Neutral Citation Number: [2016] EWCA Civ 932

Case No: C5/2015/0942

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Upper Tribunal
(Immigration and Asylum Chamber)
Judge Poole
DA/01038/2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/09/2016

Before :

LADY JUSTICE ARDEN
LORD JUSTICE JACKSON
and
LADY JUSTICE GLOSTER

- -

Between :

IT (Jamaica)	**Respondent**
- and -	
The Secretary of State for the Home Department	**Appellant**

- -
- -

Sarabjit Singh (instructed by **Government Legal Department**) for the **Appellant**
Christian Howells (instructed by **NLS Solicitors**) for the **Respondent**

Hearing date: 7 July 2016

- -

Approved Judgment

LADY JUSTICE ARDEN:

ISSUE: WEIGHT TO BE GIVEN TO THE PUBLIC INTEREST IN AN APPEAL AGAINST A REFUSAL TO REVOKE A DEPORTATION ORDER AGAINST A FOREIGN CRIMINAL

1. This appeal from the Upper Tribunal's determination dated 12 January 2015, dismissing an appeal from the determination of the First-tier Tribunal ("FTT") dated 5 September 2014, raises the question of the weight to be given to the public interest when a deportee applies for revocation of a deportation order made against him. On it depends the further question of what the deportee must show to displace that public interest and in turn what he must demonstrate to a tribunal to succeed on any appeal from the Secretary of State's refusal to revoke that order.

2. In this case, the appellant, A, was deported under section 32 of the UK Borders Act 2007 ("the Borders Act") in 2010 following his conviction for a serious criminal offence for which he was sentenced to 42 months' imprisonment. The Secretary of State has refused to revoke that order so that he can return to the UK to live with his wife and son. The FTT allowed A's appeal and the Upper Tribunal dismissed a further appeal. It is effectively common ground that, under section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), the deportation order may only be revoked if its retention is determined to be "unduly harsh", but there is a dispute between the parties as to the weight to be given in that determination to the public interest in deporting foreign criminals who have committed serious offences and to whether the tribunals followed the right approach in this case.

3. For the reasons given below, in my judgment, the undue harshness standard in section 117C of the 2002 Act means that the deportee must demonstrate that there are very compelling reasons for revoking the deportation order before it has run its course. Section 117C is to be read in the context of the Immigration Rules which make that clear. The tribunals in this case recognised the role of the public interest but fell into error because they did not direct themselves as to the weight to be given to it in balancing it against the interests of the applicant and others.

4. I start by considering the circumstances leading to A's application for revocation of the deportation order made against him, the relevant legislative framework and then the determinations of the FTT and the Upper Tribunal. After that I will consider the submissions and state my detailed reasons.

RELEVANT LEGISLATIVE FRAMEWORK

5. Under section 32 of the Borders Act the Secretary of State is obliged to order a person convicted of a specified offence and sentenced to more than 12 months' imprisonment to be deported from the UK on completion of his sentence, unless (among other matters) his Convention rights would be violated (Borders Act, section 33).

6. The Secretary of State may not revoke a deportation order save in certain cases: see section 32(6) of the Borders Act, which provides:

> (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.

7. The Immigration Rules deal with applications for revocation of a deportation order. In so doing they make provision for the application of Article 8 of the European Convention on Human Rights ("the Convention"). This will arise if a foreign criminal contends that the maintenance of the deportation order will constitute a disproportionate interference with his right to respect for his family or private life.

8. The relevant Immigration Rules, in force at the date that the FTT promulgated its decision on 9 September 2014, provided (in so far as is relevant):

> **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 4 years, unless 10 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 4 years, at any time,

Unless, 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.

…

Deportation and Article 8

A398. These rules apply where:

…

(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

…

(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…

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."

9. Section 117C of the 2002 Act, which applied to Tribunal decisions as of the 28 July 2014, states:

> 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.
>
> … [exception 1, not relevant]
>
> (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…."

10. 'Qualifying child' is defined in section 117D(1) as including a British citizen under the age of 18.

A'S CONVICTION, DEPORTATION AND APPLICATION FOR REVOCATION

11. A is a Jamaican national. He was born on 28 February 1966. He entered the UK in 1998 and resided here until his deportation in 2010.

