Neutral Citation Number: [2016] EWCA Civ 1012

Case No: C5/2014/2079 AND C5/2015/1968

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION & ASYLUM CHAMBER)
Upper Tribunal Judge Martin (VH)
Upper Tribunal Judge Pinkerton (AJ)
DA/00352/2014 and DA/01965/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/10/2016

Before :

LORD JUSTICE ELIAS
and
LORD JUSTICE VOS

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
AJ (ZIMBABWE)	**Respondent**
- AND -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**
- and -	
VH (VIETNAM)	**Respondent**

- -

Mathew Gullick (instructed by **Government Legal Department**) for the **Appellant in AJ (Zimbabwe)**
Russell Fortt (instructed by **Government Legal Department**) for the **Appellant in VH (Vietnam)**
Harshaka Kannangara (instructed by **Direct Access**) for the **Respondent in AJ (Zimbabwe)**
Jonathan Martin (instructed by **Direct Access) for the Respondent in VH (Vietnam)**

Hearing date : 12 October 2016

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Approved Judgment

Lord Justice Elias :

1. These two appeals were heard together. They share the following common features: each concerned a foreign criminal sentenced to between 12 months' and four years' imprisonment for criminal offences and then made subject to a deportation order by the Secretary of State; in each case the deportee successfully appealed on article 8 ECHR grounds to the First Tier Tribunal (FTT); in each case the principal basis of the FTT decision was that deportation would be a disproportionate interference with family life because it would have a significant detrimental effect upon the children of the deported criminal which outweighed the very powerful public interest in deporting foreign criminals and constituted "exceptional circumstances" within the meaning of rule 398 of the Immigration Rules; and in each case a further appeal by the Secretary of State to the Upper Tribunal (UT) failed on the grounds that the decision reached by the FTT displayed no misdirection in law and was an assessment which it could legitimately reach on the evidence.

2. The Secretary of State appeals against both UT decisions, essentially on the same grounds in each case. She submits that the FTT erred either in failing to appreciate quite how exceptional the circumstances must be in order to overcome the great weight which must be given to the public interest in deporting foreign criminals or, if it did properly appreciate that requirement, in making a finding that the circumstances were exceptional when that was not a conclusion open to it on the evidence. She submits that in each case the UT thereafter erred in failing to identify an error of law in the FTT decision.

The legal framework

3. The Secretary of State has the power to deport a person who is not a British citizen if she "deems his deportation to be conducive to the public good": section 3(5) of the Immigration Act 1971.

4. There is specific legislation regulating the way in which that power should be exercised in the case of foreign criminals. Section 32(4) of the UK Borders Act 2007 provides that for the purposes of section 3(5) of the Immigration Act, "the deportation of a foreign criminal is conducive to the public good". Subsection 32(5) then provides that the Secretary of State *must* make a deportation order in respect of a foreign criminal unless one of the exceptions in section 33 applies. The exceptions include, under subsection (2), a situation where deportation would breach a person's rights under the European Convention on Human Rights or would involve a breach of the UK's obligations under the Refugee Convention.

5. The Convention right which the convicted prisoner typically relies upon, as in these two appeals, is article 8. The foreign criminal contends that deportation would be a disproportionate interference with his family life so as to render deportation unlawful.

6. The definition of a foreign criminal is found in section 32(1) to (3) of the UK Borders Act as follows:

> (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.

7. The statutory provisions are supplemented by the Immigration Rules which specifically regulate the relationship between deportation and the rights under article 8. (I set out the rules in force at the material time). They have since been amended with effect from 28 July 2014 to reflect important statutory changes made by the new part 5A of the Nationality, Immigration and Asylum Act 2002.)

8. The rules distinguish between those sentenced to imprisonment for a period longer than four years, those sentenced for periods between 12 months and four years, and those sentenced to lesser periods whose offending has nonetheless caused serious harm or who are persistent offenders. These appeals concern criminals falling into the middle category. In their cases the relevant rules are as follows:

"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 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, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors."

Rule 399 is as follows:

"This paragraph applies where paragraph 398 (b) or (c) applies if -

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

(i) the child is a British Citizen; or

> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> > (a) it would not be reasonable to expect the child to leave the UK; and
> >
> > (b) there is no other family member who is able to care for the child in the UK; or
>
> (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and
>
> > (i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and
> >
> > (ii) there are insurmountable obstacles to family life with that partner continuing outside the UK."

