



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/00796/2012

**THE IMMIGRATION ACTS**

Heard at Royal Courts of Justice  
On 27 January 2014

Determination Promulgated  
On 19 March 2014

Before

UPPER TRIBUNAL JUDGE KEKIC  
UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JOHN ENO TABI

Respondent

**Representation:**

For the Appellant: Mr Wilding, Senior Presenting Officer  
For the Respondent: Mr R. Bartram, Migrant Law Partnership

**DECISION AND DIRECTIONS**

1. The Secretary of State appeals with permission against the decision of a First-tier Tribunal panel (Judge Pullig and Dr P L Ravenscroft) to allow the appeal of the

Respondent against the decision to make a deportation order pursuant to Section 32(5) of the UK Borders Act 2007.

2. Whilst this is the appeal of the Secretary of State, for convenience we will refer to the original Appellant, Mr John Eno Tabi, a citizen of Cameroon, born on 17<sup>th</sup> March 1983, as the Appellant herein.

**The Background:**

3. The history is as follows. The Appellant is a national of Cameroon but was born in Nigeria on 17<sup>th</sup> March 1983. He arrived in the United Kingdom on 1<sup>st</sup> December 1986 when he was 3 years old, in the company of his brother, Marvin Ebai Tabi, and his parents. They are all nationals of Cameroon. There is no evidence that the Appellant holds Nigerian nationality but there is evidence and it is accepted and common ground between the parties that he is a national of Cameroon. The Appellant was granted indefinite leave to remain on the 2<sup>nd</sup> February 1991.
4. On 26<sup>th</sup> June 2000 the Appellant submitted an application for British nationality which was refused on 22<sup>nd</sup> January 2003. The reason for refusal was the Appellant's convictions prior to that date.
5. The Appellant has a number of criminal convictions. The first conviction was on 5<sup>th</sup> January 2001 at Watford Magistrates' Court. He was fined £150 plus costs of £55 for using threatening, abusive, insulting words or behaviour with intent to cause fear or provocation of violence on 22<sup>nd</sup> December 2000. The Appellant was 18 at that time.
6. On 9<sup>th</sup> March 2001, the Appellant was convicted of possessing an offensive weapon in a public place and was fined £250 with a compensation payment of £50.
7. On 18<sup>th</sup> November 2002 at Uxbridge Magistrates' Court the Appellant received a conditional discharge for twelve months for attempted burglary and theft of a non-dwelling which took place on 25<sup>th</sup> October 2002.
8. Not long after that on 10<sup>th</sup> March 2003 the Appellant was convicted of an offence of theft from a motor vehicle and was fined £200 with costs of £118.
9. At Harrow Magistrates' Court on 18<sup>th</sup> July 2008, the Appellant was convicted of carrying an air weapon in a public place and was sentenced to a community order with the requirement of unpaid work of 150 hours. A forfeiture order was made in respect of the gun. Also on that date he was dealt with for the breach of a conditional discharge which was imposed by the Uxbridge Magistrates' Court from the conviction of 18<sup>th</sup> November 2002 and no action was taken on the breach. It appears that the order was subsequently revoked. The date of that offence appears to be 1<sup>st</sup> October 2003 but that he was not dealt with for that until 18<sup>th</sup> July 2008.
10. On 18<sup>th</sup> August 2008 the Appellant was convicted for his first drug offence, possession of a class A controlled drug, crack cocaine which he had in his possession on 23<sup>rd</sup> November 2003, again a period of time between the offence and being dealt

with it. He was fined £100 or to serve one day which was deemed to have been served.

11. On 17<sup>th</sup> March 2009 the Appellant was convicted at Southend Crown Court of three offences namely possession of a controlled drug (class C), possession of a class A drug (cocaine) and the possession of a prohibited weapon namely a handgun. He received a sentence of five years' imprisonment for the offence relating to the prohibited weapon, a sentence of twelve months' imprisonment consecutive for possession of a class A drug and imprisonment of six months to run concurrently for the offence of possessing a class C controlled drug. Thus his total sentence was one of six years' imprisonment. Orders were also made for the forfeiture and destruction of the drugs, paraphernalia and the weapon.
12. The final conviction shown on the Appellant's antecedent history refers to 3<sup>rd</sup> April 2009 at South-East Essex Magistrates' Court for a breach of a community order which had been imposed on 18<sup>th</sup> July 2008 and that order was revoked.
13. The information before the Tribunal also demonstrates that he received a caution from the Essex Police for battery for an offence on 26<sup>th</sup> July 2007.
14. On 15<sup>th</sup> June 2009 the Respondent wrote to the Appellant informing him that he would be liable to deportation under Section 32(5) of the 2007 Act and invited him to give details as to why he should not be deported and why he fell within exceptions to the Act. A questionnaire was enclosed which the Appellant returned only partially completed under cover of a letter dated 29<sup>th</sup> June 2009. The letter explained that he could not provide all the information required because he had been made unable to contact his mother. He made reference to the fact that he had been resident in the UK since the age of 2, all five of his brothers and sisters as well as his parents were citizens of the UK and he will try and contact his mother.
15. The Appellant gave further information concerning his circumstances at a later date stating that he had a son Warren George Tribe born on 7<sup>th</sup> November 2004 who was a British national and also a daughter named Naturelle Celine Marie Tribe born on 16<sup>th</sup> November 2005. This led to the Respondent on 6<sup>th</sup> April 2011 asking the Appellant for copies of the birth certificates of the children and their mother and a copy of the mother's current passport. Further information was requested concerning the relationship and contact that he had with the children. It is not known what, if any, reply was received to that letter sent by the Respondent.
16. It is also plain from the correspondence in the Respondent's bundle that letters addressed to Leanne Tribe, the mother of the two children did not reply to those requests that were made by the Respondent.
17. On 9<sup>th</sup> October 2012 a deportation order was signed against the Appellant and a decision was made that Section 32(5) of the UK Borders Act 2007 applied. The letter giving reasons for the decision was dated 11<sup>th</sup> October 2012. In summary the decision letter set out the reasons for deportation noting his convictions and in particular those relating to the possession of a prohibited weapon and the offences

relating to drugs and his sentence of six years' imprisonment. Having reviewed the facts, including the representations made, it was concluded that he did not fall with any of the exceptions from automatic deportation in Section 33 of the UK Borders Act for the reasons set out. His background and immigration history was taken into account including the grant of indefinite leave to remain on 12<sup>th</sup> February 1991 and his criminal convictions. The sentencing judge's remarks were also set out within the decision letter. As to Article 8, the Respondent considered the Immigration Rules by reference to paragraph 398 and 399 and 399A. In view of his conviction and sentence of six years' imprisonment and therefore in excess of the four years set out in paragraph 398, it was noted that it would only be in exceptional circumstances that a person's right to private or family life would be outweighed. It was noted that the Appellant's parents and siblings were resident in the United Kingdom but whilst he had indefinite leave to remain, it was not known what legitimate employment he had ever held in the United Kingdom.

18. As to whether there were exceptional circumstances, the Respondent considered the Appellant's family life and his children. It was noted that there was a lack of evidence to substantiate this, because Leanne Tribe had failed to respond to communications sent to her and there were no birth certificates submitted, that she had visited the Appellant once since he had been in prison without the children and that he did not maintain contact with either of the children referred to. It was not accepted that he had a subsisting relationship with Leanne Tribe and there was no evidence that he and the family had lived together as a family unit.
19. In relation to the Appellant's private life, the Respondent noted that he had lived in the United Kingdom for 26 years but had not raised any further grounds to suggest that there were any exceptional circumstances. It was said that he had ties to Cameroon and that he had lived there for 2½ years with his parents before accompanying them to the United Kingdom at the age of 3. Also at the age of 10 he had spent a year in Cameroon with his parents and siblings before returning to the United Kingdom. It was further noted that whilst his parents have been settled in the United Kingdom, they had spent most of their life in Cameroon thus there was no reason why he would not be able to readjust to life in that country. His relationship with his parents and siblings did not constitute family life, as they were adults and there were no elements of dependency beyond the normal emotional ties. The Secretary of State concluded that deportation would not violate the Appellant's rights under Article 8 or any other Articles under the Human Rights Convention.

#### **The Proceedings before the First-tier Tribunal:**

20. The Appellant exercised his right to appeal that decision and the appeal came before the First-tier Tribunal panel, consisting of First-tier Tribunal Judge Pullig and Dr Ravenscroft at Hatton Cross on 8<sup>th</sup> April 2013.
21. The Appellant appeared before the panel unrepresented. It is plain from the determination that he had previously been represented by solicitors but they had

withdrawn representation at a later date and asked for their name to be removed from the Tribunal's records.

