Court of Appeal

ZP (India) *v* Secretary of State for the Home Department

[2015] EWCA Civ 1197

2015 July 23; Nov 24

Underhill, Christopher Clarke LJJ, Sir Timothy Lloyd

Immigration — Deportation order — Revocation — Deportation order made following conviction for criminal offence — Application for revocation of deportation order after deportation — Whether exceptional circumstances outweighing public interest in maintaining deportation order — Approach to be adopted in determining post-deportation revocation application — Statement of Changes in Immigration Rules (1994) (HC 395) (as amended by Statement of Changes in Immigration Rules (2012) (HC 194), para 114), para 391[1]

ZP, an Indian national, entered the United Kingdom on a visitor's visa. She became involved in a conspiracy to facilitate bogus marriages for immigration purposes and was arrested and charged. She fled to India and was convicted in her absence. While there ZP married a British national and, using a false Indian passport in another name, obtained leave to enter the UK as his wife. She re-entered the UK and gave birth to a son the following year. In her false identity she was granted indefinite leave to remain in the UK. Thereafter her true identity was discovered and she was sentenced to imprisonment in respect of the offences on which she had been convicted in her absence and for obtaining leave to enter the UK by deception. A deportation order was subsequently made. Her appeal was unsuccessful and she was deported in 2009. In 2012 ZP applied for the deportation order to be revoked so that she could return to the UK to live with her husband and son, relying on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and section 55 of the Borders, Citizenship and Immigration Act 2009. The application was refused and ZP's appeal to the First-tier Tribunal was dismissed. The Upper Tribunal allowed her appeal and revoked the deportation order, finding that there were exceptional circumstances which outweighed the public interest in maintaining the deportation order for its full term, namely the impact on ZP's son of his separation from his mother.

On the Home Secretary's appeal—

Held, dismissing the appeal, that if an application for revocation of a deportation order was made by a foreign criminal who was outside the UK, the Home Secretary had power, under section 32(6) of the UK Borders Act 2007, to grant the application even if none of the exceptions in section 33 applied; that paragraph 391 of the Statement of Changes in Immigration Rules, as amended, applied to post-deportation applications and provided that a deportation order should continue for a prescribed period, which in the present case was ten years from the date of the making of the order since ZP was sentenced to less than four years' imprisonment, save where either its continuation would be contrary to the Convention on Human Rights and Fundamental Freedoms or the Refugee Convention or where there were other exceptional circumstances that meant the continuation was outweighed by compelling factors; that paragraph 391 did not require a fundamental difference in approach in considering post-deportation revocation applications from that which was followed when considering pre-deportation applications under paragraphs 390A and 398–399A; that, therefore, in respect of a post-deportation application to revoke a deportation order, a decision-maker would have to conduct an assessment of the proportionality of maintaining the order in place for the prescribed period, balancing the public interest in continuing it against the interference with the applicant's private and family life but in striking that balance he should take as a starting point the Home Secretary's assessment of the public interest reflected in the prescribed periods and should only order revocation after a lesser period if there were compelling reasons to do so; and that, accordingly, the Upper Tribunal judge's decision was one that was open to him and was adequately explained (post, paras 14, 22, 23, 24, 48, 51, 52, 53).

[1] Statement of Changes in Immigration Rules (1994) (HC 395), as amended, para 391: see post, para 16.

Per curiam. The Home Secretary need not fear that the decision of the Upper Tribunal in the present case, or the court's upholding of it, will open the gates to a flood of cases in which post-deportation applicants who have had to leave their children in the UK are granted early revocation of their deportation notices. It is only where the tribunal is persuaded that, exceptionally, there are very compelling reasons which outweigh the public interest in the order continuing for the full prescribed term that such revocation may be allowed. Each case will turn on its own facts, and the facts of the present case should not be taken as establishing any kind of benchmark (post, para 51).

Decision of the Upper Tribunal (Immigration and Asylum Chamber) of 17 April 2014 affirmed.

APPEAL from the Upper Tribunal (Immigration and Asylum Chamber)

On 28 November 2008 the Home Secretary made a deportation order against ZP. She was deported on 6 November 2009. On 7 April 2012 ZP's solicitors applied for the deportation order to be revoked. On 27 February 2013 the UK Borders Agency refused the application. On 10 September 2013 the First-tier Tribunal dismissed ZP's appeal. On 17 April 2014 the Upper Tribunal allowed her further appeal and revoked the deportation order.

By an appellant's notice filed on 13 October 2014 and pursuant to permission from the Court of Appeal (Elias LJ) the Home Secretary appealed.

The facts are stated in the judgment of Underhill LJ.

John Mckendrick (instructed by *Government Legal Department*) for the Home Secretary.
Michael Biggs (instructed by *Hanson Young Solicitors, Harrow*) for ZP.

The court took time for consideration.