9. There is also an exception in rule 399A where the foreign criminal has strong links with the UK as identified in that rule. It has no application to either of these cases.

The relevant legal principles

10. As rule 398 makes clear, if the foreign criminal is unable to avoid deportation by relying upon these detailed exceptions, there will need to be "exceptional circumstances" before a court can conclude that the public interest in deportation is outweighed by other factors.

11. There has been a plethora of cases which have come to this court concerning the application of article 8 to foreign criminals and in particular seeking to clarify the scope of the residual "exceptional circumstances" concept. The principles of law are well established and not in dispute in these appeals and therefore I will do no more than summarise the effect of the leading authorities:

> (1) The rules establish a set of criteria which tribunals must apply when assessing the impact of article 8 in criminal deportation cases: *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544 para.2 per Lord Dyson MR.
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> (2) The rules are a complete code. Accordingly, when applying the "exceptional circumstances" criteria, the court should apply the article 8 proportionality test: *MF (Nigeria)* para.44.

(3) Unless the specific exceptions apply, the scales are very heavily weighted in favour of deportation. In *MF (Nigeria)* Lord Dyson said that there must be "very compelling reasons" to outweigh the public interest in deportation. These compelling reasons constitute the "exceptional circumstances" referred to in rule 398: *MF* paras 42-43.

(4) The justification for the courts giving such weight to the public interest in the deportation of foreign criminals is not simply that the Immigration Rules do so, it is that Parliament itself in section 32(5) of the UK Borders Act has stipulated that deportation should be the usual consequence of criminal offending: see *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550; [2014] 1 WLR 544 para.54 per Laws LJ where he said that "only a very strong claim indeed" could override the public interest.

(5) A consequence of the rules constituting a comprehensive code is that when exercising the residual article 8 assessment where exceptional circumstances are relied upon, the tribunal must carry out the assessment "through the lens of the new rules" and that requires a recognition of the very considerable weight to be given to the public interest in deportation. This distinguishes the foreign criminal cases from other article 8 cases, such as where the Secretary of State seeks to remove illegal immigrants in circumstances engaging article 8, where no single factor carries such dominant weight and a more general balancing exercise will be appropriate: *Secretary of State for the Home Department v AJ (Angola)* [2014] EWCA Civ 1636 per Sales LJ, paras 39-40. Here the scales tip heavily in favour of deportation.

(6) When having regard to the public interest in deportation, there are three important facets: the need to deter foreign criminals from committing serious crimes; an expression of society's revulsion at serious crimes and building public confidence in the treatment of foreign criminals who have committed such crimes; and the risk of re-offending. It is an error to assume that the risk of re-offending is the sole, or even the most important, facet where serious crimes are committed: see the observations of Wilson LJ in *OH (Serbia) v The Secretary of State for the Home Department* [2008] EWCA Civ 694 para.15 drawing upon the judgments of this court in *N (Kenya) v Secretary of State for the Home Department* [2004] EWCA Civ 1094.

(7) It is not enough for a tribunal in its reasons simply to identify a strong public interest in the deportation of foreign criminals; there must be a full recognition of the very powerful weight to be given to that factor and of the need for compelling factors to outweigh it: *Secretary of State for the Home Department v MA (Somalia)* [2015] EWCA Civ 48 para. 25 per Richards LJ.

Exceptional circumstances and the best interests of children

12. It is now firmly established that in any decision affecting children, the best interests of the children must be a primary (but not the paramount) consideration but they can be outweighed by the cumulative effect of other considerations: see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166. paras. 27-28 per Baroness Hale. However, the very strong weight given to the public

interest in deporting foreign criminals is not diluted where the rights of children are affected.