22. The panel heard evidence from the Appellant which they set out in their determination at paragraphs 30 to 49. At the end of that evidence they heard submissions from each of the parties which they recorded in their determination. The panel then turned to the law that they should apply. In respect of the Immigration Rules, they found that paragraphs 399 and 399A did not apply as those provisions only related to convictions giving rise to a sentence of less than four years or where deportation was conducive to the public good because that was the view of the Secretary of State in the light of the offending causing serious harm or being persistent. Thus they found that "the issue of exceptional circumstances or the length of the Appellant's residence in this country, under the Immigration Rules, simply is not an issue". They recorded that the Appellant therefore could not succeed under the Immigration Rules and that "the only basis for the Appellant's case is Article 8 of the Human Rights Convention."
23. The panel identified that in this case the Appellant's rights under the Human Rights Convention would apply and they set out a number of self-directions concerning the law including that of **Maslov v Austria (Application 1638/03)** and the criteria of **Boultif** and **Uner**. The panel then made reference to the evidence before them concerning the two children in question. Warren Tribe, who was his "stepson" and Naturelle Tribe who was his biological daughter. The panel noted that they had no documentary evidence regarding the children and that their mother had failed to respond to the letters sent by the Respondent. They considered that in the light of the explanation that they had heard that she may have been in prison at the time or subsequently suffered mental health problems, that may be the reason why there was no answer to that correspondence. They also recorded that the children had been in the care of the Social Services by way of foster care. As to contact that the Appellant had, the panel noted that he had last seen his daughter before he went to prison in September 2008 when she was 7 at the time. It was further recorded the Appellant's evidence that he had spoken to the children on the telephone when their mother had visited. The panel made reference to the OASys Report (section 3) in which Ms Tribe was referred to as his "girlfriend" and at section 6.7, the police caution of July 2007 which related to an assault on his partner. The Tribunal noted that there was no response to the directions given by them to obtain information about the children but that the Tribunal was not obliged to pursue enquiries any further. They noted that they had no information as to the level of contact that Warren's biological father had with him. At paragraph 73 they said this:-

"We acknowledge the Appellant's contact with both children, of course of greater importance is that with his biological daughter. We also acknowledge the Appellant's wish to re-establish contact, as it has been interrupted by four years' separation. However, whilst their best interests would involve contact if not actually living with both parents, we cannot say, beyond that general principle, very much more about the best interests of either child and that, on the evidence, cannot bear any significant weight."

24. The panel then turned to the case law relating to Article 8 in deportation appeals. They set out the decision of the Tribunal in **Masih (deportation - public interest - basic principles) Pakistan [2012] UKUT 0046 (IAC)** and then set out at length what was said by Laws J in **SS (Nigeria)** (see paragraphs 76 to 84). The panel proceeded to make what they described as “two observations on **SS (Nigeria)**”, the first was that as in the present case, the Article 8 claim related to the Appellant’s relationship with his child. They concluded that they had dealt with the best interests of the children in the appeal but did not find that to be a significantly strong factor. The second observation related to the reference to **Maslov** and the nature and seriousness of the offence. They recorded that what was not specifically mentioned in **SS (Nigeria)** were the matters set out in **Maslov** at paragraphs 72 to 75 and for the relevance of this case, paragraphs 74 to 75. At paragraph 82 they quoted Laws LJ that not to effect deportation can only be justified by a very strong claim indeed. They found that the Appellant had come to the UK when he was 2 years old or at the age of 3 and was granted indefinite leave to remain on 2<sup>nd</sup> February 1991 when just under 8 years of age. They found him to be a settled migrant who had now spent lawfully all of his life in this country save for a brief absence in Cameroon. Thus they considered that “the use of the term ‘very serious reasons’ in paragraph 75 of **Maslov** suggests that someone coming within that concept does have a very strong claim indeed even if the Appellant does not fall within the last sentence of that paragraph in **Maslov**.”

25. The panel then turned to a consideration of the Appellant’s case. They began by considering the length of the sentence and the seriousness of the offence. In this context they considered the OASys assessment and the work that the Appellant had undertaken in prison. They noted that the OASys Report was completed in June 2009 and there had been no update or later assessment. Turning to the risk, they quoted from the OASys Report at paragraph 88 noting that he had been assessed as a “low risk for other offences, i.e., non violent or sexual offences within two years of release as ‘low medium’.” As to risk of reconviction for violent offences that results in imprisonment, within two years of release “some”. However they also noted “summary sheet risk of reconviction” that he was shown as having a high risk of reconviction. As to the assessment of risk of harm, reference was made to this at paragraph 89. The Appellant posed a low risk in custody but a high risk of harm to the public, medium risk to a known adult and low risk to children and staff. It was further recorded that

“Those at risk are potential victims and society as a whole. The Appellant had said that he had been a drug dealer prior to conviction who had kept a gun for protection. The risk of harm are from drugs offered and potential discharge of the firearm. When the Appellant is released that risk is likely to be the greatest if he returns to his previous lifestyle. Any return to the misuse of drugs and alcohol would be a concern.”

The panel recorded at paragraph 90 that the factor that is likely to reduce the risk include the statement the Appellant would like to start a promotion business with friends and if successful he would not return to reoffending.

26. They noted at paragraph 91 that he had not been assessed for MAPPA (Multi Agency Public Protection Panel) and at section 5 there were risks of objectives to reduce the

risk of harm involving undertaking courses including a CARAT course in relation to drugs. The panel noted however “We have no evidence of what happened if the Appellant undertook that course but we do have evidence in other respects.” The panel then considered at paragraphs 92 to 93 the courses that he had undertaken namely a post-programme report concerning thinking skills and problem solving. They considered that the report showed overall that he had made significant progress, that he had “displayed openness” and was “a very supportive member of the group”. They found that the report was “encouraging”. The other certificates produced by the Appellant related to undertaking a course in victim awareness and restorative justice in September 2011 and that he had undertaken various units in personal and social development. At paragraph 94 they noted that he had had four adjudications in prison in the course of 2010 but none of them indicated any antisocial features. The panel concluded at paragraph 95

“Whilst we cannot make our own risk assessment the preponderance of the evidence points clearly to the risks involved being less than originally assessed (in spite of the contradictions) because of the work undertaken by the Appellant in prison, work that had been identified as being required to reduce the risk.”

They then made reference to the Appellant’s criminal record noting that save for the index offence, all are comparatively minor. None involved a prison sentence save in 2008 for possession of a class A drug, crack cocaine, where he received a fine of £100 or one day deemed to have been served.

27. As to their conclusions at paragraphs 97 to 98 they found that the Appellant had established private life in the United Kingdom having been in the United Kingdom since the age of 2 or 3 and that it was a “very strong case indeed and when one adds to that the presence of at least a child here, although her best interests do not weigh significantly in the balance, we find that these do outweigh the public interest concerns under Article 8.” Thus they allowed the appeal.

### **The Proceedings before the Upper Tribunal:**

28. Permission was sought to appeal that decision by the Secretary of State, permission being granted on 23<sup>rd</sup> August 2013 by First-tier Tribunal Judge Brunnen. The reasons for granting permission are as follows:-

“The submission in paragraph 3 of the grounds that the panel should have considered whether there were any exceptional circumstances that justified not deporting the Appellant is arguable. The panel arguably misdirected itself in paragraph 57 of the determination. Although paragraphs 399 and 399A do not apply where a sentence of at least four years’ imprisonment has been passed, it is still necessary under paragraph 398 to consider whether there are exceptional circumstances. It is arguable (following **MF**) that the answer this question should have been taken into consideration when deciding the issue of proportionality when considering Article 8 outside the Immigration Rules.

It is arguable that when assessing proportionality at paragraphs 85 to 96 the panel erred by considering only the risk of reoffending and left out of consideration the

wider aspects of the principle of deterrents identified in cases such AM [2012] EWCA Civ 1634, Richards [2013] EWCA Civ 244 and SS (Nigeria) [2013] EWCA Civ 550".