24 November 2015. The following judgments were handed down by the court.

UNDERHILL LJ

Introduction

1 The respondent is an Indian national, born on 12 January 1969. She came to this country on 10 September 2002 on a visitor visa. She became involved in a conspiracy to facilitate bogus marriages for immigration purposes, and indeed she entered into such a marriage herself and obtained an extension of her leave to remain on that basis. In May 2003 she was arrested and charged in relation to those offences. She fled to India and was convicted in her absence.

2 On 14 January 2005, while still in India, the respondent married another British national ("RO"). It is common ground that that marriage was lawful, so presumably her previous marriage had been dissolved. She applied for leave to enter the United Kingdom as his wife, using a false Indian passport in another name. She made an application for leave in her assumed identity on 31 May 2005. This was granted on the 30 June 2005 and she re-entered the UK on 16 July 2005. It is common ground that her husband was at the time wholly unaware of her history.

3 On 28 September 2006 the respondent gave birth to a son ("YO"). She was granted indefinite leave to remain—again, in her false identity—on 19 July 2007.

4 Shortly afterwards the respondent's true identity was discovered. On 17 January 2008 she was sentenced to 12 months' imprisonment for obtaining leave to enter the UK by deception and also to 12 months' imprisonment in respect of the offences on which she had been convicted in her absence in 2003, the two terms to run consecutively. A deportation order was made on 28 November 2008. She appealed, but her appeal was unsuccessful and she was deported on 6 November 2009.

5 The result of her deportation was that the respondent was separated from her husband and son. At first the arrangement was that YO would spend part of his time with her in India and part with his father in this country, but after two years or so this was decided to be too unsettling for him and he now lives permanently here with his father.

6 On 7 April 2012 solicitors instructed on the respondent's behalf applied for the deportation order to be revoked, so that she could come back to live with her husband (with whom it is common ground that she still enjoys a strong and subsisting relationship) and her son. She relies on article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and section 55 of the Borders, Citizenship and Immigration Act 2009, and in particular on the seriously damaging effect on YO of being separated from his mother for so long a period. On 27 February 2013 the UK Borders Agency refused that application.

7 The respondent appealed to the First-tier Tribunal ("the FTT"), which on 10 September 2013 dismissed the appeal. She appealed to the Upper Tribunal ("the UT") and at an error of law hearing on 28 November 2013 the FTT's decision was, by consent, set aside and an order was made for the decision to be re-made by the UT. A hearing took place before UTJ Conway on 8 January 2014. By a decision promulgated on 17 April he allowed the appeal and revoked the deportation order.

8 The Secretary of State appeals against that decision with the permission of Elias LJ. She has been represented before us by Mr John McKendrick of counsel. The respondent has been represented by Mr Michael Biggs of counsel. The appeal has been well argued on both sides.

The statutory provisions and the rules

9 The statutory provisions and the rules relating to the deportation of foreign criminals are now reasonably familiar and have attracted a fair amount of exegesis in the case law. The present case is of a less usual kind, in that it is concerned with an application for revocation of a deportation order made by an applicant who has been deported and makes the application some years into the "term" of the order. (Applications for revocation by persons who have not yet been deported are not at all uncommon, given that deportation is often not enforced promptly on the making of an order.) We were referred to no authorities dealing with the case of such a post-deportation applicant, and the parties were not agreed either about the applicable provisions or about the approach to be followed.

Statute

10 The Secretary of State's power to deport non-UK nationals derives from section 3(5) of the Immigration Act 1971 (as amended), which reads, so far as material:

> "A person who is not a British citizen is liable to deportation from the United Kingdom if— (a) the Secretary of State deems his deportation to be conducive to the public good;"
>
> Section 5 of the Act contains further provisions about deportation. The only one relevant for present purposes is subsection (2), which gives the Secretary of State power to revoke a deportation order 'at any time'".

11 The exercise of those powers in the case of non-nationals who commit serious offences is governed by sections 32 and 33 of the UK Borders Act 2007. Section 32 reads (so far as material):

> "(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."

12 I need not set out much of section 33. Subsection (1) provides:

> "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 sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions)."
>
> The section goes on to identify six exceptions. But I need only set out the first and third, which are covered in subsections (2) and (4), as follows:

"(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."

"(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 EU treaties."

13 Mr McKendrick initially submitted that heads (a) and (b) under section 32(6) must be read together, with the result that even following the deportation of a foreign criminal the Secretary of State could only revoke the order where one of the exceptions under section 33 applied. Mr Biggs disputed that. He relied on the word "or" between heads (b) and (c), but he also pointed out that exceptions 1 and 3 in section 33 are couched in terms of whether the deportation of the foreign criminal "would" breach his rights under the Convention or the EU treaties, which seems to contemplate that it had not yet occurred. He said that it followed that in a "(b) case", ie where the criminal had already been deported, the power of revocation fell to be exercised without reference to section 33.

