and 2".

79. However, Mr Tam submits that the Tribunal erred in the weight it placed upon the medical evidence in KJ's case. The Tribunal ought to have considered KJ's case based on Article 3 first, against the very high threshold required to be satisfied for such a claim to be made out, and should have found that KJ's case clearly did not meet that test: see *GS (India) v Secretary of State for the Home Department* [2015] EWCA Civ 40 for a detailed recent discussion of the relevant authorities. The Tribunal ought then to have addressed the question whether the lesser standard of medical treatment which might be available in Angola impacted in any relevant way on his family life or private life interests in the UK, bearing in mind that a similar rigorous standard of relevance of difference in medical treatment is applicable in the context of a claim under Article 8 as it is in the context of a claim under Article 3, since both Articles reflect in that respect an underlying principle

> "that the ECHR does not impose any obligation on the contracting states to provide those liable to deportation with medical treatment lacking in their 'home countries'. This principle applies even where the consequence will be that the deportee's life will be significantly shortened …" (*MM (Zimbabwe)* [2012] EWCA Civ 279, [17]-[18] per Moses LJ; see also *GS (India)* at [85]-[87] per Laws LJ and [111] per Underhill LJ).

80. In our judgment, this criticism of the Upper Tribunal judgment is made out. The Tribunal erred in law by failing to direct itself properly regarding the stringency of the test to be applied when considering whether a difference in availability of medical treatment as between Angola and the UK could play any significant role in bolstering KJ's claim to have the deportation order set aside, let alone whether it could make any significant contribution to establishing that there were other "very compelling circumstances" for the purposes of section 117C(6).

81. We therefore allow the appeal on this ground and remit it to the Upper Tribunal for the decision to be re-made. This is not a case in which it can be said that KJ's appeal against deportation must necessarily succeed or must necessarily fail.

WM (Afghanistan)

82. The FTT decision in this case was promulgated on 9 May 2014. The FTT had to apply the 2012 rules and the primary legislation as it stood before the amendment of the 2002 Act by the 2014 Act. The FTT allowed the claimant's appeal.

83. The Upper Tribunal dismissed the Secretary of State's appeal against the FTT's decision, concluding that the FTT had made no error of law. The Secretary of State

appeals to this court. In these circumstances the operative decision which requires examination is that of the FTT to see whether it erred in law, assessed by reference to the Immigration Rules and primary legislation in place at the time of its decision. This means that for the purposes of the appeal in this case this court has to look at paras. 398 to 399A of the 2012 rules and apply the guidance in relation to them given by this court, in particular in *MF (Nigeria)*.

84. WM is a citizen of Afghanistan born on about 1 January 1980. He first entered the UK illegally, on 21 January 2002 and claimed asylum. His application was refused but he was granted 12 months' exceptional leave to remain. An application for further leave to remain in 2004 was refused and his appeal was dismissed. On 24 June 2004, WM applied for leave to remain as the unmarried partner of Ms Manduzeh, a British citizen. This was refused in February 2005 with no right of appeal.

85. On 13 August 2005 WM committed a sexual assault upon a 14 year old girl.

86. This was only discovered after he had returned to Afghanistan in 2006 and then been given entry clearance to the UK as Ms Manduzeh's fiancé later in that year. They married in September 2006 and she gave birth to their son on 3 November 2006.

87. On 24 December 2006 WM was arrested and charged with a recent sexual assault upon a woman. He was also now charged with the previous sexual assault. At a late stage he pleaded guilty to both charges, on 7 January 2008. He was sentenced to imprisonment for 22 months (20 months for the sexual assault on the girl and 2 months consecutive for the sexual assault on the woman).

88. On 1 July 2008, while WM was in prison, Ms Manduzeh gave birth to their second child, a daughter.

89. On 5 September 2008, the Secretary of State made a decision to deport WM. WM's appeal to the Tribunal was dismissed in December 2009. His appeal to this court was compromised in March 2011 on terms that the Secretary of State undertook to reconsider WM's Article 8 claim afresh on the basis of current circumstances.

90. On 28 November 2013 the Secretary of State decided to deport WM. He appealed to the FTT.

91. The FTT correctly observed at para. [16] that paras. 398 to 399A of the 2012 rules provide a complete code for assessing whether deportation would breach a person's Article 8 rights. This had been made clear by this court in *MF (Nigeria)*.