29. Thus the hearing came before the Upper Tribunal. The Secretary of State was represented by Mr Wilding and the Appellant appeared unrepresented. Mr Wilding relied upon the grounds. In addition he made the following submissions. He submitted that the panel erred in their proportionality assessment at paragraphs 85 to 96 of the determination, in that there was a real lack of engagement with a proper balancing exercise. In their determination at paragraphs 79 to 84, the Tribunal undertook an analysis of SS (Nigeria) which was in parts correct but in other parts was misconstrued. At paragraph 81 the Tribunal had set out the relevant parts of Maslov but missed the point made by Laws LJ at paragraph 28 of SS (Nigeria). In Maslov, the court considered the Austrian Aliens Act and the provisions under that statute did not compare with the 2007 Act and legislative policy and therefore greater weight was attached compared with the pre-2007 executive policy. At paragraph 28 Lord Justice Laws commented that the decision of Maslov did not engage with this important point and that where a policy is made by the legislature (rather than the executive) that has to play a greater part in the balance. He submitted that the panel had missed the point made by Lord Justice Laws and that the closest that the Tribunal got to it was at paragraph 82. However whilst they made reference to the weight to be attached to the State's policy, in fact very little consideration as to what was in the public interest and the weight to be attached to it featured in this determination. He submitted that the panel fell into the same trap as identified by the Court of Appeal in Gurung at paragraph 21 and that much of the determination has the appearance of a search for reasons for not deporting him rather than an enquiry into whether, despite the statutory policy of automatic deportation, Article 8 of the Convention would be violated by its implementation.
30. Mr Wilding further submitted that they failed to take into account the seriousness of the offences and made reference at paragraph 88 to the "low medium" risk, rather than the fact that he had received a sentence of six years' imprisonment. He further submitted that what was not clear from the balancing act carried out by the panel was that the Appellant was in fact convicted of three offences; two in respect of class A and class C drugs and also what the panel referred to as the "index offence". The panel failed to engage with the offences as a whole and fell into error at paragraph 96 when making a summary of the offences and their level of seriousness. Similarly when setting out the sentencing remarks, no reference was made to the offences relating to drugs for which he also received a period of imprisonment. Thus it was submitted, there was a lack of understanding concerning the Appellant's offending.
31. Mr Wilding submitted that the panel failed to take into account that the Appellant failed to meet the Immigration Rules (Article 8) and that those were Rules where an expression of where the Secretary of State said the balance lay and this had been endorsed by Parliament thus when the Rules are not met, that must weigh heavily in the balance. He submitted that this was part as a result of a misinterpretation of SS (Nigeria) and their failure to properly weigh up the concept of the legislative scheme under the 2007 Act. He reminded the Tribunal that this was not a case that involved



significant family ties and that it was plain from the determination of the panel that it was the length of residence that the panel considered was the factor that outweighed the public interest. However there had been no assessment of his private life save that he had been in the United Kingdom since he was 3 years of age. Whilst not downplaying the length of residence, there was no evidence concerning matters of his private life concerning his work or other community ties which had been established by this Appellant. In view of that, and the fact that a very strong claim indeed would only succeed and therefore pointing to a high threshold, there were a number of matters missing from the assessment. Much of the assessment referred to the risk of reoffending by reference to courses carried out but the panel had failed in its assessment to properly balance the public interest, the fact that he could not meet the Rules and the lack of evidence concerning the nature of his private life which therefore amounted to a material error of law.

32. As to the issue of deterrence, the panel solely looked at the risk of reoffending and failed to consider the wider public interest of the deterrent effect deportation has upon migrants to the United Kingdom. In summary the only factor in this case weighed in the balance was the Appellant's length of residence despite there being a lack of evidence concerning the nature of that private life and how it would be interfered with and a greater depth of analysis was required by the Tribunal of the public interest including the concept of deterrence and the legislative policy underlying the 2007 Act.
33. At the conclusion of those submissions we heard from Mr Tabi. He gave an impassioned plea before us that when he had appeared before the First-tier Tribunal he appeared without representation and had "told the truth". He said that he had not denied his criminal activity and tried to address the issues concerning reducing his risk of reoffending. As to his private life, he said that he had been in the United Kingdom since he was 3 and that he must have established a private life during that period of time given the length of it. He told us that when he had received the information to say his appeal allowed he was extremely happy but when he had heard the Secretary of State had been granted permission to appeal he had become depressed. He told us that he had lived "a certain kind of lifestyle" and that he had been a criminal and that he had made choices in his life. He said that if he had a life in Cameroon he would have said so.
34. As to his family, he said that all his family members were in the United Kingdom and that he would like to re-establish ties with them. When asked why there were no witnesses at the hearing the Appellant said that he had been "away for a long time. I did get into a lot of trouble as a juvenile my parents have six children, I'm the second eldest and the last three were born in the United Kingdom. I had a lot of falling out with them ....". The Appellant said that his mother had told him that "You are an adult and sort your life out". The Appellant was therefore stating that he had not had contact with his family members although he would like to re-establish contact with them at a later date. As to his partner, he confirmed that she was now out of prison but that they were "not on speaking terms".

35. As to future plans, he said that he wished to enrol in college and undertake coaching for football which he would not be able to do if he was deported to Cameroon. He told us that he thought that he was British. He reiterated that he had addressed his reoffending and that he would wish to re-establish ties with his parents and also his children.
36. Mr Wilding did not make any further reply.
37. We reserved our decision. We indicated to the parties that if we found an error of law and set aside the decision that it would require another hearing. Thus we reserved our determination.

### **Conclusions on the Error of Law**

38. In a decision promulgated on the 18<sup>th</sup> October 2013 we reached the conclusion that the Secretary of State had made out her grounds and that the determination when analysed did disclose an error of law in its approach.
39. The reasons we gave are as follows:

“39. We consider that the panel failed to properly assess and attach appropriate weight to the public interest identified in this appeal. In particular, that the panel failed to weigh in the balance the fact that the Appellant could not meet the requirements of Article 8 as expressed in the Immigration Rules. The panel said this about the Immigration Rules at paragraphs 55 and 57:-

“55. We need to deal below, albeit very briefly with the provisions of the Immigration Rules. These are set out in paragraphs 398, 399 and 399A. However for reasons to which we shall come, and on which subject we agree with Ms Pos, only 398 applies.

...

57. Notwithstanding what is said in the letter giving reasons for the decision, paragraphs 399 and 399A do not apply as those provisions only relate to convictions giving rise to a sentence of less than four years or where deportation is conducive to the public good because that is the view of the Secretary of State in the light of the offending causing serious harm or being persistent. Thus the issue of exceptional circumstances or the length of the Appellant’s residence in this country, under the Immigration Rules, simply is not an issue. The Appellant cannot succeed under the Immigration Rules and thus the only basis of the Appellant’s case is Article 8 of the Human Rights Convention to which we shall then turn.”

40. We find that the panel misdirected itself in law at paragraph 57. The first step undertaken under the new Rules is to decide whether deportation would be contrary to an individual’s Article 8 rights on the grounds as to whether the case falls within paragraph 399 or 399A. Here as identified by the panel paragraphs 399 and 399A do not apply because the case fell within paragraph 398(a) due to the length of sentence being one in excess of four years. Whilst the panel did acknowledge that, they erroneously stated that “the issue of exceptional circumstances under the Immigration Rules, simply

is not an issue". However the new Rules provide that in the event that paragraph 399 or 399A do not apply, "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors." Whilst the panel acknowledged that the Appellant could not succeed under the Immigration Rules, the fact that the Appellant would have to demonstrate exceptional circumstances to outweigh the public interest was a relevant consideration in the balancing exercise as was the weight that should have been attached to the fact that he could not meet the Immigration Rules.

41. As set out in the decision of the Tribunal in **MF (Article 8 - new Rules) Nigeria [2012] UKUT 00393 (IAC)**, the Tribunal dealt with the new Rules and the public interest at paragraphs 42 to 48. At paragraphs 42 to 43 they said this:-

**"New rules and the public interest**

42. There is, however, at least one important respect in which the new rules affect the second-stage Article 8 assessment. Previously judges' understanding of the weight the Secretary of State attaches to the public interest side of the Article 8 balancing exercise had largely to be gleaned from the submissions of the Secretary of State in leading cases. It has fallen very much to the judicial system to give it form and content. In deportation cases involving foreign criminals s.32 of the 2007 Act gave clear parliamentary expression to the particular importance the Secretary of State attached to their deportation: see *MK (deportation-foreign criminal-public interest) Gambia* [2010] UKUT 281 (IAC); *AP (Trinidad and Tobago)* [2011] EWCA Civ 551 per Carnwath LJ; *Gurung v Secretary of State for the Home Department* EWCA Civ 62. Now more generally, greater specificity is given in the new rules as to what circumstances are seen to attract the greatest weight in respect of the public interest; the Secretary of State has now herself told us what factors she considers relevant and what weight at the general level she attaches to them. In particular, in the context of deportation of foreign criminals, the new rules set out thresholds of criminality (by reference to length of terms of imprisonment) so that the Article 8 private life claims brought by foreign criminals can only succeed (unless there are exceptional circumstances) if they not only have certain periods of residence but can also show their criminality has fallen below these thresholds.
43. That must and should properly inform our Article 8 assessment made in compliance with our s.6 obligations under the HRA. Whereas previously it has been open to judges, within certain limits, to reach their own view of what the public interest is and the weight to be attached to it, the scope for doing so is now more limited."