14 Mr McKendrick acknowledged the force of those points, but he asked for time to consider, and we allowed written submissions to be lodged following the hearing. In the event, because Mr McKendrick was not available, the submissions on behalf of the Secretary of State were settled by the Government Legal Department. Those submissions are not quite explicit, but as I read it they accept that Mr Biggs is right. In any event, it is in my view clear that he is: in particular, it is quite clear that the heads under subsection (6) are drafted as alternatives. Accordingly, if an application for revocation is made by a foreign criminal who is outside the UK the Secretary of State has power to grant the application even if none of the exceptions under section 33 applies. And in fact, as the Government Legal Department pointed out, most of the section 33 exceptions will not be available to someone abroad and/or will have been held not to apply at the time of the original deportation decision; so in practice head (b) will almost always afford the only available gateway.

15 However, although Mr Biggs's point is important in the interests of accurate analysis I do not believe that it makes much difference in practice. It is true that, as he submitted, the non-applicability of section 33 in a post-deportation case means that Parliament has not made any express provision about what the public interest requires in such a case, so that the Secretary of State's discretion is unfettered by statute. But if it has been established when the original order was made that none of the exceptions specified in section 33 applies, and accordingly that the public interest requires the making of a deportation order, that does not cease to be the case the moment the foreign criminal leaves the country: it will, for essentially the same reasons, be contrary to the public interest for them to come back. No doubt it may be right to put a limit on the period for which the public interest requires their continued exclusion, but that is another matter and is addressed in the Immigration Rules, to which I now turn.

The Immigration Rules: Part 13

16 The statutory provisions about deportation are supplemented by the Immigration Rules. The rules relating to revocation are contained in paragraphs 390–392, which at the date of the decision of the UT read as follows:

"*Revocation of deportation order*

"390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following: (i) the grounds on which the order was made; (ii) any representations made in support of revocation; (iii) the interests of the community, including the maintenance of an effective immigration control; (iv) the interests of the applicant, including any compassionate circumstances.

"390A. Where paragraph 398 applies the Secretary of State 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.

"391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course: (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than four years, unless ten years have elapsed since the making of the deportation order, or (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least

four years, at any time, Unless,[1*] in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

"391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

"392. Revocation of a deportation order does not entitle the person concerned to re-enter the United Kingdom; it renders him eligible to apply for admission under the Immigration Rules. Application for revocation of the order may be made to the Entry Clearance Officer or direct to the Home Office."

17 Paragraph 390A refers to paragraphs 398–399A. Those paragraphs form part of a section headed "Deportation and article 8" and read (again, at the material time[2]):

"398. Where a person claims that their deportation would be contrary to the UK's obligations under article 8 of the Human Rights Convention, and (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least four years; (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least 12 months; or (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

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

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

18 It is convenient to set out at this stage the authoritative exposition of the correct approach to the test contained in the final words of paragraph 398 given in *MF (Nigeria) v Secretary of State for the Home Department* [2014] 1 WLR 544. One of the issues before the court was how the approach taken in paragraphs 398–399B (which had only recently been introduced and were referred to as "the new Rules") was compatible with the assessment of proportionality required

[*] *Reporter's note*. The superior figures in the text refer to notes which can be found after para 51.

by the jurisprudence relating to article 8 of the Convention on Human Rights and Fundamental Freedoms ("the ECHR"). Paras 43–44 of the judgment of the court, given by Lord Dyson MR, read, so far as material, as follows:

> "43. The word 'exceptional' is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the 'exceptional circumstances'.
>
> "44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence …"

19 The language of paragraph 390A is essentially the same as that of the relevant words of paragraph 398 (the only difference being the reference to the public interest "in maintaining the deportation order", as opposed to "in deportation"), and the guidance in *MF* is clearly equally applicable.

20 The question then is which of paragraphs 390–392 apply to the present case, and how. At the risk of being over-elaborate, it is safest to take them in turn.

21 *Paragraph 390.* This plainly applies to all applications to revoke a deportation order, whether made by a foreign criminal or not and whether or not the applicant is in the UK. However, its provisions are at a very general level and for our purposes are in practice superseded by the more specific provisions which follow.

22 *Paragraph 390A*. In broad terms the effect of this paragraph is evidently to apply the "deportation and article 8" regime of paragraphs 398–399A—which is in practice concerned with foreign criminals[3]—not only to the initial decision whether to make a deportation order but also to a decision whether to revoke such an order once made. But Mr Biggs submitted that that was only so in a case where the applicant for revocation had not yet been deported. He said that that followed from the initial words of the paragraph—"where paragraph 398 applies"—since paragraph 398 by its own terms only applies "where a person claims that their deportation *would be* contrary to [article 8]", and that language is inapt to a case where they have already been deported; the same is true of the following provisions, which are concerned with whether "deportation"—which would not naturally include the continued exclusion of a deportee—is conducive to the public good. That of course parallels his submissions in relation to section 33 of the 2007 Act, and again it seems to me clearly correct. It is not only the natural reading of the words used, but it makes sense of the existence at paragraph 391 of a separate provision covering "the case of a person who *has been* deported". In my view the rule-maker has deliberately provided separately for the two separate situations, with paragraph 390A applying to pre-deportation revocation applications and paragraph 391 to post-deportation applications. (In its post-hearing submissions the Government Legal Department sought to rely on paragraph A398 of the Rules, which was introduced (by Statement of Changes in Immigration Rules (2014) (HC 532)) with effect from 28 July 2014, to support the contrary conclusion. But, as Mr Biggs submitted, a paragraph which was not in force at the date of the UT's decision can have no bearing on the analysis.[4] I need not in those circumstances set out the terms of paragraph A398, though I should record that at first sight it would not appear to support the Department's submission even if it had been in force.)