13. This court has on a number of occasions had cause to emphasise that the mere fact that there will be a detrimental effect on the best interests of the children where the parent (almost always the father) is deported in circumstances where the children cannot follow him does not by itself constitute an exceptional circumstance. In *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ 1310; [2015] Imm.AR 2 the appellant, a citizen of China, had been convicted of two offences of robbery and sentenced to five years' imprisonment. The Secretary of State made a deportation order which was challenged on article 8 grounds. The appellant had two young children who were British citizens and a partner who had indefinite leave to remain in the UK. The FTT held that it would be disproportionate to deport him after taking into account the nature of his offending, the likelihood of his re-offending, the circumstances facing the family if they were all to live in China, and the best interests of the children. The UT held that the FTT had been in error and upheld the order. The Court of Appeal (Moore-Bick, Ryder LJJ and David Richards J) dismissed the appeal. Moore-Bick LJ noted that this was not a case of removing someone who had illegally entered the country – had it been, the decision of the FTT, which placed particular emphasis on the best interests of the children, might well have been sustainable. But here the more important public interest was engaged of deporting a foreign criminal. He observed that:

> "…. neither the fact that the appellant's children enjoy British nationality nor the fact that they may be separated from their father for a long time will be sufficient to constitute exceptional circumstances of a kind which outweigh the public interest in his deportation"

14. In *Secretary of State for the Hone Department v CT (Vietnam)* [2016] EWCA Civ 488 a foreign criminal with two firearms offences and a variety of other offending was sentenced to seven and a half years' imprisonment, having earlier served a lengthy sentence. The FTT nonetheless found that his deportation would infringe his article 8 rights. The fact that it was in the best interests of the children for their father to remain in the UK weighed particularly heavily with the tribunal. Rafferty LJ, giving a judgment with which Tomlinson LJ agreed, held that it was not a factor capable of constituting exceptional circumstances (paras.36 and 38):

> "The effect on the children was, on the evidence, to leave them unhappy at the prospect of their father being on another continent. I readily accept that description. Experience teaches that most children would so react. I cannot accept the conclusion that, added to a low risk of reoffending, the effect on them tips the balance. These children will not be bereft of both loving parents. Nor was there evidence of a striking condition in either (I ignore the stepchildren by virtue of their age) which his presence in the UK would dispositively resolve. He is said to have "a particular tie" with the Respondent. The son was said to have spoken less confidently when his father was in prison and to have returned to confidence upon his release. That is not exceptional. …
>
> Appellate guidance is clearer now than when the FTT promulgated its decision. As paragraph 24 of *LC (China)* succinctly explains, where

> the person to be deported has been sentenced to 4 years' imprisonment or more, the weight attached to the public interest in deportation remains very great despite the factors to which paragraph 399 refers. Neither the British nationality of the Respondent's children nor their likely separation from their father for a long time is exceptional circumstances which outweigh the public interest in his deportation. Something more is required to weigh in the balance and nothing of substance offered. The approach of both the FTT and the UT failed to give effect to the clearly expressed Parliamentary intention."

15. *LC (China)* and *CT (Vietnam)* were cases where the sentence was over four years and the public interest was correspondingly even stronger than in either of these appeals. However, in my view their observations apply equally where shorter sentences are imposed and the foreign criminal does not fall within the specific exceptions in rules 399 and 399A. Moreover, similar observations to those made in *LC* and *CT* have been made in such cases. In *SS (Nigeria)* the appellant was convicted of supplying class A drugs and sentenced to three years' imprisonment. He was illegally in the UK. He had a young child in the UK who could, however, be cared for by his mother so rule 399(a) did not apply. One of the issues before the court was whether there had been an adequate consideration of the child's best interests. The Court of Appeal held that it was immaterial on the facts; it was quite unrealistic to believe that further consideration of the child's interests could possibly lead to the conclusion that deportation would be a disproportionate interference with the appellant's article 8 rights.

16. More recently, this court considered a number of appeals together in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662. In some of the cases sentences of between 12 months and four years had been imposed. Jackson LJ, delivering the judgment of the court (Jackson, Sharp and Sales LJJ) made this observation with respect to the interests of the children in the context of "exceptional circumstances" (paras.33-34):

> "….. it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.
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> The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals..."

The court then cited with approval the observations of Rafferty LJ in para. 38 of the *CT (Vietnam)* case, reproduced in para.14 above.

17. These cases show that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. Neither is it looking at the concept of exceptional circumstances through the lens of the Immigration Rules. It would undermine the specific exceptions in the Rules if the interests of the children in maintaining a close and immediate relationship with the deported parent were as a matter of course to trump the strong public interest in deportation. Rule 399(a) identifies the particular circumstances where it is accepted that the interests of the child will outweigh the public interest in deportation. The conditions are onerous and will only rarely arise. They include the requirement that it would not be reasonable for the child to leave the UK and that no other family member is able to look after the child in the UK. In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the rule of any practical significance. It would mean that deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adversely affected and the carefully framed conditions in rule 399(a) would be largely otiose. In order to establish a very compelling justification overriding the high public interest in deportation, there must be some additional feature or features affecting the nature or quality of the relationship which take the case out of the ordinary.