As the Court of Appeal has stated, the new Rules were an index of the enhanced importance the Secretary of State attaches to the public interest in the deportation of foreign criminals. The fact that the Appellant had failed to meet the requirements of the new Rules was a "very significant consideration". The Court of Appeal have considered the effect of the new Rules and whether they have affected any change. At paragraphs 40-41 they said this:-

- "40. Does it follow that the new rules have effected no change other than to spell out the circumstances in which a foreign criminal's claim that deportation would breach his article 8 rights will *succeed*? At this point, it is necessary to focus on the statement that it will only be "in exceptional circumstances that the public

interest in deportation will be outweighed by other factors". Ms Giovannetti submits that the reference to exceptional circumstances serves the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paras 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under article 8(1) trump the public interest in their deportation.

41. We accept this submission. In view of the strictures contained at para 20 of *Huang*, it would have been surprising if the Secretary of State had intended to reintroduce an exceptionality test, thereby flouting the Strasbourg jurisprudence. At first sight, the choice of the phrase "in exceptional circumstances" might suggest that this is what she purported to do. But the phrase has been used in a way which was not intended to have this effect in all cases where a state wishes to remove a foreign national who relies on family life which he established at a time when he knew it to be "precarious" (because he had no right to remain in the UK). The cases were helpfully reviewed by Sales J in *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin). The fact that *Nagre* was not a case involving deportation of a foreign criminal is immaterial. The significance of the case law lies in the repeated use by the ECtHR of the phrase "exceptional circumstances". "

Thus the Court of Appeal concluded at paragraph 42 that in approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal. As they noted "In our view it is no coincidence that the phrase 'exceptional circumstances' is used in the new Rules in the context of weighing the competing factors for and against deportation of foreign criminals."

42. Thus in those circumstances we find the panel failed to consider that in the balancing exercise and failed to attach weight to the consideration that the Appellant could not meet the Immigration Rules.
43. We also find that the panel failed to have regard and weight to the public interest when carrying out the balancing exercise under the second stage test when considering the "classic" Article 8. Whilst the Secretary of State makes some criticism of the panel's approach to their discussion of the decision of the Court of Appeal in **SS (Nigeria) v SSHD** [2013] EWCA Civ 550 which the panel addressed at great length between paragraphs 76 and 81, we find that even if the panel digressed when considering that jurisprudence, important as it is, there was some recognition that the weight to be attached to the State's policy is greater because it is expressed now in legislative policy rather than by the executive and that what the Court of Appeal said in **SS (Nigeria)** at paragraph 54 that:-

"... They also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's expressed declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed."

44. However whilst the panel made reference to that consideration at paragraph 82, it is not sufficient to make a reference to it but it must be demonstrated that that was a factor in the balancing exercise. We do not consider that the panel did attach the weight to that factor as indicated in the decision of **SS (Nigeria)** (as cited). The only factor identified by the panel was the Appellant's private life on the basis that he was a settled migrant who had spent lawfully his life in the United Kingdom since he was the age of 3 (see paragraph 84). However the panel did not identify any evidence as to the strength and type of private life it was said the Appellant had built up during that time; for example the strength of ties, employment, links with the community. The panel placed, we consider, undue weight on the fact of the length of residence alone without more. This was not a case in which there was any "family life" in view of the findings made by the panel relating to the lack of evidence in respect of his family members, and that of his previous partner. Nor did the panel find there was any significant weight attached to the Appellant's children with whom he had had no contact since 2008. Thus in those circumstances, it was incumbent on the panel to identify the nature of the private life rather than placing emphasis only on the length of a residence.
45. We also find the panel erred in its consideration of the seriousness of the offences when carrying out the balancing exercise. Whilst the panel identified that that was a factor that must be put in the balance (see paragraph 85) the panel did not take into account the totality of the Appellant's offending and that he had been convicted of three offences and not simply one offence which they referred to throughout the determination as the "index offence", which related to the possession of a prohibited weapon when considering the seriousness of the offence. In this case the Appellant was convicted of three offences; the possession of a prohibited weapon and possession of class A and class C drugs. The panel said this about the seriousness of the offences at paragraph 96:-
- "Save for the index offence, the offences in the Appellant's PNC are all comparatively minor. None involving a prison sentence save in 2008 for possession of a class A drug, crack cocaine, where he received a fine of £100 or one day deemed to have been served."
46. Throughout the determination the panel refer to the "index offence" relating to the prohibited weapon (we refer to paragraph 13, 16 and paragraph 96). The panel also only set out the sentencing remarks in respect of the "index offence" at paragraph 15 and do not set out or make any reference to the sentencing remarks in respect of the drugs offences (see paragraph 16). It is plain that the Appellant was sentenced to three offences, not only the possession of a prohibited weapon but also for the possession of drugs. Looking at his antecedent history, this was not the first conviction for offences involving weapons. On 9<sup>th</sup> March 2001 he was convicted of possessing an offensive weapon in a public place. On 18<sup>th</sup> July 2008 he was convicted of carrying an air weapon in a public place therefore this was the third offence relating to a weapon. The circumstances of the offence are also relevant. They indicate that the prohibited weapon was found when a police raid had taken place at his home and a handgun was found in his safe along with the class A and class C drugs (cocaine and cannabis). The barrel of the gun had been drilled and the Appellant's own account in the OASys Report was that the Appellant had been a drug dealer before his conviction who had kept a gun for his protection. In those circumstances the offence relating to the possession of the prohibited weapon was closely linked to the drugs offences and thus merited consideration.

47. We do not consider that paragraph 96 adequately reflects the seriousness of the offences. Whilst it is true that the other offences did not involve a prison sentence, the panel failed to have regard that this was the third time the Appellant had been convicted of offences concerning possession of a weapon and the second time for drugs offences and thus demonstrated an escalation in the seriousness of his offending. Whilst the panel quoted **Maslov** they did not take account of the fact that these serious offences were committed at the time when the Appellant was an adult.
48. We also consider that when the panel assessed proportionality at paragraphs 85 to 96 they erred by considering only the risk of reoffending and left out of consideration the wider aspects of the principle of deterrence as identified in cases such as **AM [2012] EWCA Civ 1634**, and **Richards [2013] EWCA Civ 244**. The legitimate aim of prevention of crime is not confined to those who are likely to reoffend and the case law indicates that in serious cases affecting public confidence in the criminal justice and immigration systems, deportation of offenders has a legitimate role of playing the deterrence of others who might be minded to offend. Thus the private interest of an Appellant against the public interests of the State, which Judge LJ (as he then was) summarised in **N (Kenya)** as being “broad issues of social cohesion and public confidence of the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom.
49. We do not find that the panel weighed that matter in the balance when making an assessment of the public interest. “
40. Thus we set aside the decision of the First-tier Tribunal. We indicated to the parties that if we found an error of law that it would require the parties’ attendance at a resumed hearing. As regards the findings of the First-tier Tribunal, we found no error in their findings relating to the family life of the Appellant but considered that in relation to his private life that is an issue which required further consideration.
41. The appeal was listed before us on the 6<sup>th</sup> December. At that hearing Mr Bartram appeared on behalf of the Appellant. He had recently been instructed to act on his behalf but did not have access to his file or any of the documentation necessary for the appeal to proceed. In those circumstances he requested an adjournment to take further instructions and to prepare for the resumed hearing. We considered that it was necessary in the interests of justice for the adjournment to be granted and for the appellant to be represented and gave further directions for hearing of the appeal. The case was subsequently listed before the Upper Tribunal.