23 *Paragraph 391*. It is accordingly paragraph 391, and not paragraph 390A, which applies in the present case. That paragraph states the Secretary of State's policy as to the proper length of time for which a deportation order should "continue"—ie in practice the length of time before an application for leave to enter will be entertained. I will refer to this as "the prescribed period". In the present case the prescribed period is ten years from the date of the making of the order, since the respondent was sentenced to less than four years' imprisonment. However, that policy is expressly stated not to apply in two distinct circumstances—*either* where continuation would be contrary to the ECHR or the Refugee Convention ("the Conventions exception") *or* where "there are other exceptional circumstances that mean the continuation is outweighed by compelling factors" ("the sweep-up exception").

24 It does not, however, in my view follow that paragraph 391 requires a fundamental difference in approach in considering post-deportation revocation applications from that which is followed in considering pre-deportation applications under paragraphs 390A/398–399A. It is true that the structure of paragraphs 398 (at the relevant time[5]) and 391 is different. In the case of the former the Secretary of State has set out herself to formulate the approach required by article

8, whereas in the case of the latter she has stated her policy but acknowledged that it should not apply where that would lead to a breach of the ECHR (in practice, article 8).[6] It is also true that there are some minor differences of wording.[7] But the difference in drafting structure does not require a different approach as a matter of substance, since we know from *MF* that the exercise required by paragraph 398 is the same as that required by article 8. Likewise, while the use in the sweep-up exception of the phrase "*other* exceptional circumstances [involving] compelling factors" no doubt implies that it is only in such circumstances that the Secretary of State's general policy will be displaced by article 8, that too is consistent with the approach in *MF*. As for the differences in wording, they may be vexing to the purist but they are plainly not intended to reflect any difference of substance. The exercise required in a case falling under paragraph 391 is thus broadly the same as that required in a case falling under paragraph 390A or paragraph 398. Decision-takers will have to conduct an assessment of the proportionality of maintaining the order in place for the prescribed period, balancing the public interest in continuing it against the interference with the applicant's private and family life; but in striking that balance they should take as a starting point the Secretary of State's assessment of the public interest reflected in the prescribed periods and should only order revocation after a lesser period if there are compelling reasons to do so.

25 Mr Biggs argued that a fundamental difference between the decision whether to make a deportation order in the first place and the decision whether to revoke a subsisting order short of the prescribed period—and, particularly where, as here, the applicant has been deported—is that in the latter case the public interest in maintaining the order will generally diminish with the passage of time and that that must be borne in mind in striking the proportionality balance. I would accept that up to a point. Where there are compelling factors in favour of revocation the applicant's case is—other things being equal—bound to be stronger if they have already been excluded for a long period. But I would not accept that the passage of time can by itself be relied on as constituting a compelling reason for early revocation. It is inherent in the making of a deportation order that there must be a period before the deportee becomes eligible for re-admission: otherwise it would be a mere revolving door. Mr Biggs did not contend that the ten-year prescribed period applicable to foreign criminals sentenced to between one and four years' imprisonment was itself irrational or that it inherently involved any breach of article 8. That being so, the default position must be that deportees should "serve" the entirety of the prescribed period in the absence of specific compelling reasons to the contrary.

26 *Paragraph 391A*. The phrase "in other cases" at the beginning of paragraph 391A must at least exclude the cases covered by the immediately preceding paragraph, ie paragraph 391, so that it certainly has no application in the present case. It is not necessary for us to decide whether its effect is to exclude also cases covered by paragraph 390A—so that in practice it means "in cases other than those of foreign criminals" – but the Government Legal Department submitted that that was plainly the intention, and I am inclined to agree.

27 *Paragraph 392*. This simply clarifies the effect of the revocation of a deportation order. It has no bearing on any of the issues before us.

Section 55 of the 2009 Act

28 No point arose before us about the construction or effect of section 55 of the 2009 Act. But since it was an important part of the respondent's case before the tribunal I should set out the relevant part, as follows:

> "(1) The Secretary of State must make arrangements for ensuring that— (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and (b) …
>
> "(2) The functions referred to in subsection (1) are— (a) any function of the Secretary of State in relation to immigration, asylum or nationality; (b)–(d) … (3)–(8) …"

29 There has now been a good deal of case law about the effect of that provision, starting with the decision of the Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166. All that I need note for present purposes is that it is now well-established that it requires the Secretary of State to treat the best interests of a child affected by an immigration decision as a primary consideration but that that is not the same as treating it as *the* primary consideration: see, eg, *SS (Nigeria) v Secretary of State for the Home Department* [2014] 1 WLR 998.