The two appeals

18. I now turn to consider the two appeals separately.

VH

19. The respondent is a national of Vietnam who entered the UK clandestinely and unlawfully probably sometime in 2006 and has since then had a somewhat chequered history. He came to the notice of the authorities in December 2006 when he was arrested on suspicion of committing a money laundering offence. When interviewed by immigration officers, he said that he had come to the UK to visit friends and because he was wanted by the police in Vietnam for an offence of causing grievous bodily harm. He was released on temporary admission subject to reporting conditions but he absconded in breach of the conditions. He was arrested on suspicion of growing cannabis in May 2010 and was again released subject to conditions. Again he broke them and absconded for a second time. In July 2010 he was arrested and granted police bail but he failed to surrender to his bail. On 8 January he was arrested for a driving offence and on suspicion of being an immigration offender. This time he was remanded in custody. He was convicted in May 2011 at Lincoln Crown Court of the production of a controlled drug, namely cannabis, and sentenced to 18 months' imprisonment. The judge observed that he had played a subordinate, but nonetheless significant, role in a sophisticated growing operation and he recommended that VH be deported.

20. He was served with a deportation order on 11 October 2011. When he was released from prison in October 2011, he was placed in immigration detention. In February

2012 he made representations why the deportation order should be revoked. The basis for this was the relationship he had with his partner, with whom he lived, and their son and his step daughter. On 11 August 2011 his partner, Ms Vu, had given birth to their child, a son named Harry. She already had a daughter, Hannah, by a previous partner and she had custody of her. Hannah and her father are British citizens but at that time at least, Ms Vu and Harry were not. Ms Vu had, however, been granted limited leave to remain on 11 November 2012 as a carer of a British citizen.

21. The Secretary of State refused to revoke the deportation order. She considered that the family could live together in Vietnam, or alternatively the children could remain with their mother in the UK. For these and other reasons the appellant did not qualify for permission to remain under the specific exceptions in either rule 399(a) or (b). The Secretary of State also concluded that there was no compassionate or other compelling reason which would constitute exceptional circumstances warranting the revocation of the deportation order.

The decision of the FTT

22. Before the FTT, it was not suggested that the appellant fell within the terms of the specific exceptions and so he had to bring himself within the exceptional circumstances criterion if his article 8 claim was to succeed.

23. FTT Judge Bell referred to a number of authorities. She cited from the judgment of the Master of the Rolls in *MF (Nigeria*) including the passage referring to the need for "something very compelling" to outweigh the powerful public interest in deporting a foreign criminal. She also referred to *ZH (Tanzania)*, recognising the need to consider the best interests of the child as a primary consideration, particularly if the child is a British citizen.

24. When considering the facts, the judge observed that in the light of both his immigration history and his offending, "significant weight must be attached to the state's interest in deporting him." (para.37). The judge noted that it was accepted that the appellant had genuine and subsisting relationships both with his partner and the two children. Ms Vu had said in evidence that she did not think it possible that she could return to Vietnam and the judge accepted this. Therefore the effect of the deportation order would be the physical separation of the appellant from the rest of the family. The judge observed that there had been no offending by the appellant since his release from prison.

25. The heart of the judge's analysis on exceptionality is then contained in the following paragraphs of the decision (paras. 44-46):

> 44. The best interests of Hanna and Harry are not served by the appellant's removal because he lives with them and plays an important role in their everyday life such as Hanna taking her to nursey as confirmed by a letter from the nursery. The presence of the appellant has also enabled Ms Vu to take up employment and become less reliant on benefits. Both children would lose the physical presence of the appellant and the benefit of that relationship.

> 45. Whilst family life could be maintained from Vietnam, it would undoubtedly be severely curtailed by the appellant's removal. Although visits and other forms of electronic contact could be maintained, such forms of contact are insufficient to adequately maintain family relationships between a parent and very young children.
>
> 46. Taking into account the above I am satisfied that there are exceptional circumstances here in that the particular nature of the appellant's family life is not adequately provided for by the rules. This is a family in which one child is a British Citizen with family connections in the UK through her biological father and yet is living with her mother and half-brother who only have limited leave to remain until 2016. …"

26. The judge's conclusion, therefore, was that these constituted "compelling circumstances that outweigh the public interest in removal".