### **The Resumed Hearing:**

42. The documentation that was put before the Tribunal consisted of a witness statement of the Appellant, a copy of a Post Programme Report dated 21<sup>st</sup> March 2011 and a letter from the detention support project manager dated 18<sup>th</sup> December 2013. The documentation that had been presented by the Appellant himself before the First-tier Tribunal was also available. It also included a certificate for his attendance at the Restore Programme (Victim Awareness and Restorative Justice 2011) and a series of certificates from the OCR. Mr Bartram who appeared on behalf of the Appellant also produced a skeleton argument and a copy of the decision of the Tribunal in **BK**

**(Deportation – S33 “exception” UKBA [2007] – public interest) Ghana [2010] UKUT 328 (IAC).**

43. On behalf of the Respondent, we had before us the original Respondent’s bundle containing the trial record sheet, indictment, antecedent history of the Appellant, sentencing remarks, the liability to detention deport letter dated 15<sup>th</sup> June 2009, the application for naturalisation as a British citizen made on 19<sup>th</sup> June 2000, the responses to the liability of deportation letter with enclosures dated 15<sup>th</sup> June 2009, request letters sent to the Appellant and the deportation decision dated 11<sup>th</sup> October 2012. Mr Wilding, who appeared on behalf of the Secretary of State also produced a skeleton argument and relied upon a number of decisions, Balogun v The United Kingdom [2012] ECHR 614, SS (Nigeria) v SSHD [2013] EWCA Civ 550, JO (Uganda) v SSHD [2010] EWCA Civ 10, Richards v SSHD [2013] EWCA Civ 244, Maslov v Austria [2008] ECHR 546, MF (Nigeria) v SSHD [2013] EWCA Civ 1192.
44. We also heard oral evidence from the Appellant, Mr Tabi, in accordance with the statement submitted and exhibited in the Appellant’s bundle. In his evidence-in-chief he confirmed that the evidence that he had given before the First-tier Tribunal was the truth. He was asked about his criminal history and in particular he was referred to the sentencing remarks of the judge in which he had referred to the Appellant being addicted to drugs. The Appellant confirmed that he was using cocaine and cannabis. He was referred to the probation OASys report (7.1) in which it was said he took drugs for others and he was asked about what happened. The Appellant stated that he was “messed up” and was “doing a lot of things” and that he thought “he could cut corners to make money.” He confirmed that he had done “silly things” like that. He was also referred to the OASys report in which he had described himself as a drug dealer before being in custody and asked to explain where his source of income came from. He confirmed that when he left college he had had “little jobs” and a friend had a painting business but his money mainly came from criminal activities. He was further asked about gang related activities referred to in the OASys report (at 7.1). He stated that he was not part of a named gang but a group of friends who were committing criminal activities and therefore from the outside it would look like a gang but we were a group of people doing “illegal stuff” as we were criminal associates we were a gang.
45. In respect of the offences themselves, he confirmed that the indictment was correct, that his accommodation was raided and they had found a drilled weapon and drugs, cocaine of 12.27 grams and cannabis of 141.2 grams.
46. He was asked about the TSP Post Programme Course that he had attended and to summarise the changes in his behaviour. The Appellant stated that he went on the course at first without an open mind but considered that it made him really “stop and think” and made him think “outside the box” and that he would stop doing things. He stated that before there was a danger and he personally thought that the course had helped him quite a lot.

47. He was asked about his connection to the Cameroon. He stated that his parents were from Cameroon and had been there and he always knew that he had Cameroonian roots but as far as he knew he had been there briefly and that he knew that they spoke French and he remembered saying to his mum when he was in Cameroon "When are we going home?" He said that he could pick up some French and understand some but could not really understand enough if he were living in France. He said Cameroon was part of his background but it was "not me". He said "Cameroon is not my country of birth". It was put to him that the drugs offences were very serious and that it was in the public interest to deport him and he was asked to explain why he should not be deported. The Appellant said that he believed that he was British and that everything about him was British and that he knew that he had done wrong but he had put it behind him. He said he did not smoke or drink and did not do drugs and that in his view he should not be deported.
48. In cross-examination he was asked about his criminal activity. He confirmed that the only source of income that he had come from his criminal activity and that was by selling drugs. It was put to him that in the OASys report he had confirmed, as he had in oral evidence, that he was a drug dealer and that he would return to this on release (5.2). He was asked in those circumstances what confidence did the Tribunal have that he would not return to drug dealing on release? He stated that the OASys report was made early on and at that time he was "still fiery, still aggressive and stubborn" and that his "mindset was that I didn't care". He explained that he was 25 then and now he was 31 and that he was a different person. He said that the courses that he had gone on had led him to see things "in a different light". He said he could only do his best to try to prove he had changed. He was then asked about what actual plans he had to find work outside his criminality. The Appellant said that he had spoken to a probation officer three weeks ago and had seen the duty officer and that they had recently said that they would help him. He said he was quite involved in music and would like to do a sound engineering course at college or undertake football coaching which would cost £300 to obtain level B. He thought the probation officer could assist him in obtaining work.
49. In respect of his current position he was asked if he had had any further contact with his children or ex-partner since the First-tier Tribunal hearing. In respect of his children he confirmed that he had had no contact with them but that he had tried to contact Social Services but they would not let him have any contact. In respect of his ex-partner he said that he last spoke to her a year ago but had had no contact with her since.
50. As to his own family, he confirmed that his family including his siblings and parents resided in the United Kingdom. He confirmed he had had no contact with his parents but had had some recent contact with his siblings. He said that his sister had sent him a message last night and he had heard from his brother. It was put to him that his relationship with his family had broken down seven or eight years ago, in fact if not longer ten years ago. The Appellant stated that it had been "rocky for probably fifteen years" and sometimes they were not speaking to him. He stated that he had had contact with his brother but had only started to have contact with his



sister recently. She had got married and he spoke to her. He confirmed that since he had been released on bail he had not seen any of his relatives or siblings but that she had sent him a picture of her wedding.

51. There was no re-examination. He was asked some questions by the panel. He confirmed that he had not undertaken the drugs course that had been recommended in the OASys report. He claimed that it was because he was not a heavy class A drug user. He said that he had tried cocaine but he was not a heavy user but was using cannabis every day; skunk cannabis. He confirmed that in mitigation on his behalf his Counsel had confirmed that he was addicted to drugs. When asked about the weapon that he had in his house, he said that he had obtained it from a friend and that he had friends who had firearms. He further confirmed that the children were in the home when he had the gun. As to past intervention by the Probation Services, in respect of the community order that had been passed he was asked if he had done any courses. He said that he did not undertake any courses at that time and that he would not have done any in any event because at that time he was still taking drugs and trying to make money.
52. As to future plans, he confirmed that he previously said that he planned to be a promoter and that now his plans for the future had changed. He said that his cousin was a promoter and that there was always trouble in nightclubs and he did not want to be involved in that kind of scene. He confirmed in relation to his conviction history that he had used five aliases. When asked why, he said it was "to get away with stuff".
53. As to other plans for the future, he said that he had spoken to the probation officer and that he had not wished to reside in London and that the Probation Service said that they could help him in Bolton. He said he did not know anyone in Bolton. When asked about contact with his friends in London, he said that he had spoken to one or two of them and when asked if those were friends who were involved in crime the Appellant said that he had a friend who had gone to prison and upon release had started a plumbing business. He said friends that he had known for a long period of time that some of them were criminals but now he would say that he would not become involved with them. When asked if he had received help in prison for drugs he said that he did not. He was asked how old he was when he left school. He said that he left at 16 and attended college only briefly but that did not last very long.
54. At the conclusion of our questions, we asked the parties if they had any further questions. Mr Wilding asked him about his comments that he was still in contact with friends and that some were involved in crime and that that was inconsistent with his view to having motivation to turn his life around and demonstrated those negative ties were not severed. The Appellant said that he took it that they were still involved but these were people that he had known for twenty years and they were his friends. Although they did not have time to meet up, they could talk on the phone. He stated that just because they may be a criminal does not mean that he would meet them. It was put to him that it did not demonstrate that he was so

committed that he would sever ties with them. He said that he had the strength and power to say to friends that he would not carry out criminal activities. He said that he would be lying if he said that he had no criminal friends; they are friends he had known for twenty years but he said that he would not say he would not contact them but he would tell them that he would not be involved in any criminal activities. They may still keep the same relationship but it would not be the same as before. In respect of the firearms he was asked about his evidence that he had kept it in the house where the children were living and was asked why he had had it. He said that he had it because of his lifestyle; that “you get threats and you are not thinking right”. He said it was part of the lifestyle for protection purposes.