The decision of the Upper Tribunal

30 We are not concerned with the decision of the FTT since, as I have said, it was set aside by consent. I can summarise the reasoning of UTJ Conway in re-making the decision as follows.

31 At paras 12–15, he identifies the nature of the evidence that was before him. He had witness statements from the respondent, RO, her mother-in-law ("FO")—who also lives in the UK, either with RO or nearby—and from YO himself. He also had various letters from YO's school and his doctors: these include a report from a child psychologist. We have not been shown the witness statements or the documents, and the judge does not summarise their effect (though he does give some details at a later point: see para 38 (3) below). He does, however, briefly summarise the oral evidence given by RO, FO and YO. Most of the evidence of RO and FO related to behavioural problems that had been encountered with YO. His behaviour was said to be erratic and "abnormal" and he was liable to mood swings. He had been bullied at school and there had been attendance problems, though things had improved since a recent change to a new school. YO was receiving counselling from a child psychologist. FO believed that these problems were because his mother was not at home: RO worked and she herself was elderly and had recently been ill and unable to undertake caring responsibilities. YO's oral evidence seems to have been brief—understandably, because he was only seven; but he said that he missed his mother and had not liked living in India because of the insects and the heat. The judge makes clear at a later point that there was no challenge to the credibility of the witnesses.

32 At paras 16–17, he summarises the submissions of the Home Office presenting officer for the Secretary of State and of counsel for the respondent. There is nothing material for our purposes.

33 At para 18, he purports to set out paragraphs 390–391 of the Immigration Rules. In fact he quotes an earlier version of paragraph 391, which is different from the version actually in force in a number of respects. No doubt this reflects what was put before him by the parties, and it is regrettable that more care was not taken. But it was common ground before us that in the respects relevant for our purposes the provisions are to substantially the same effect and that the error is immaterial.

34 At para 20, he notes that the case was caught by paragraph 398(b) and that it did not fall within paragraphs 399 (because YO's father was able to care for him) or 399A. The result of that conclusion is—though he only spells this out a little further on (see para 36 below)—that the public interest in the respondent's deportation would only be outweighed "in exceptional circumstances", as explained in *MF (Nigeria)*. It follows from my analysis at paras 22–25 above that his approach was formally incorrect, because paragraph 398 was not engaged, but also that the error made no difference of substance.

35 At paras 21–31 he summarises in some detail the contents of the Secretary of State's decision letter, which contained a full account of the respondent's offending, the remarks of the sentencing judge and the decision of the tribunal on her appeal against the original deportation order. The judge quoted a passage from the sentencing remarks in which the respondent was described as "a thoroughly devious person" who had "cheated the system on two occasions"; and a passage from the earlier tribunal decision which made the point that the present case was one in which the public interest required deportation even though there was no evidence of a propensity to re-offend.

36 At para 32, he directs himself, in accordance with paragraph 390A, that the deportation order should only be revoked "in exceptional circumstances". He then goes on to quote a passage from *MF (Nigeria)* which included paras 43–44 of the judgment which I have set out above. My comments at para 34 apply equally here.

37 At para 35, he says "I note also … the importance of deterrence in considering the public interest". He then sets out the following passage from the judgment of Pitchford LJ in *AM v Secretary of State for the Home Department* [2012] EWCA Civ 1634 at [31]:

> "in measuring proportionality the public interest in deterrence is a material and necessary consideration … It is an indelible feature of the balancing exercise that the decision-maker weighs the consequences of deportation against the full import of the legitimate aim to be achieved."

38 Paras 37–46 contain the judge's consideration of the interests of YO, though there is also a brief reference also to the position of the respondent's husband. I can summarise them as follows:

"(1) He finds, at para 37, that YO has a genuine and subsisting relationship with his mother but that the attempt to share his care between her in India and his father in the UK had failed because it had been too unsettling and YO had not liked living in India.

"(2) At paras 38–39, he directs himself that he is required to consider YO's best interests as a primary consideration. He refers to *ZH (Tanzania)* and quotes two passages, which I need not set out, from the judgment of Lady Hale.

"(3) At paras 40–46, he considers what YO's best interests are and concludes that it is in his best interests to live with both parents and to do so in the UK. Since that conclusion is not controversial in itself—and is indeed unsurprising, given that he is of British nationality and has lived most of his life here—I need not summarise the reasoning in full. I should, however, refer to para 42, where he says:

> "Here, there is evidence that the child has behavioural difficulties. The oral evidence to that effect is supported by letters from his school and from medical sources. It was not suggested that these were solely the consequence of the absence of his mother. He has had problems since birth. However, I find of some assistance a letter from a child psychologist at Homerton University Hospital (9 August 2013) stating that the child is unsettled by living in both countries, here and abroad with his mother. Also, a letter from the deputy head of his primary school in which she states: 'with regard to the impact his mother not being with him is having: this could only be my opinion, I do feel it would definitely have a positive impact to have his family back together'."