92. The FTT then considered the circumstances of the offences committed by WM, the risk posed by WM (medium risk of serious harm to children and members of the public), the medical problems experienced by Ms Manduzeh and her children and the current circumstances of WM and Ms Manduzeh in relation to employment, household chores and care of the children.

93. The FTT analysed the position as follows. WM did not qualify for consideration of leave to remain under para. 399A because he continues to have significant cultural, social and family ties to Afghanistan. The Secretary of State conceded that it would be unreasonable to expect WM's children, who are British citizens, to leave the UK

and since Ms Manduzeh is the only person available to provide them with full-time care the FTT concluded that this had the effect that there are insurmountable obstacles to her settling with WM in Afghanistan (there is no appeal in relation to this part of the reasoning so it is unnecessary for us to examine it further). The FTT therefore focused on the ability of Ms Manduzeh to care for the children without the assistance of WM, and concluded that she would be able to provide an adequate level of care on her own (para. [41]).

94. Unfortunately, the FTT's analysis which followed is flawed. At para. [42], whilst reminding itself that the relevant section of the 2012 rules provides a complete code, it stated that "the phrase 'exceptional circumstances' [in para. 398] can only refer to circumstances that are not already within the contemplation of the Rules". That is not correct, as an individual might be able to establish "exceptional circumstances" on the basis of a particularly strong and compelling case falling within the scope of paras. 399 and 399A (just as, under section 117C and the 2014 rules, "very compelling circumstances over and above those described in Exceptions 1 and 2" might be established by a particularly strong case falling within Exceptions 1 and 2: see above).

95. From this starting point, the FTT then looked at the guidance in *Uner v Netherlands* to see what factors listed in that judgment and applicable in the present case might be said not to be in the contemplation of the 2012 rules, identifying as such the factor of "the time elapsed since the offence was committed and the applicant's conduct during that period" (*Uner v Netherlands*, para. [57]): para. [43]. The FTT then reasoned that this factor had not been distinctly addressed in the Secretary of State's decision to deport WM; that the time which had elapsed since his offences and the good use to which WM had put it served to diminish the risk he posed to the public and to reduce the overall proportionality of deportation in furtherance of the public interest in preventing crime; and it then added "the inevitable degree of hardship" that would be faced by Ms Manduzeh and the children if WM were deported was a further matter relevant to "the proportionality exercise that it becomes necessary to undertake once it has identified circumstances that do not fall within the contemplation of paragraphs 398 to 399A of the Immigration Rules"; finally saying, "We have therefore considered the issue of proportionality in a holistic manner, and have concluded that the decision to deport [WM] does not strike a fair balance between the rights and interests of [WM] and his family members on the one hand and those of the public on the other": paras. [43]-[45].

96. This reasoning shows that the FTT fell into error by conducting its own free-standing proportionality analysis, without approaching the question of proportionality through the lens of paras. 398 to 399A of the 2012 rules as it should have done: see *LC (China)*, [17]; *AJ (Angola)*, [39]-[40]. It failed to ask itself, as it should have done, whether there were very compelling circumstances which required the strong presumption in favour of deportation of a foreign criminal such as WM to be overridden: *MF (Nigeria)*, [43]. The FTT thus failed to give proper weight to the public interest in deportation of WM.

97. The appeal in WM's case is therefore allowed. Mr Tam accepts that in these circumstances the case should be remitted to the Upper Tribunal for a fresh decision to be made. In making a fresh decision, the Upper Tribunal will apply the 2014 rules and sections 117A-117D of the 2002 Act.

MY (Kenya)

98. The FTT decision in this case was promulgated on 4 February 2014. In a first determination, the Upper Tribunal held that the FTT had erred in law. It is common ground that this determination cannot be impugned. As a result of it, the Upper Tribunal proceeded to a further hearing to re-make the decision.

99. The Upper Tribunal re-made the decision by its determination promulgated on 2 September 2014. Therefore, the Upper Tribunal had to apply sections 117A-117D and the 2014 rules. The Tribunal held that MY's appeal should be allowed and that the deportation order made against him should be set aside. The Secretary of State now appeals to this court.