55. Mr Bartram had no further questions.

### **The Submissions of the Parties:**

56. We heard from Mr Wilding who relied upon the skeleton argument that he had prepared. In addition he made the following oral submissions. He submitted that the effect of **MF (Nigeria)** in conjunction with the decision of **SS (Nigeria)** demonstrated that where someone did not meet the Immigration Rules then very great weight needed to be given to the public interest in considering whether “exceptionally” they should succeed on the basis that they could not meet the criteria of the Rules. In this case as a result of the offences committed he received a sentence of four years’ imprisonment and it must be an exceptional case before the public interest is outweighed. He submitted that the central issue in this case was the private life established and whether that private life outweighed the public interest. He reminded the Tribunal that the First-tier Tribunal panel’s findings were that there was no family life engaged in his case and those findings were preserved by the Upper Tribunal. Even at the date of the hearing there was no evidence to any family life being established in the United Kingdom for Article 8 purposes and there was crucially a lack of evidence and in those circumstances the only relevant consideration was the Appellant’s private life based on his length of residence, given the lack of evidence concerning the constituent elements of his private life.

57. Mr Wilding referred us to the decision of **Balogun**. He submitted that the facts of the appeal were very similar to the present appeal and that in **Balogun** he too was an Appellant who the court accepted had arrived at the age of 3 in the United Kingdom. It was a case where he had had difficulties in his childhood and as a teenager and the key offences committed related to possession with intent to supply class A drugs and he was sentenced to a period of three years. In respect of that case the important feature was the length of his residence and also that he had had a relationship with a British citizen. Thus the circumstances are very similar in terms of length of residence but in his case the offences took place when he was a juvenile. In the present appeal the Appellant was an adult when the index offences were committed. The court in **Balogun** submitted that there would be required “very strong reasons” to justify the deportation of a settled migrant, however on the facts of **Balogun** notwithstanding that, they considered it was not disproportionate for his deportation even taking into account his length of residence and lack of ties in Nigeria. As Judge

Gaetano stated at paragraph 3 “Article 8 provides no absolute protection against expulsion of a category of aliens including those born in the host country”. Thus he submitted the Appellant’s length of residence did not demonstrate that he should not be deported.

58. He further submitted in reference to the Rules that the Appellant was sentenced to a period of imprisonment of four years and was therefore not able to rely on the length of residence set out in the Rules themselves to avoid deportation.
59. We were then referred to **MF Nigeria** and in particular paragraphs 42 to 44. In this context he reminded the Tribunal that the decision made it clear that when approaching the question of whether removal was a proportionate interference with an individual’s Article 8 rights, that the “scales are heavily weighted in favour of deportation and something very compelling (which will all be ‘exceptional’) is required to outweigh the public interest in removal”. As the court went on to state “It is no coincidence that the phrase ‘exceptional circumstances’ is used in the new Rules in the context of weighing the competing factors for and against deportation of foreign criminals”. At paragraph 43 it was stated:

“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’.”

Thus, he submitted, the new Rules are a complete code and that the exceptional circumstances are to be considered in the balancing exercise involved the application of a proportionality test as required by the Strasbourg jurisprudence (see paragraph 44).

60. Mr Wilding submitted that when looking at the Rules at paragraph 399 and 399A, it is plain that length of residence is not enough by contrasting the circumstances of those who receive a sentence of imprisonment of two years that if they can show that they have lived in the UK for over twenty years and no ties with the country of removal then under the Rules it would be disproportionate to remove them and in those circumstances their appeal would be allowed. However the situation is different for those sentenced to a period of imprisonment for over four years and in those cases they would have to show that there were “very compelling reasons”. Therefore this Appellant, having received a sentence of six years’ imprisonment would have to demonstrate “very compelling reasons” which would be far greater than the length of residence and the issue of ties in Cameroon.
61. In this appeal he submitted that there should be great weight attached to the public interest in deportation of the Appellant because it is not now simply the policy of the Secretary of State but a judgment of Parliament and as recognised by Laws LJ in his decision of **Richards** (as cited) that gives it special weight which the courts should recognise. Mr Wilding contrasted the comparable legislation in Austria when the European Court considered the decision in **Maslov**. The Austrian Aliens Act 1997

states explicitly “An exclusion order can be issued”, no such discretion applies to automatic deportation; and deportation order must be made unless to do so would breach the person’s Convention rights.

62. Therefore drawing all those factors together, the length of residence is not sufficient. The Appellant had not advanced any specific elements of private life other than his length of residence and it is not a case where there are any relevant children or family life that has been established which needs to be put in the balance. On the other side of the balance there is a significant criminal history culminating in a significant term of imprisonment leading to the decision to deport. As the exceptions to automatic deportation are codified in the Immigration Rules they do not assist the Appellant because his sentence was one of over four years. Thus the Secretary of State submitted that deportation was proportionate when everything was considered by looking at the circumstances of the offence and the sentence imposed.
63. The circumstances demonstrated that he was keeping, and continues to keep albeit more remotely, to be in the company of those who committed criminal offences around drug dealing. There is no confidence in the assertion that he is a changed man and given his record, great care should be taken before accepting his strength of resolve or commitment to change. Even if it was accepted, it would have little bearing on the balancing exercise of proportionality.
64. As to the submission made on behalf of the Appellant in the skeleton argument relying on the decision of **BK (Deportation)** as cited, and the concept of a “home grown criminal” that case is distinguishable from the current jurisprudence in that it was a pre-2007 Act and the legislative background has changed. The decision in **Balogun** demonstrates that someone who might have been in the position of a “home grown criminal” based on his length of residence of a similar type that this Appellant has, was found not to be disproportionate and that it has not been shown that the very strong public interest in deportation has been outweighed and that the length of residence was not a compelling circumstance.
65. We were then addressed by Mr Bartram on behalf of the Appellant. He also relied upon his skeleton argument that he produced before us. He began by referring us to **Maslov** and in particular paragraph 76 of that decision. He submitted that it was very clear that the European Court had reiterated that the state had a margin of appreciation as to what was proportionate and it had not been the Appellant’s case that Article 8 was always a shield nor was it his case that the imperative to deport foreign nationals should not be given significant weight. That was a matter referred to in **Maslov** and was one criteria to put in the balance as was the nature and seriousness of the offences committed. He therefore submitted that all the factors are important including the public interest which is a legitimate aim of deportation. He too agreed with the submission of Mr Wilding as to the effect of **MF (Nigeria)** and that the new Rules set out a position where an Appellant can succeed and that the reasons should be sufficiently compelling noting a departure from the general Rule.

66. He further referred us to paragraphs 68 to 75 of **Maslov** submitting that that had been a thorough consideration of the Article 8 principles and that in that case that where there is long residence of a settled migrant, the relevant criteria was identified as being “very serious reasons” which he submitted reflecting the “compelling reasons” set out in **MF (Nigeria)** and that this could outweigh the public interest. He therefore submitted that the public interest could be outweighed by something outside of the ordinary. In those circumstances he submitted that the decision of **BK** had not been superseded in the way advanced by the Secretary of State. That was a case that looked at the issue of deportation. He submitted that the issue of deportation was to keep faith in the system. He referred us to paragraph 14 of **BK** and that the line of reasoning set out there goes to the core of the automatic deportation provisions, namely that it must be based on a purposeful view. There must always be other factors that would render deportation a disproportionate measure. The purpose of the deportation Rules is to deter foreign criminals and to express the public revulsion and reflect the views of the public; but when looking at the purpose of them, there are a set of circumstances like the present ones, where an individual has lived in the UK for a significant period of time that would therefore show that such a measure when applied to him is disproportionate.
67. Whilst the decision of **Balogun** has been relied upon by the Secretary of State and the facts are similar, it was a relevant consideration that there was no mention of the risk of re-offending and that case or remorse, or rehabilitation as there has been in the present appeal. Furthermore their leave was tenuous but was physically present and in this case he has lived in the United Kingdom with lawful leave. Therefore having considered all of those factors in **Maslov**, in essence all the facts must be considered on its own merits to conclude whether deportation is proportionate to the legitimate aim. When applying the test of either “very serious reasons” or “compelling circumstances” they are demonstrated in this case by his length of residence since the age of 3. He has little or no cultural awareness of the circumstances in Cameroon and only has connections with the UK. There is sufficient information in the report to show that the risk of re-offending is lower (in the light of the report from the course undertaken in 2011) and that the Appellant has shown good understanding and insight to his previous lifestyle. In those circumstances it ranks as an exceptional case or in the alternative that there are compelling reasons demonstrated to show why deportation is disproportionate. He invited us to allow the appeal.
68. At the conclusion of the appeal we reserved our determination.