39 Paras 47–54 contain the judge's overall balancing exercise and conclusion. I should set them out in full:

> "47. However, it is necessary to take account of the whole circumstances which include the undisputed fact that the [respondent's] history involved serious dishonesty.
>
> "48 In considering deterrence and the public interest I note first that there is no suggestion that the [respondent] is likely to reoffend.
>
> "49 The [respondent] has been absent from this country for nearly five years. I see no reason to doubt her comment in her statement: 'I will never be making the same mistake again and neither will I be reoffending as the passage of time has taught me the biggest and most painful lesson of all and that is not being able to be with my innocent son. He does not even know why I'm not in the country with him.'
>
> "50 Her son was, of course, born in 2006 which is after her initial dishonesty which resulted in her fleeing to India in 2004 to avoid trial, and also after her dishonest return to the UK in 2005. In finding mitigating factors the sentencing judge, as well as noting her early plea of guilty to the second indictment, her otherwise good character, a letter of remorse, also noted that 'events have moved on because she has remarried and now has a young son'. As indicated, she has also been out of the country a considerable length of time.
>
> "51 I have no doubt from the evidence before me that the effect on the [respondent] of being separated from her child for most of his recent formative years has been particularly severe. I consider that the deterrent effect on her has been very significant. In no sense has she got away with her criminality, nor would she be seen as such by others. Whilst having little sympathy with her as an individual, the high risk is that by her continued exclusion it is the child who increasingly suffers as he grows up.
>
> "52 I cannot see an argument that, in the light of the circumstances of this particular case, early revocation of the deportation order would weaken the principle of deterrence as viewed by wider society.
>
> "53 In looking at the evidence as a whole it does seem to me that there are 'exceptional circumstances' in this case which outweigh the public interest in maintaining the deportation order.
>
> "54 The appeal succeeds under the Rules."

40 I shall have to examine some aspects of that reasoning in more detail below, but it may be useful to summarise at this stage my understanding of it. The judge's essential, and explicit, finding was that there were "exceptional circumstances" which outweighed the public interest in maintaining the deportation order for its full term: see para 53. He had earlier directed himself as to the meaning of "exceptional circumstances" by reference to the exposition in *MF (Nigeria)*: para 32. The circumstances in question consisted essentially of the impact of the separation on YO, which he described as increasing with the passage of time (para 51), rather than on its impact on the respondent, with whom he says he has "little sympathy" (loc cit): in this connection he had earlier directed himself that YO's best interests were a primary consideration (para 38). That

impact had to be weighed against the public interest in maintaining the respondent's exclusion. It is in that context that he makes the points, in the earlier parts of para 51, that the respondent has learnt her lesson and that she has herself suffered severely by being separated from YO for over four years: their importance is that they mean that there is no real risk of her re-offending and that there would be no public perception that she had "got away with it".

The appeal

The grounds

41 I need not set out the Secretary of State's pleaded grounds of appeal since they underwent some reformulation in Mr McKendrick's skeleton argument and oral submissions[8]. His eventual formulation was threefold: (1) that the judge failed to look at the issue of proportionality "through the lens" of the Immigration Rules—a metaphor borrowed from the judgment of Sales LJ in *Secretary of State for the Home Department v AJ (Angola)* [2014] EWCA Civ 1636 (see para 39) — and that the matters on which he relied did not amount to very compelling circumstances of the kind which were established in *MF (Nigeria)* as being required; (2) that he erred in approach by failing to apply, or in any event to demonstrate that he had applied, the very great weight which is to be accorded to the public interest in the deportation of foreign criminals; (3) that he failed to appreciate the range of components comprised in the concept of the public interest. Mr McKendrick submitted by way of overview that either separately or cumulatively those three points meant that the judge had carried out the necessary balancing exercise in a manner that was "irrational and/or perverse"[9].

42 It seems to me that on analysis the first and second points, and Mr McKendrick's overview, are simply expressions of a single submission that the facts of the respondent's case were incapable of justifying the revocation of the deportation order: in substance it is a submission that the judge's decision was perverse, though (as is usual with perversity grounds) with a fallback submission that the decision was in any event inadequately reasoned. Though I accept that there may be some overlap, the third point alleges something more in the nature of a specific misdirection, and it is convenient to deal with it separately and first.