The submissions on appeal

27. Counsel's submissions can be shortly stated. The Secretary of State submits that the separation of the father from the two children was not capable as a matter of law of constituting exceptional circumstances. In substance, given that the judge had recognised the need for compelling circumstances, this amounts to alleging either that the decision was perverse or that although the judge had ostensibly directed herself properly, she could not have understood how truly compelling the circumstances must be before they can be described as "exceptional" within the terms of rule 398.

28. The respondent says that there was no legal misdirection and that the decision fell within the margin of judgment open to the FTT, as the UT judge properly recognised. This was no more than a disagreement about the assessment of the relevant factors.

Discussion

29. It is trite law that the article 8 proportionality exercise is fact specific and it is not for this court to substitute its judgment for that of the tribunal below; it must be possible to identify an error of law. I also bear firmly in mind in this context the injunction from Baroness Hale that an appellate court should recognise the expertise of a specialist tribunal and should respect its decisions, especially on the facts, only interfering where it is quite clear that the tribunal has misdirected itself in law: *AH (Sudan) v Home Secretary* [2007] UKHL 49; [2008] 1 AC 678 para.30.

30. Even after giving all due weight to those considerations, I have come to the clear conclusion that this is one of those cases where the decision of the FTT, and hence of the UT which upheld it, simply cannot stand.

31. I am not satisfied that the FTT did give the appropriate weight to the public interest in deportation, notwithstanding its reference to the principles enunciated in *MF (Nigeria).* The later reference to the "significant weight" to be given to the relevant public interest suggests that the full rigour of the test was not appreciated. Even if I am wrong about that, in my judgment the FTT did not apply the article 8

proportionality assessment in accordance with the principles laid down in the authorities. It was not open to the FTT to find that the separation of the children from the father/step-father was a compelling reason to allow the respondent to remain. Far from being an exceptional circumstance, this is an everyday situation as the authorities I have set out demonstrate. They show that the separating parent and child cannot, without more, be a good reason to outweigh the very powerful public interest in deportation. No doubt the FTT was right to say that these children would unfortunately suffer from the separation but for reasons I have already explained, if the concept of exceptional circumstances can apply in such a case, it would undermine the application of the Immigration Rules.

32. The FTT judge seems to have thought that there was something special about the nature of this family's relationships. Again, they were not atypical, but in any event it would be odd if a family which included a step-child were to be treated more favourably than a family with two natural children. The fact that there was a step-child with a natural father in the UK was a good reason why the family could not be expected to go to Vietnam, but it does not provide a justification for allowing the appellant to remain in the UK. The judge was not, in my opinion, looking at the concept of exceptional circumstances through the lens of the Immigration Rules but without proper regard to them. I appreciate that she also commented on the fact that it would be difficult for the partner to remain in employment without VH's presence in the country, but that again is frequently a problem which arises where a partner is deported. It is not capable on its own of constituting an exceptional circumstance and nor, in my view, can it do so even when added to the prejudice to the children.

33. For these reasons, therefore, I would uphold the appeal. Since in my view it was not open to a tribunal properly directing itself to find a disproportionate interference with article 8, I would not remit the case but would uphold the appeal and restore the deportation order.

AJ

34. The respondent is a Zimbabwean national, aged 42. He entered the UK as a student in 1999 and leave was subsequently extended on the grounds of ancestry through his maternal grandmother. A subsequent application to extend leave on that ground was rejected when it was found that he was relying upon forged documents. He unsuccessfully challenged a removal decision but on 25 February 2010 he was granted leave to remain as a partner of NM, also a Zimbabwean national, who had been given asylum because of the risks facing her if she were to return to Zimbabwe. They had entered into a customary marriage and had two children, J and N, born in 2005 and 2010 respectively.

35. On 23 November 2010 AJ was convicted on a guilty plea of two counts of sexual assault of a female. The victim was a colleague at the care home where they both worked. Both incidents were described by the judge as "horrible and unpleasant" and involved assaults with an exposed penis. He was sentenced to 14 months' imprisonment.