### **Findings of fact and analysis:**

69. We found no error of law in the Tribunal’s findings as to family life and the best interests of the children and that the only error found was in regard to the absence of other material considerations in the balancing exercise. In those circumstances we preserved the findings of the First-tier Tribunal which were, in essence, that the Appellant did not enjoy any family life but was a single adult and was not part of a family unit.

70. The findings of the Tribunal and the evidence upon which they were based can be summarised as follows:
- (i) The Appellant is the father of two children; WT (his stepson) and NT (his biological daughter born in 2005). The children's mother is LT and whilst they were in a previous relationship they had not lived together permanently (OASys report [68 FTT decision]). In 2007 he received a police caution for assault on LT as a result of a row that had got out of hand.
  - (ii) The children's mother had been asked to provide information concerning his relationship with the children in 2011. She failed to respond. The panel concluded this may have been due to incarceration of having suffered mental health problems. The children had been placed into care of the Social Services (at [67] FTT decision).
  - (iii) He last saw his daughter before he went to prison in September 2008.
  - (iv) He stated before the Tribunal that he wished to re-establish contact with his daughter.
71. His evidence before this Tribunal was that he had last had contact with his partner a year ago by telephone and had not spoken to her since that time. He confirmed that he had had no contact with his daughter and whilst he wished to re-establish it with her he had not done so.
72. We acknowledge, as did the First-tier Tribunal panel, that the Appellant is the father of NT and that he wishes to re-establish contact with his daughter. However the circumstances are such that he has not had contact with her now since 2008 and we further acknowledge that whilst it would be in their best interests to have contact with their non-residential parent, given the length of separation and the lack of evidence concerning the nature of the relationship between the Appellant and his children we cannot conclude that beyond the general principle, any weight can be given to that in the balancing exercise as noted by the First-tier Tribunal.
73. As to members of his family, the Appellant's parents and siblings are resident in the UK but as noted by the First-tier Tribunal they have little or no contact with the Appellant. The panel recorded that his parents had not visited him in prison (see [32] FTT decision) and that was confirmed in his oral evidence. Further, in respect of his siblings, they have not visited him in prison and at the time of the panel decision he had fallen out with his brother Marvin. As to contact with them now, we find that there has been limited contact between the Appellant and his siblings and had only recently had contact with his sister by way of telephone. He told us that despite his release he had not seen his siblings.
74. None of the family members gave evidence before the First-tier Tribunal nor have they done so before this Tribunal. Thus the evidence before us is no different to that as it was before the First-tier Tribunal panel and thus all those preserved findings remain.

75. The second issue relates to the risk of re-offending. In this respect we have considered the OASys report alongside the evidence before us. The Probation Service are required to determine the degree of risk of causing serious harm to the public and the likelihood of the offender re-offending within the two year period of discharge. The standard tool to deduce these estimates is the Offender Assessment System (OASys) which combines static, actuarial data with scores relating to the prisoner's achievements in addressing dynamic, criminogenic factors such as anger, addictions, victim awareness and so on. The document would be used initially to identify the key areas of concern and convert them into a timed programme of action known as a "sentence plan" and this would be revised in order to chart the prisoner's progress through his sentence.
76. It is also appropriate to observe that behaviour in prison, family structure, employment prospects, and maturity on matters that can also indicate future risk of re-offending and thus the risk of harm to the public.
77. We have therefore considered the OASys report in the light of the evidence before us. We note that no party has sought to produce either before the First-tier Tribunal or before this panel an up-to-date OASys report or any further evidence from a probation officer and the one before us is dated 14<sup>th</sup> November 2011. In that OASys report, the risk of serious harm to the public was stated to be high as was the risk of reconviction. The areas identified which were a cause of concern in the context of harm are the analysis of the offence, financial management and income, lifestyle and associates, drug misuse and attitudes. The information relating to those areas is set out in the report. The analysis of his offences has been set out earlier. In this context the Appellant describes himself as having been a drug user and a drug dealer who has had a gun for his protection, who has previous convictions for possession of drugs and also possession of weapons in a public place.
78. As to financial management, it was noted on the Appellant's own account that he had been a drug dealer prior to custody and that he may return to this on release. He also stated that he hoped to have moved away from the idea by the time of his release. The financial issues were related to the risk of serious harm and offending behaviour; a legal activity as the source of income was recorded as a "significant problem". As to lifestyle and associates, he stated that he would return to his previous lifestyle if released now but may be not in the future. He described himself as a "strong person making a decision". He stated he had taken drugs from people, not returning to pay for them. Continuing with his gang and drug related activities showed risk taking behaviour. He agreed with this stating, if he had the opportunity to think before reacting it minimised the risks.
79. His own drug misuse is described as; that he had used drugs but that they were "not an issue". He said "but will probably continue after release". He stated in interview that he was a drug dealer when not in custody and may return to it after release.
80. The section attitudes is set out at section 12; it reads as follows:

“Mr Tabi has stated that he may continue with his criminal activities on release. It went on to state that he will do what he has to do in order to survive. Even if it means letting off a few caps (bullets). He said he would be a model licensee... He offended for financial reasons and that he is part of a gang culture. Something he aspired to as a young person because choices were limited and that he knew he needed to survive”.

The summary of risk is set out at R10 and identifies who is at risk, namely “potential victims or society as a whole” and the nature of the risk of harm is from “drugs offences and potential discharge of firearms.” The risk was likely to be greater when released by returning to his previous lifestyle. The factors linking to producing risk were said to be those relevant to his employment and his wish to start a promotion business with friends. The risk to the public was said to be high which was defined as “there are identifiable indicators of risk of serious harm. The potential even could happen at any time and the impact would be serious.” The risk of reconviction was also said to be high (see page 22 of OASys).

81. The risk management plan looking at his motivation and capacity to change and the particular facts of the offences indicated that he was “quite capable of change in this area” and work required to increase motivation was drug related work and motivational work including CARAT for one year of offending work.
82. In this context we note the age of the OASys report and that neither party has sought to produce any up-to-date evidence from the Probation Services and in those circumstances we have considered the other evidence before us relevant to this issue.
83. It is plain that the Appellant has completed a TSP post programme on 14<sup>th</sup> February 2011 (see Appellant’s bundle for report). The programme was related to develop his thinking skills. The areas are described as “stop and think”, “emotional awareness”, “problem solving”, “perspective taking”, “offence free relationships”, “goals and values” and “seeing the whole picture”. In summary, the report indicated that he had made significant progress and that he had displayed openness and was a very supportive member of the group. As the First-tier Tribunal noted at paragraph 92 of their decision, he had shown a good understanding of the impact of emotions on his behaviour and recognised anger, boredom, embarrassment and frustration as problematic emotions for him. We concur with the First-tier Tribunal that the report overall is indeed encouraging. In addition to that course he undertook a Restore course between 5<sup>th</sup> and 15<sup>th</sup> September 2011 dealing with victim awareness and restorative justice. There is no report for that course. He has also produced certificates having completed units in personal and social development on behalf of the National Open College Network. They show having attained 18 credits for different modules including cash flow forecasting, creating visions for business and financial needs, computer skills, database software and IT user skills.
84. In relation to his behaviour and conduct in prison, there were adjudications in 2010 where he was found in possession of an insulin pen, 112.5 grams of tobacco and several items not on his property card and therefore unauthorised and also found in possession of a radio. As the First-tier Tribunal panel noted, none of those would seem to indicate any antisocial features.