12. On 2 December 2000 he married a British citizen, the Sponsor. They have a son, R, who is also a British citizen and who was born on 30 September 2002. Both A and the Sponsor have a number of other children (6 in total) from previous relationships in both the UK and Jamaica, but none of those children were relied on in support of A's appeal.

13. On 23 January 2009 A was convicted on four counts of supplying Class A drugs. On 11 February 2009 he was sentenced to 42 months imprisonment. This meant that the Secretary of State's duty to deport him under section 32 of the Borders Act came into effect.

14. On 29 October 2009 the Secretary of State made a deportation order against A. A's appeal was dismissed and he was deported to Jamaica on 21 July 2010.

15. Under paragraph 391 of the Immigration Rules, the deportation order in A's case was to last ten years.

16. A has not seen R since he was deported. The Sponsor has visited A twice in Jamaica but she did not take R with her as he does not like to fly. It would appear that R did not visit A in prison and according to the Secretary of State it is unclear when they last saw each other.

17. On 23 September 2013, three and a half years after his deportation, A applied for the deportation order made against him to be revoked to enable him to return to the UK and resume his family life with his wife and R. The Secretary of State refused his application by way of a letter dated 9 May 2014. A appealed.

DECISION OF THE FIRST-TIER TRIBUNAL

18. By its determination promulgated on 9 September 2016, the FTT allowed A's appeal against the decision of the Secretary of State.

19. The evidence before FTT included written evidence from (1) an occupational therapist of the North Bristol NHS Trust about R's condition and saying that he had been referred to a paediatrician; (2) Dr Longhurst, a consultant paediatrician, stating that R received 12 to 13 hours one-to-one support each week at school and was in good health and his condition was to be reviewed annually; (3) the principal of his school saying that R had special needs and that the Sponsor had to shoulder all the responsibility for him; and (4) Jonathan Roddis, a therapeutic consultant, confirming that R missed A and was craving the input of a father figure in his life. There was also evidence that R spoke to A every night on the telephone and that he could be distressed by those calls which caused him to be absent from school, and that his school attendance was well below the norm. The Sponsor gave evidence to the FTT and she stated that she was worried because R was about to enter puberty and she considered that she would not be able to cope on her own "as he [got] bigger and his hormones start to take effect on him. With his father overseas it would be difficult for him with no father figure to see everyday."

20. The Home Office Presenting Officer submitted that the question would be whether the continuing deportation was unduly harsh. The Secretary of State did not consider that was so. The Home Office Presenting Officer referred to section 55 and to the decision in Case C-34/09 *Zambrano* [2012] QB 265. The Secretary of State recognised that R had learning difficulties and medical problems but that it was the respondent's case that treatment was available in Jamaica.

21. A's advocate relied on paragraph 95 of the decision of the Upper Tribunal in *Re Sanade & Ors (British Children-Zambrano-Derici) sub nom (1) Milind Manohar (2) Damion Harrison (3) Conroy Maurice Walker v Secretary of State for the Home Department* [2012] UKUT 48 (IAC). He agreed that the question was whether it would be unduly harsh not to allow the appeal. He submitted that it was unduly harsh in this case and that the child's care was best served by having both parents present in the jurisdiction.

22. The FTT found that the effect of continuing the deportation order was unduly harsh. They stated that they had regard to the reasoning in the determination in 2010 that a

deportation order should be made and to section 117 of the 2002 Act (Determination, paragraph 28). The FTT added:

> Parliament has declared that the deportation of foreign criminals is in the public interest. This appellant is a foreign criminal: he has been convicted on his own confession of supplying Class A drugs, offences which the public consider abhorrent and which are deplored. (Determination, paragraph 28)

23. In paragraph 29, the FTT referred to the commencement date for section 117 of the 2002 Act.

24. The FTT found that A's relationship with the Sponsor was genuine and subsisting, as was the parental relationship between A and R. It noted R's flying phobia so that he could not join him in Jamaica. It further noted that there was no objective evidence of that. However, it added that as a result of *Sanade* it is not possible to expect R, a British citizen, to relocate outside the European Union.