36. The Secretary of State made an order to deport him pursuant to section 32 of the UK Borders Act. She gave reasons why AJ did not meet any of the specific exceptions

under the Immigration Rules and did not accept that the exceptional circumstances exception applied to him either.

37. AJ successfully appealed to the FTT. In setting out the legal framework, the FTT referred to *MF (Nigeria)* but only for the purpose of deriving two principles; first, that the Immigration Rules constituted a complete code; and second, that when applying the article 8 assessment with respect to "exceptional circumstances" the proportionality test had to be considered in the light of the Strasbourg jurisprudence. No reference was made to the considerable weight to be given to the pubic interest in deportation, nor to the the need for very compelling factors to outweigh it.

38. The FTT then referred to the approach of the Strasbourg Court when dealing with foreign criminals. Reference was made a trilogy of Strasbourg decisions, *Uner v The Netherlands* 45 EHRR 41, *Boultif v Switzerland* 33 EHRR 1179; and *Maslov v Austria* 47 EHRR 496 in which the Court has considered when expulsion of a foreign criminal may be necessary in a democratic society. These cases set out the criteria which Strasbourg adopts in such cases. The nature and seriousness of the offence is just one of ten factors to which reference was made, and there is no indication in the FTT decision that it should carry any special status or weight. Specific reference was also made by the FTT to an observation in para.70 of *Maslov* where the Strasbourg court stated that "the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities."

39. Finally, the FTT also referred to *ZH Tanzania* and cited that part of Baroness Hale's judgment in which she referred to the approach to article 8 cases articulated by Lord Bingham of Cornhill in *EB (Kosovo) v Secretary of State for the Home Departmen*t [2008] UKHL 41; [2009] AC 1159 in which he said, inter alia, that

> "it will rarely be proportionate to uphold an order for the removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably to follow the removed spouse to the country of removal, or if the effect of the order is to sever a genuine and subsisting relationship between parent and child."(para.12)

40. The FTT then set out its findings, having heard evidence both from AJ and his partner. The FTT agreed with the Secretary of State that AJ did not qualify under the rules. It then identified certain factors relevant to the balancing exercise when applying the "exceptional circumstances" test. It found that both parents cared for the children and that they would be adversely affected if their father were to be deported, particularly given that they were at a stage where their emotional development was very important. The older child in particular had put down roots in the UK where she had lived all her life. The mother could not go to Zimbabwe and therefore if the family was to remain together it had to be living in the UK.

41. As to the offending, the sexual assaults were serious and had caused significant psychological harm to the victim. However, the appellant had pleaded guilty and expressed remorse and shame, although the FTT accepted that that was only of limited weight when set against the gravity of the offence. It was material that AJ had committed no further offences and in the light of various reports, the FTT considered that it was unlikely that he would offend in the same way again. The FTT did,

however, recognise that assessing the public interest in deportation did not just involve the likelihood of reoffending but also included having regard to the deterrent element and the significance of deportation as an expression of society's revulsion at the offending. The FTT said in terms that it had given "considerable weight" to these aspects of the public interest.

42. The FTT concluded that the proportionality assessment was "very finely balanced" but that the decisive feature tipping the balance in his favour was the effect on the children (para.58):

> "The proportionality assessment is very finely balanced. If it were not for the best interests of the two children we would have concluded that the interference to family and private life caused by the deportation would be proportionate. If the Appellant was simply in a relationship with his partner without children we would have found that the interference that will be caused to their relationship, given the insurmountable obstacles to his partner returning to Zimbabwe, would have been proportionate to the legitimate aim of the prevention of disorder or crime given the seriousness of the offending and the public interest in deterring criminality. It is the fact that deporting the Appellant will cause separation of two children from their father, and be against their best interests, that tips the balance ultimately to a finding that deporting this Appellant would cause interference that would be disproportionate to the legitimate aim. … "

43. On appeal to the Upper Tribunal the Secretary of State argued that the FTT had failed to give proper weight to the public interest in deportation. Alternatively, if the right test had been applied, the decision was perverse.

44. Upper Tribunal Judge Pinkerton rejected these submissions. He concluded that there had been no misdirection; and that the FTT clearly understood the weight to be given to the public interest in deporting foreign criminals and had in terms identified the three elements in that public interest. The evidence had been properly assessed and the conclusion was open to the FTT on the evidence before it.