(1) The components in the public interest

43 The point which I address under this head was not explicitly pleaded in the grounds of appeal, nor indeed was it specifically articulated in the skeleton argument. It emerged only in Mr McKendrick's oral submissions and was accordingly somewhat protean. But his broad contention was that the judge treated the essential—and in truth the only—element in the public interest in making, and continuing, a deportation order, as being its effect in preventing the individual criminal from reoffending. He said that that was evident from paras 48, 49 and (most of all) 51 of the determination, which focus almost exclusively on the fact that the respondent's prolonged exclusion from this country and the consequent separation from YO have taught her her lesson and that there is no real risk of her reoffending. He submitted that that involved ignoring at least two other important elements in the public interest in deportation, namely the expression of society's revulsion at the offence and the need to deter other non-nationals from committing serious offences. He relied in particular on the following passage from the judgment of Elias LJ in *AM*:

> "41. The central question in this appeal is whether the FTT erred in law in its approach to proportionality. In particular, did the FTT have in mind not only the risk that the applicant might commit future offences but also the need to deter foreign nationals from committing serious offences by making it plain that one of the consequences may well be deportation, as well as the legitimate need to reflect society's public revulsion of such crimes and to ensure that the public will have confidence that offenders will be properly punished?
>
> "42. The decisions of this court in *N (Kenya)* [2004] EWCA Civ 1094, *OH (Serbia)* [2008] EWCA Civ 694 and *RU (Bangladesh)* [2011] EWCA Civ 65, all emphasise the importance of a tribunal giving full weight to these different aspects of the public interest in the proportionality assessment. They emphasise that it is not a sufficient answer to the public interest concerns that the risk of future offending by the applicant himself is very low. Indeed, where a serious offence has been committed, then as Lord Justice Judge pointed out in *N (Kenya)* (para 65), that will not even be the most important aspect of the public interest.

"43. Nowhere does the Tribunal in terms state that it has had regard to these factors."

The decision of the FTT in *AM* was held to be flawed because it had not made it clear that it took into account what Ward LJ described, at para 55, as "essential elements of the public interest, namely, deterrence and revulsion".

44 I see some force in that submission, but I am not persuaded by it. It is undoubtedly true that the judge attached considerable weight to his view that the respondent had, in effect, learned her lesson; and that, rather confusingly, he seems to have used the label "deterrence" in referring to that factor. But that is not an illegitimate consideration in itself and—which is the real point—I do not think that it involved him treating it as the only element in the public interest. Mr Biggs relied on a number of indications to that effect. He noted that the judge himself quoted from *AM* (see para 37 above): although the passage quoted was not that relied on by Mr McKendrick, it referred to deterrence in terms that do not seem limited to "individual deterrence", and it was hardly likely that the judge had failed to understand the overall message of the case. He pointed out that in para 48 the judge referred to "deterrence [apparently meaning "individual deterrence"] *and* the public interest" and introduced his assessment of the deterrent effect on the respondent personally as only the "first" of the considerations. More substantially, Mr Biggs also pointed out that in para 51 the judge said not only that the respondent would not think that she had "got away with" her offending but "nor would she be seen as such by others". Likewise para 52 refers to "the principle of deterrence as viewed by wider society". Mr Biggs added that the judge had himself earlier quoted the sentencing remarks, which made clear the revulsion which the respondent's behaviour attracted, and the decision of the earlier tribunal that the circumstances of her case were such that the public interest required her deportation even in the absence of a propensity to reoffend: see para 35 above. In my view, although the judge would have done better to be more explicit, it is sufficiently clear that he was aware of, and sought to take into account, all the relevant aspects of the public interest.

(2) Perversity

45 I should start by spelling out the obvious point that the perversity case proceeds on the basis that the judge made no error in directing himself as to the applicable law. It is clear that that was the case. As I have identified above, he correctly identified the essential question as being whether the respondent had shown exceptional circumstances capable of outweighing the public interest in maintaining the deportation order, and he quoted this court's gloss on those words in *MF (Nigeria)* making it clear that they required "very compelling reasons".

46 The question then is whether the circumstances as the judge found them to be were capable of being assessed as "exceptional" or "very compelling". Mr McKendrick referred us to para 43 of the judgment of Sir Stanley Burnton in *PF (Nigeria) v Secretary of State for the Home Department* [2015] 1 WLR 5235 where he made the point that it is a common consequence of the deportation of a person who has children in this country that their deportation will have a damaging impact on those children and that that damage cannot in itself be an exceptional circumstance; he also emphasised the need for a tribunal which made a finding of exceptional circumstances to identify with particularity what those circumstances were. He referred us to the observation at para 27 of the judgment of this court, given by Sedley LJ, in *Lee v Secretary of State for the Home Department* [2011] Imm AR 542, that it is in the nature of a deportation order that, however tragically, it will sometimes break up families, with the inevitable adverse consequences on any children of the family. The tribunal which upheld the original deportation order had been aware of the necessary impact on YO but had made the decision none the less.

47 Against that background, Mr McKendrick submitted that the evidence recounted by the judge did not establish that the consequences for YO of his continuing separation from his mother were truly out of the ordinary, or worse than must have been anticipated from the start. The evidence is summarised at para 42 of the determination, which I quote at para 38(3) above; but Mr McKendrick submitted that it did not amount to much. No details are given of YO's "behavioural difficulties", and the judge himself records that they were not entirely due to the consequences of the respondent's deportation. The judge placed weight on the letter from the child psychologist, but that said only that YO was unsettled by having to divide his time between his father in the UK and his mother in India: that was no longer the case by the time of the hearing in the UT and the psychologist does not address the impact on YO of straightforward separation from his mother. The letter from the school does so, but the opinion—avowedly non-expert—that it would have a positive impact on YO to have his family back together was no more than

a truism. Those circumstances, such as they were, were incapable of outweighing the important public interest in continuing the deportation order for its full term.