25. The FTT referred to the effect of A's absence on R, and to the fact that R had special educational needs and medical problems associated with microcephaly. It also noted that the sponsor had the whole burden of the child's problems and upbringing although some support was probably given by other children in the wider family. It further observed that R was about to start secondary school and was on the brink of puberty. All the evidence therefore suggested to the FTT that the burden of caring for him would increase rather than diminish in the coming years. The FTT accepted the sponsor's evidence that "in order to cope she needs the presence of the appellant here. Without him she says the future is likely to be 'very bleak.'"

26. The FTT acknowledged that A's offences were serious and that the more serious an offence, the greater the public interest in deportation. They took into account that he had completed his prison sentence and been absent from his family for over four years and that he had been of good character in that time (Determination, paragraph 33).

27. The FTT considered that the consequences of the deportation order were unduly harsh for R but not as between A and the Sponsor. R had reached a stage in his life where his particular needs were likely to increase and the Sponsor could not reasonably be expected to cope with that increase alone.

28. The FTT concluded:

> 34. The consequences of deportation for [A] are harsh: he is separated from his wife and child and step-children but we find that is the foreseeable consequence of his serious criminal behaviour.
>
> All other things being equal, those consequences could be mitigated by the Sponsor and [R] joining [A] in Jamaica and living with him there, alternatively by both visits and regular contact by telephone and other means.

> It is clear from the decision of the Upper Tribunal in *Sanade* however that as the Sponsor and [R] are British citizens and therefore citizens of the European Union, it is not possible to require them to relocate outside the European Union. Moreover, although the Sponsor has visited [A] three times in the last four years [R] has not done so because of a phobia of flying. As a result [R] has not seen his father for over four years and has no prospect of doing so for the remainder of his childhood while the deportation order remains in effect.
>
> Given [R]'s condition and educational needs we find that the consequences of not revoking the deportation order are unduly harsh and we allow the appeal.

29. The Secretary of State appealed to the Upper Tribunal.

DECISION OF THE UPPER TRIBUNAL

30. By a determination dated 12 January 2015, Upper Tribunal Judge Poole dismissed the appeal of the Secretary of State. The judge considered that the FTT were entitled to come to their conclusion. The UT considered that 'read as a whole' the FTT's determination shows that it found the public interest in IT's deportation to be outweighed by the 'needs of [A] and his family'. The UT considered that some of the Secretary of State's submissions went beyond the grounds of appeal for which leave had been given. Upper Tribunal Judge Poole also refused permission to appeal, which was granted by this Court.

COUNSEL'S SUBMISSIONS AND MY REASONS FOR ALLOWING THIS APPEAL

31. The key submission of Mr Sarabjit Singh, for the Secretary of State, relates to the adequacy of the FTT's treatment of the public interest in the deportation of foreign criminals. Mr Singh submits that the FTT should have applied the approach recently identified by this Court in *ZP (India) v Secretary of State for the Home Department* [2016] 4 WLR 35, where the leading judgment was given by Underhill LJ, with whom Christopher Clarke LJ and Sir Timothy Lloyd agreed.

32. *ZP (India)* concerned a post-deportation revocation application made before 28 July 2014, when section 117C of the 2002 Act came into force. We understand that this appeal is the first time that this Court has considered the role of the public interest in appeals from determinations of the tribunals after that date.

33. Mr Singh relies on *ZP (India)* for four reasons.

34. First, this Court noted that each of the three subparagraphs of section 32(6) sets out a separate basis on which a deportation order can be set aside: see at [14] per Underhill LJ. This Court further noted that, while, on the face of section 32(6), the Secretary of State has a discretion to revoke a deportation order under paragraph (b) without reference to section 33, the weight to be given to the public interest when considering revocation of a deportation order could not in practice (or logically) be

any less than when the original deportation order was made: see per Underhill LJ at [15]:

> 15…It is true that…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…

35. Second, Underhill LJ decided that paragraph 390A (see paragraph 8 above) applied to pre-deportation revocation applications and paragraph 391 (paragraph 3 above) applied to post-deportation applications ([22]-[23]). Although this Court did not decide the point, Underhill LJ (again at [22] to [23]) also appeared provisionally to have concluded that the new A398 (see A 398(b) set out in paragraph 8 above), which was introduced on 28 July 2014, did not apply to post-deportation applications to revoke deportation orders before they expired under paragraph 391 (set out at paragraph 8 above). Mr Singh relies on this conclusion as showing that the gap in section 32(6)(b) of the Borders Act is filled, in relation to post-deportation applications, by the Immigration Rules.