Discussion

45. Nowhere in the tribunal's decision is there a clear recognition of the very powerful weight to be given to the public interest in deporting foreign criminals or the need for compelling factors to outweigh it. Acknowledging that "considerable weight" should be given to certain aspects of the public interest does not suffice: see *Secretary of State for the Home Department v MA (Somalia)* [2015] EWCA Civ 48 para.25 per Richards LJ.

46. Nor do I think that this case should be remitted to the UT. In line with the authorities I have already discussed, had the FTT properly understood the force of the public interest in deportation, it could not have concluded that separation from his children, without more, could amount to compelling reasons. No doubt there will be some emotional damage to the children, but that is not unusual whenever a parent is deported and the child is unable to live with that parent outside the UK. There was

nothing special or unusual in the circumstances here which would justify a conclusion that the interference with article 8 rights was disproportionate.

47. I have some sympathy for the tribunals below. The FTT in particular determined this case before many of the authorities on which I have relied were decided. It is plain that the FTT essentially treated this case like any other article 8 assessment, recognising the public interest in deportation for sure, but not giving it the prominence required. The reference to Lord Bingham's analysis in *EB (Kosovo)*, and in particular his observation that it will rarely be appropriate to sever a genuine and subsisting relationship between parent and child without any recognition that this is not a principle which applies in foreign criminal case, strongly suggests that the FTT failed to make its assessment through the lens of the Immigration Rules. So does its reliance on the Strasbourg authorities in this field. Although they have some relevance in helping to identify potentially relevant factors, tribunals will be in error if they apply the principles without recognising that the UK has chosen to put a heavy premium on the removal of foreign criminals. As Jackson LJ pointed out in *NA (Pakistan*) para.39, it is for each state to determine what weight to give to the public interest in deporting foreign criminals, and accordingly article 8 assessments may vary from state to state even where the factual circumstances are essentially the same. The general framework of Strasbourg law as established in cases such as *Maslov* cannot simply be slavishly applied. The premise of that jurisprudence departs from the UK approach in two important respects. First, it does not give the same significant weight to the need for deporting foreign criminals as the UK does; and second, it sees the public interest principally in terms of the potential damage caused by the particular individual re-offending, whereas that is merely an element - and by no means even the most important element – of the relevant public interest as perceived in the UK. Applying the criteria in *Maslov* without modifying them to take account of the particular way in which the UK views the public interest, fails to view the article 8 assessment through the lens of the Immigration Rules and will cause tribunals to go astray, as in this case.

48. In my judgment if the proper legal test had been applied, the only proper answer is that there were no compelling circumstances in this case which could displace the very heavy weight to be given to the public interest in removing foreign criminals. Accordingly, there is no purpose in remitting the case. I would uphold the appeal and restore the deportation order.

Disposal

49. In my judgment the decision in each of these cases fails to view the concept of "exceptional circumstances" through the lens of the Immigration Rules. Rather the judges have applied a stand alone article 8 analysis, recognising that some additional weight should be given to the public interest in deporting foreign criminals, but without an appreciation of the need for compelling factors to overcome the very considerable weight which both the Rules and the primary legislation give to the public interest in deportation.

50. I would in each case uphold the appeal and restore the deportation order.

Lord Justice Vos:

51. I agree.

Postscript

Since providing a draft of the judgment to counsel, there has been some dispute between them as to whether we have by implication also found that the article 8 applications would necessarily fail under the new version of the Immigration Rules introduced in July 2014. The Rules were amended at that time to bring them into line with the statutory provisions introduced into Part 5A of the Immigration, Nationality and Asylum Act 2002. For the most part they set more stringent requirements to be met before leave to remain will be permitted under the specific exceptions. The broad principles we set out in this judgment in respect of the article 8 assessment of foreign criminals would apply equally under the old and new Rules. We find it very difficult to see how the article 8 position of these deportees could possibly be improved under the new Rules. However, we should make it plain that we did not in terms address that question, nor did we consider whether, if there were to be a fresh reconsideration now, any of the specific exceptions may apply to these deportees given the further passage of time. The issue was not directly before us and was barely touched upon in argument - indeed, we were not taken to the new Rules or part 5A. It will be for the Secretary of State to determine any further applications in accordance with the principles enunciated in this judgment and the Immigration Rules currently in force."