100. At the hearing before the Upper Tribunal it was agreed that there had been no challenge in the FTT to the credibility of any of the witnesses or their statements and that the Upper Tribunal could therefore rely on the evidence which had been presented to the FTT: para. [10]. This was not the same as saying that the Upper Tribunal would adopt the findings made by the FTT, and the Upper Tribunal was entitled to make its own assessment of the evidence before it. At para. [39], the Upper Tribunal found, in disagreement with the findings of the FTT, that there would be no support available to MY's family from other family members. This was a finding which the Upper Tribunal was entitled to make on the evidence. In his oral submissions Mr Tam agreed that this was so (despite passages in the grounds of appeal and skeleton argument for the Secretary of State, not drafted by him, which suggested that the Secretary of State might dispute this).

101. MY is a citizen of Kenya, born on 19 March 1991. He arrived in the UK on 16 November 2007 to join his father and family. He was granted indefinite leave to remain on 23 November 2009.

102. On 26 February 2013 he was convicted of inflicting grievous bodily harm, an offence committed while drunk. He has no other history of offending. In due course he was sentenced to 12 months' imprisonment. With a sentence at the lowest level to make MY a "foreign criminal", as defined in section 32(1) and (2) of the 2007 Act and in section 117D(2), and well below 4 years, it is section 117C(3) rather than section 117C(6) which applies in his case.

103. The FTT examined the complex needs of MY's family. The medical evidence is that MY's father has severe illnesses and physical difficulties amounting to need at the highest level, in terms of requiring constant care and support for all daily activities, including managing his toilet needs, washing, dressing and undressing etc. MY's father has a special relationship of dependency on MY to help him to lead as normal a life as possible. MY's mother also has poor health and restricted mobility; is not capable of lifting his father; and requires physical support herself from MY, as well as emotional support from him. MY's sister also has poor physical health, suffers from depression and has physical limitations on what she can do. She, like her mother, is heavily dependent on MY for emotional support. Benefits received by the family are insufficient to meet all their needs, so the family is also dependent on the modest earnings MY brings in. It was not suggested by the Secretary of State that the family could relocate to Kenya if MY were deported.

104. Although the Upper Tribunal recognised that MY's return to Kenya would be difficult for him, since he has no relatives there to support him and has had little connection with the country since arriving in the UK, it did not consider that such a return would be unduly harsh on that basis or that there would be very significant obstacles to MY's integration back into Kenya. Hence the Tribunal found that MY was not within Exception 1. It also accepted that on the evidence he posed no risk of re-offending and would for the future be a responsible member of society, but made it clear that it did not consider that this factor alone could outweigh the public interest in deportation.

105. Nor did MY fall within Exception 2. But the Tribunal found that "It would … devastate his family to remove from them the main support and help they have" ([24]). There was no other viable source of support for them to meet their wholly exceptional and severe needs. Applying the guidance in *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31, the Tribunal found that the emotional ties between the family members in the exceptional circumstances of the case were so unusually strong that even though MY is an adult child, family life exists for the purposes of Article 8 between him and his parents and sister.

106. At para. [38] of the decision, the Upper Tribunal directed itself in these terms:

> "In general terms therefore were the appellant not to meet the strict requirements of the Rules it would generally only be in exceptional circumstances Article 8 would be held to apply. There would need to be compelling circumstances outside of the Rules which would make deportation unduly harsh in all the circumstances."

107. Mr Tam submitted that this showed that the Tribunal did not approach MY's case as it should have done, through the lens of sections 117A-117D and paras. 398 to 399A of the 2014 rules, which now constitute the applicable complete code in relation to the question of deportation of a foreign criminal. We do not accept this submission.

108. At paras. [27]-[28] and [31] the Tribunal specifically reminded itself that it was to apply section 117C and paras. 398-399A of the 2014 rules, and at para. [28] it quoted the statement in para. 398 of the 2014 rules that the public interest in deportation "will only be outweighed where there are very compelling circumstances over and above those described in paragraphs 399 and 399A." At para. [37] the Tribunal reminded itself of previous decisions on the proper approach to the application of paras. 398-399A of the 2012 rules: this, we infer, plainly included a reminder by the Tribunal to itself of the leading judgment of this court on those Rules, in *MF (Nigeria)*, with its analysis of the Rules as constituting a complete code for dealing with deportation of foreign criminals and its statement of the requirement that "very compelling circumstances" needed to be shown by the deportee in a case falling outside paras. 399 and 399A. At para. [49] the Tribunal again referred to the similarity between "the structure of the code [constituted by paras. 398-399A of the 2012 rules] and the amount of public interest enshrined therein" and the new code introduced with sections 117A-117D.