36. Third, Underhill LJ held at [24] of his judgment that in substance the approach in pre-deportation revocation cases under paragraph 390A and post-deportation revocation cases under paragraph 391 is broadly the same. This was made clear by Underhill LJ at [24] (with footnote references removed):

> 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) 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). It is also true that there are some minor differences of wording.
>
> But the difference in drafting structure does not require a different approach as a matter of substance, since we know from [*MF(Nigeria) v SSHD* [2014] 1WLR 544] 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. (footnotes removed, paragraph breaks added)

37. So far as material paragraph 399 considered by Underhill LJ was in the same form as paragraph 399 in paragraph 8 above, but paragraph 398 as considered by him contained a different test.

38. Fourth, Underhill LJ thus concluded in [24] and again at [51] that in post-deportation revocation cases very compelling reasons for revocation were required:

> 51…. 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...".

39. Mr Singh submits that while circumstances satisfying Exceptions 1 and 2 in section 117C of the Nationality, Immigration and Asylum Act 2002 can constitute very compelling circumstances (see *NA (Pakistan) v SSHD* [2016] EWCA Civ 662 at [29]), those circumstances must meet the high threshold in paragraph 51 of the judgment of Underhill LJ.

40. Mr Singh goes on to submit that there is no trace in the FTT's decision of it applying a test comparable to the test identified by Underhill LJ in *ZP (India)*. There is no indication in the FTT's decision that "exceptionally" it was persuaded that there were

"very compelling reasons" outweighing the serious public interest in maintaining A's deportation. He describes the FTT's consideration of the public interest as simply "lip service".

41. Moreover, submits Mr Singh, the FTT did not identify what made the separation of A and R "unduly harsh". He submits that 'undue' harshness would require the effects of maintaining deportation to go significantly beyond the usual harshness of keeping a parent separated from his child. Moreover, what is due or undue harshness depends not merely on the impact on the child but also on the parent's immigration and criminal history (see *MM (Uganda) v SSHD* [2016] EWCA Civ 450 at [24]). The expression "unduly harsh" requires the tribunal to balance the public interest against all the other circumstances in the case.

42. Mr Singh criticises paragraph 33 of the FTT's determination. The FTT there referred to his criminal conviction but then almost dismissed it by saying that he had served his sentence and was of good character. The fact that he had been convicted and served his sentence was not the crucial consideration. The crucial consideration was whether the public interest required him to remain out of the jurisdiction.

43. Mr Christian Howells, for A, submits that the decision of the FTT should be upheld. He submits first that there is no need in the case of revocation of a deportation order to show that there were very compelling reasons for it to be revoked: the concept of very compelling reasons is derived from the decision of this court in *MF Nigeria,* and not section 117C(5), which lays down a different test that the continuation of the deportation order is "unduly harsh". *ZP India* can therefore be distinguished.

44. *MF Nigeria* was concerned with paragraph 398 of the Immigration Rules as it stood at the time of *ZP India*. So far as material paragraph 398 provided that, where paragraph 399 did not apply, the public interest in deportation would be outweighed by other factors only in "exceptional circumstances". This Court (at [43] to [44]) held that those words required "very compelling reasons" to be shown, and moreover that the provisions of the Immigration Rules were a complete code so that the exceptional circumstances to be considered involved the application of the proportionality test required by Article 8.