48 Those are powerful points, and I regard this case as very near the borderline. But I have in the end come to the conclusion that the judge's decision is one that was open to him and is adequately explained. There plainly was evidence that YO was suffering from quite serious behavioural difficulties: there was not only the evidence of his father and grandmother but the fact that he was receiving continuing counselling from a child psychologist. It is a pity that the judge does not give more detail than he does about the history and nature of those difficulties; but the reports and/or the witness statements must have contained more information than appears in the brief summary which he gives. I am not prepared to find that the evidence before him did not justify the conclusion that those difficulties reflected real psychological damage being suffered by YO and that that damage was at least in substantial part being caused by separation from his mother and was likely to increase the longer that separation lasted. I bear in mind also that he had had the advantage of seeing YO, his father and his grandmother give evidence. Mr McKendrick did not attempt to take us to the reports themselves or to the witness statements or other evidence in order to show—the burden being on him—that they were incapable of justifying the judge's conclusions. I accept that the direct evidence on the question of causation, at least as summarised by the judge, was not very satisfactory, but in my opinion he was entitled to supplement that evidence by his own common sense judgment.

49 The question then is whether the conclusions reached by the judge as to the psychological damage being suffered by YO from his separation from his mother, and which he believed to be likely to increase, constituted a sufficiently compelling factor to outweigh the strong public interest in the deportation order remaining in force for its full term. In striking that balance he was entitled to take into account, as he did, the fact that the respondent had already been excluded from the UK for four years and his own assessment of the impact of revocation on public confidence in the circumstances of this particular case.

50 I am not sure that every tribunal would have reached the conclusion that was reached in this case, but I am not prepared to say that the judge's decision was perverse. Mr Biggs reminded us of the authorities which emphasise that proportionality assessments of this kind require a difficult exercise of judgment which can often not be said to be definitely right or definitely wrong, and that an appellate court should not intervene simply because it might have reached a different decision: see, eg, *AH (Sudan) v Secretary of State for the Home Department* [2008] 1 AC 678, per Lady Hale, at para 30.

Conclusion

51 I would accordingly dismiss this appeal. I do not believe that the Secretary of State need fear that the decision of the UT in this case, or our upholding of it, will open the gates to a flood of cases in which post-deportation applicants who have had to leave children in the UK are granted early revocation of their deportation notices. It is only where the tribunal is persuaded that, exceptionally, there are very compelling reasons which outweigh the public interest in the order continuing for the full prescribed term that such revocation may be allowed. Each case will turn on its own facts, and the facts of the present case should not be taken as establishing any kind of benchmark.

Notes

1. The capitalisation of "unless" is eccentric, but that is how it appears in the rules.

2. Mr McKendrick pointed out that paragraphs 399–399A of the Rules have now been superseded by section 117C of the Nationality Immigration and Asylum Act 2002, which is one of a group of sections introduced by the Immigration Act 2014 with effect from 28 July 2014, and he referred to *YM (Uganda) v Secretary of State for the Home Department* [2014] EWCA Civ 1292; but he acknowledged that this change made no difference for our purposes.

3. In fact it appears to go wider because head (c) under paragraph 398 covers cases where the potential deportee has committed an offence for which he has received a sentence of less than 12 months' imprisonment, meaning that he is not caught by "condition 1" in section 32, and which are not of a kind specified by an order under section 72 of the 2002 Act, so that he is not caught by condition 2 either and falls outside the definition of "foreign criminal". But such cases will be rare in practice.

4. This carelessness about which version of the Rules is in force at a particular time is a continuing problem with the conduct of cases by the Secretary of State in the tribunals and indeed in this court: see para 33 above (also*Singh v Secretary of State for the Home Department* [2014] EWCA Civ 74).

5. It has been changed since.

6. We can ignore the Refugee Convention and the sweep-up exception because paragraph 398 (and thus also paragraph 390A) is in terms only concerned with cases where article 8 of the ECHR is in play.

7. For example, paragraphs 390A and 398 refer simply to "other factors", as opposed to "compelling factors" in paragraph 391; and although in the former case the language of "compelling" is introduced by the court in *MF (Nigeria)* the actual phrase used in para 43 is "very compelling" and the reference is to "reasons", not "factors".

8. They also relied in part on the changes introduced by the 2014 Act, but as already noted (see No 2 above) these were not relied on by Mr McKendrick before us.

9. I should mention for completeness that in his skeleton argument Mr McKendrick submitted that the judge had wrongly treated YO's best interests as not merely a primary consideration but the primary consideration. But that point was not pursued in his oral submissions.

52 CLARKE LJ
I agree.

53 SIR TIMOTHY LLOYD
I also agree.

Appeal dismissed.

NICOLA BERRIDGE, Solicitor