109. Therefore, on a fair interpretation of para. [38], set out above, read in the context of the decision as a whole, the Tribunal correctly directed itself that it should consider MY's case through the lens of the new code set out in sections 117A-117D and paras.

398-399A of the 2014 rules and that if MY did not meet the strict requirements of paras. 399 and 399A (corresponding with Exceptions 1 and 2, as set out in section 117C) – as the Tribunal found he did not – there would need to be very compelling circumstances over and above those described in Exceptions 1 and 2 which would make the deportation unduly harsh (that is to say, disproportionate).

110. It is true that the Tribunal did not say "*very* compelling circumstances" in para. [38], but it had already stated that test in para. [28] and reminded itself of it in para. [37], so we consider that in substance it understood that it was the appropriate "very compelling circumstances" test which it had to apply when it referred to "compelling circumstances" in para. [38]. Mr Tam, sensibly, did not seek to suggest otherwise.

111. In deciding that it should address itself to the question whether, despite the fact that MY could not bring himself within Exception 1 or Exception 2, "very compelling circumstances" existed which would make deportation unduly harsh and hence disproportionate, the Upper Tribunal correctly rejected the primary submission made by counsel then appearing for the Secretary of State (Mr Richards), recorded at para. [46], that if the requirements of neither of the Exceptions could be satisfied, "that is the end of the matter" and section 117C(3) mandates upholding the deportation order. That is an interpretation of section 117C(3) which Mr Tam conceded before us must be wrong. We have explained above the correct interpretation to be given to section 117C(3), in line with para. 398 of the 2014 rules. It is open to a foreign criminal with a sentence of 12 months or more but less than 4 years, who accordingly falls within the scope of section 117C(3), who does not satisfy the requirements of Exception 1 or Exception 2, nonetheless to show that "very compelling circumstances" exist which would make it unduly harsh and hence disproportionate and contrary to Article 8 for him to be deported. In the present case, that is how the Upper Tribunal correctly directed itself.

112. Looking at all the circumstances of the case, the Upper Tribunal found that the complex physical and emotional needs of MY's family and their interdependence upon him amounted to such a compelling (i.e. very compelling) circumstance: para. [39]. The Tribunal reached this conclusion while also having regard to other relevant factors, including that MY's father is a British citizen, all other members of the family are lawfully present in the UK with indefinite leave to remain and there could be no question of them relocating to Kenya (paras. [22] and [48]); the absence of any real risk of re-offending (para. [33]); the manifestations by MY of acceptance of his social responsibilities (para. [33]); the level of seriousness of the offending (as observed above, MY is right at the bottom end of the persons qualifying as foreign criminals) (para. [33]); and the fact that MY is not a burden on the state, but rather by his dedication to care of other family members is likely to be relieving the state of what otherwise might be an expensive financial burden (para. [48]).

113. In our judgment, there is no error of law by the Upper Tribunal in MY's case and the appeal should be dismissed. The Tribunal directed itself correctly as to the legal test to be applied. It properly had regard to relevant considerations. In the unusually pressing circumstances of the case on its particular facts, by reference to the interests of MY and members of his family protected under Article 8, it was open to the Tribunal to conclude that "very compelling circumstances" existed over and above those described in Exceptions 1 and 2 which would make his deportation unduly

harsh and hence disproportionate. It was a decision which was lawfully open to the Tribunal to make, even though another Tribunal considering the evidence might have come to a different conclusion.

PART 5. CONCLUSION

114. For the reasons given above, we dismiss the appeals in the cases of NA (Pakistan) and MY (Kenya).

115. We allow the appeals in the cases of KJ (Angola) and WM (Afghanistan). We remit those cases to the Upper Tribunal for fresh determinations in light of the guidance given in this judgment.