45. Mr Howells further submits that the FTT therefore correctly directed themselves as to the law and their decision discloses no error. Mr Howells submits that the correct approach is to be found in the following paragraphs from the judgment of Laws LJ, with whom Vos and Hamblen LJJ agreed, in *MM (Uganda) v SSHD* [2016] EWCA 450:

> 22. I turn to the interpretation of the phrase "unduly harsh". Plainly it means the same in section 117C(5) as in Rule 399. "Unduly harsh" is an ordinary English expression. As so often, its meaning is coloured by its context. Authority is hardly needed for such a proposition but is anyway provided, for example by *VIA Rail Canada* [2000] 193 DLR (4th) 357 at paragraphs 35 to 37.
>
> 23. The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign

> criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights. In my judgment, with respect, the approach of the Upper Tribunal in *MAB* ignores this combination of factors. The first of them, the public interest in the removal of foreign criminals, is expressly vouched by Parliament in section 117C(1). Section 117C(2) then provides (I repeat the provision for convenience):
>
> "The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal."
>
> 24. This steers the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the "unduly harsh" provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term "unduly" is mistaken for "excessive" which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history.

46. As Mr Howells points out, the *MM Uganda* decision was followed by this Court in *R (o/a) MA(Pakistan) v SSHD* although Elias LJ, with whom King LJ and Sir Stephen Richards agreed, expressed some doubts about the introduction of the public interest into the test of undue harshness.

47. Mr Howells cited further authorities, but they do not appear to me to assist. He relies on *LC (China) v* Secretary *of State for the Home Department* [2014] EWCA Civ 1310 at [14]-[17] and [24]. Moore-Bick VP considered the case of a foreign criminal who had been sentenced to less than four years in the context of a materially different situation, namely the person to be deported was the sole carer for a child who could not be expected to leave the UK. Mr Howells also relies on *SSHD v AQ* (*Nigeria*) [2015] EWCA Civ 250 at [70], but this does not seem to me to assist him. In it, this Court made it clear (among other matters) that "national policy as to the strength of the public interest in the deportation of foreign criminals is a fixed criterion against which other factors and interests must be measured."

48. In reply Mr Singh referred to *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, [29]. It became clear that there were complications in this case which do not arise in the appeal before us, and I have not found it helpful on this appeal.

49. I now state my conclusions on this aspect of the case. The relevant question is whether the continuation of the deportation order is unduly harsh, and whether very compelling reasons have to be shown to establish undue harshness.

50. I have reached the same conclusion as Underhill LJ did in relation to the provisions under which he considered that very compelling reasons have to be shown and I reach that conclusion by the following process.

51. As this Court held in *MM (Uganda)*, to answer that question, the public interest must be brought into account. Therefore, the court must know what that public interest is in any particular circumstance in order to give appropriate weight to it.

52. The function of section 117C is to set out the weight to be given to the public interest to be taken into account in the proportionality exercise to be carried out under Article 8 of the Convention in the case of a foreign criminal. Section 117C(1) states that the deportation of foreign criminals is in the public interest. In this context, and indeed in the other uses of the word "deportation" in this section, the word "deportation" is being used to convey not just the act of removing someone from the jurisdiction but also the maintaining of the banishment for a given period of time: if this were not so, section 117C(1) would achieve little.

53. To understand the length of the deportation in any particular case, the tribunal hearing the case has to examine the Immigration Rules. From that the tribunal is bound to observe that those Rules proceed on the basis that, in the absence of undue harshness, the appropriate period of absence from this jurisdiction in a case such as A's is ten years (paragraph 391 of the Immigration Rules). That is a very long period in anyone's life and so it is an indicator of the gravity of the effect on the community which the offence is considered to have. That is the period for which the deportee is expected to be removed from the jurisdiction. As has been said before, removal from the jurisdiction inevitably entails separation from people and places previously enjoyed here, and the pain, inconvenience and hardship which that separation entails.

54. Moreover, it is clear from section 117C (2) that the nature of the offending is also to be taken into account. The tribunal will have access to the circumstances of the offence and to the length of the sentence and so on.

55. Subsection (1) and (2) of section 117C together make manifest the strength of the public interest. In order to displace that public interest, the harshness brought about by the continuation of the deportation order must be undue, i.e. it must be sufficient to outweigh that strong public interest. Inevitably, therefore, there will have to be very compelling reasons. That conclusion is consistent with the *MF Nigeria* and *ZP India* even though those authorities are based on different Immigration Rules and statutory provisions.

56. The undue harshness test in section 117C(5) has been inserted by primary legislation and it was not in force at the time of the Immigration Rules considered in *ZP India.* Mr Howells in effect argues that the undue harshness test substitutes some new and lower test for that which preceded it under the Immigration Rules. Underhill LJ there held that paragraphs 398 and 399 of the Immigration Rules applying before the commencement date of section 117C meant that in a post-deportation revocation application compelling reasons had to be shown (see above, paragraph 38). By the process of reasoning that I have just set out, I reach the same conclusion in relation to a post-deportation revocation application after the commencement of section 117C to D. I therefore accept the submission of Mr Singh that the same conclusion as Underhill LJ reached in relation to a post-deportation revocation application made

before the date on which section 117C(5) came into force must similarly apply in relation to the same application made after that date, namely that very compelling reasons must be shown to displace the public interest in deportation.

57. I therefore reject Mr Howells' submission that undue harshness can be determined on any other basis. I conclude that the commencement of section 117A to D of the 2002 Act does not mean that a different and lower weight is to be given to the public interest in applications to revoke a deportation order following deportation than in other deportation situations. As I have explained, the result is that the same standard must apply in this case as in a pre-section 117A to D case like *ZP (India).*

58. *MM (Uganda)* does not mandate a different conclusion. In the passage cited above, on which Mr Howells relies, this Court was dealing with the elements which have to be taken into account in performing the proportionality exercise required by Article 8 of the Convention and not with the discrete question of the weight required to be given to the public interest. The last sentence of the citation from Underhill LJ's judgment at [24] in paragraph 36 above demonstrates that this is a separate question.

59. Mr Howells realistically accepts that A would have to show a material change of circumstances between the dismissal of the appeal against the deportation order and the revocation application. As Underhill LJ held in *ZP India,* the starting point must be that the assessment of what was in the public interest at the date on which the deportation order was made cannot be of any less weight at the later stage when revocation is sought. This means that objections to the making of a deportation order which were unsuccessful at the time it was made are unlikely to be successful grounds for obtaining the revocation of a deportation order after removal from the jurisdiction.

60. Turning to the FTT's judgment, I find that there is little evidence that the FTT attributed appropriate weight to the public interest. I accept that they adverted to the question of the public interest, in particular in paragraph 28 of their determination (see paragraph 22 above). I also accept that the FTT exercised a critical judgment in rejecting the effect of the deportation order on the Sponsor as grounds for revocation. But that was a plain case.

61. As regards R's case, the FTT did not apply the equivalent critical judgment. For instance, the FTT did not consider alternative ways in which R's care needs could be met (whereas the Upper Tribunal judge giving permission to appeal to that tribunal referred to the ability for R to access the care he required through a statement of educational needs). Nor did the FTT critically examine whether R's phobia about flying ruled out other contact between A and R. So they do not consider any other way in which R could see his father outside the jurisdiction on a basis which did not involve air travel, for instance if his father travelled to some other part of Europe which R could access by boat or train. On the other hand, as the FTT said, since R is a British citizen, he could not be expected to relocate outside the jurisdiction. That factor does not answer this matter in A's favour as he still has to show that the continuation of the deportation order causes undue hardship.

62. I conclude that the FTT did not demonstrate that they had given appropriate weight to the public interest. Paragraph 34 of the FTT's determination (paragraph 28 above) contains the FTT's summary of their reasons for allowing the appeal, but it makes no reference to any element of the public interest. If the FTT indeed considered that the

circumstances were very compelling, it was for them to demonstrate this in the reasons they gave.

63. In my judgment, this point disposes of this appeal. It is therefore unnecessary to deal with the remaining grounds of appeal. A objects to some of them in any event on the grounds that they were not argued in the Upper Tribunal but I need not express any view either way on those points.

64. The balancing exercise in this case has to be performed again. The FTT did not seek to analyse whether there were very compelling reasons why the deportation order should be revoked. In those circumstances, if my Lord and my Lady agree, the appropriate order is that the appeal should be allowed and that the matter should be remitted to the Upper Tribunal for further consideration in accordance with the judgment of this Court.

Lord Justice Jackson

65. I agree.

Lady Justice Gloster

66. I also agree.