85. In that context we make the following observations. We take into account the fact that there has not been an updated OASys report and that neither party sought to produce any further evidence concerning the assessment of risk of harm or re-offending that is more current. There is no information either from his current probation officer or from the service. Whilst we have seen a reference letter from the detention support project manager who makes reference to his current motivation, she has not appeared before us as a witness nor do we find that she qualified in the assessment of risk.
86. In the context of the OASys report there are areas of concern including drugs, attitude and lifestyles are highlighted. The Appellant has participated in a post programme report of 2011 which is a thinking skills programme. We note the comments and the encouraging nature of that report. However the thinking skills course, whilst we accept covered some work on current attitudes, did not deal with the issue of drug awareness. The Probation Service recommended he undertook CARAT which we understand concerns the issue of misuse of drugs. If the First-tier Tribunal panel noted he had not undertaken such a course which was identified as one necessary to reduce the risk of reconviction and therefore the risk of harm to the public which was said to be high. He confirmed before us that he had not undertaken any work around the misuse of drugs.
87. We cannot make our own risk assessment but note that whilst he has attended some work prior to release other work identified has not been carried out. We are concerned that at the time of the offence and his offending history in general they arose out of gang culture and those that he was associating with. We take into account his evidence that this was not a gang in the sense of a "named gang" but nonetheless they were a group who on his own evidence, had a common purpose to collectively commit crime for financial gain. That was, he told us openly, his only source of income for a considerable period of time. It is of concern that he continues to keep in contact with those friendships as he told us they go back a number of years. It is plain that from his own evidence he committed offences for financial motivation and on the present evidence it does not demonstrate any prospects of employment. The evidence concerning his future plans has been conflicting. Whilst he has told us that he is committed and motivated to change and whilst we accept the evidence set out in the thinking skills programme which shows some signs of encouragement, given his previous offending history, lifestyle and associates we must give great caution before accepting his strength of resolve which before us is untested and uncorroborated. Consequently whilst the OASys report is of some age and there is no recent assessment, even with the recent completion of the course, we consider the risk of re-offending has not been demonstrated to have reduced significantly. In any event even if the risk of re-offending has reduced, an important facet of the public interest identified from the jurisprudence before us concerns not only the risk of re-offending but the issue of deterrence.

**The Law:**

88. We commence by setting out the relevant provisions of the Immigration Rules relating to deportation and Article 8, as introduced by the Statement of Changes in HC 194 on 9<sup>th</sup> July 2012, at paragraphs 396 to 399B:

“396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with Section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person’s removal pursuant to the order would be contrary to the UK’s obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

**Deportation and Article 8**

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

- (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
- (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
- (c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

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

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
  - (i) the child is a British Citizen; or
  - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

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

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

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

399B. Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted."

89. The first step under the new Rules is to decide whether deportation would be contrary to an individual's Article 8 rights on the grounds as to whether the case falls within paragraph 399 or 399A. In this appeal, paragraphs 399 and 399A do not apply because the case falls within paragraph 398(a) due to the length of the sentence being one in excess of four years. The length of sentence in this case is six years.
90. The new Rules provide that in the event that paragraphs 399 and 399A do not apply "it will only be in exceptional circumstances that the public interest in deportation would be outweighed by other factors" thus the Appellant can only succeed if he can show "exceptional circumstances that the public interest in deportation will be outweighed by other factors".

91. It is common ground before us that in accordance with the decision of **MF (Nigeria) v SSHD [2013] EWCA Civ 1192**, the test is in effect the proportionality assessment in compliance with the Strasbourg authority and whilst there is no test of exceptionality, the Appellant is required to show “very compelling reasons” to outweigh the public interest in deportation.
92. Ultimately in this appeal, the Appellant’s case is based on the private life established by his length of residence (there being no family life established) and whether that is a compelling reason to outweigh the public interest.
93. In this context we find it necessary to set out the nature and weight of the public interest in deportation appeals.
94. The weight to be given to the public interest has always been greater in a deportation case than that involving removal (see **JO (Uganda) [2010] EWCA Civ 10** at paragraph 29). In the light of the legislative provisions set out earlier made under the provisions of Section 32 of the UK Borders Act 2007, there is no requirement for the Home Secretary to form her own view of the public interest in the deportation of a foreign criminal who is sentenced to not less than twelve months because by statute deportation of foreign criminals is deemed to be conducive to the public good. As Sir Stephen Sedley said at paragraph 9 of **Gurung v SSHD [2012] EWCA Civ 62** (when commenting upon **RU (Bangladesh)**):

“In the absence of statutory exception, the Tribunal must uphold a deportation order against a foreign criminal not because the Home Secretary considers that the public interest requires deportation but because Parliament does ...”

95. It has since been observed by Lord Justice Laws at paragraph 21 of **Richards v SSHD [2013] EWCA Civ 244** that:
- “21. What in my judgment needs emphasis is that the strong public interest in deporting foreign criminals is now not merely the policy of the Secretary of State but the judgment of Parliament. That gives it special weight, which the courts ought to recognise, as no doubt the Strasbourg Court will. This approach sits with the well established approach to proportionality questions in European Union law where Acts of the primary legislator enjoy a wide margin of discretion (see **R v The Secretary of State for Health ex-parte Eastside Cheese [1999] 3 CMLR 123** per Lord Bingham, especially at paragraph 48).”
96. The importance of this was further underlined by Laws L J in **SS (Nigeria) [2013] EWCA Civ 550** at paragraph 10:

“[T]here is no acknowledgement in **Sanade** (nor, I think. In Strasbourg) at the weight to be attached in an Article 8 case which states policy of deporting foreign criminals may be greater where the policy is made, not by the executive government, but by the legislature. But this seems to me to be of very great importance. I shall explain the position as I see it below.”

Reminding decision makers of the status of varying margin of proportionality, Laws LJ states:

“The importance of these considerations of proportionality is as follows. The principle of minimal interference means that the fundamental right in question in the case can never, lawfully, be treated as a token or a ritual. But the margin of discretionary judgment enjoyed by the primary decision maker, though variable, means that the court’s role is kept in balance with that of the elected arms of government; and refers to quiet and constitutional anxieties that the Human Rights Act draw the judges onto ground that they should not occupy. These points matter especially where the area in question is controversial, as to the edge between a child’s rights and the deportation of a foreign criminal at paragraph 42.”

Laws LJ went on to summarise the key factors in proportionality that decision makers were reminded of at paragraph 47. He then went on to note the “insufficient attention” which had been given to this. Indeed he stated:

“48. In **Sanade** the UT observed ‘[T]he more seriously offending, stronger is the case for deportation’ (paragraph 48). With respect that is no doubt right; but it applies as readily to a case where the offender is not subject to automatic deportation under Section 32 of the 2007 Act and his removal is at the Secretary of State’s discretion. In *Strasbourg*, within the **Uner-Maslov** criteria we must find a comparable reference to the ‘nature and seriousness’ of the offence committed by the applicant’.

49. These references say nothing about the policy’s origin and primary legislation. The policy source, however, is as we have seen one of the drivers of the breadth of the decision maker’s margin of discretion when the proportionality of its application in a particular case is being considered.”

97. Laws LJ endorses Sedley LJ in **NK** noting that “Sedley LJ was with respect right to state that “[in the case of a ‘foreign criminal’ the Act places in the proportionality scales a remarkably greater weight than in other cases” (paragraph 53) and noting that “the pressing nature of the public interest here is vividly informed by the fact that by Parliament’s express declaration the public interest is injured if the criminal’s deportation is not affected. Such a result could in my judgment only be justified by a very strong claim indeed”. (Paragraph 54).
98. Thus we find that from the authorities in conjunction with that of **MF (Nigeria)** which we have cited previously, provides us with assistance in determining what are the “very compelling reasons” required to outweigh the public interest and the very great weight attached to the public interest. The stronger factors in support of the public interest show the stronger needs to be the countervailing factors said to be compelling factors making deportation disproportionate.
99. The three facets of the public interest which have to be considered in a deportation case were summarised by Wilson LJ (as he then was) at paragraph 13 of **OH Serbia v SSHD [2008] EWCA Civ 694**:

- “(a) The risk of re-offending by the person concerned;
- (b) the need to deter foreign nationals from committing serious offences by leading them to understand that whatever the other circumstances, one certain consequence of that may well be deportation; and
- (c) the role of deportation as an expression of society’s revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious offences.”

100. Those three facets are equally applicable in automatic deportation cases such as the present (see RU (Bangladesh) v SSHD [2011] EWCA Civ 6 and AM v SSHD [2012] EWCA Civ 1634). In SS (Nigeria) v SSHD [2013] EWCA Civ 550, the Court of Appeal emphasised that in automatic deportation appeals, the 2007 Act set a legislative policy that the deportation of a “foreign criminal” such as the applicant was in the “public interest”. Laws LJ at [54] concluded:

“The pressing nature of the public interest here is vividly informed by the fact that by Parliament’s express declaration the public interest is injured if the criminal’s deportation is not affected. Such a result could in my judgment only be justified by a very strong claim indeed.”

101. With those matters in mind we set out the factors recognised in the settled jurisprudence of the Strasbourg Court to be taken into account when making an assessment of the proportionality of an individual’s deportation. The “Boultif criteria” (as they are known) are conveniently set out in the Grand Chamber decision in Uner v The Netherlands (Application number 46410/99) [2007] Imm AR 303 at [57] and [58] as follows:

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

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;

- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age; and
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

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

- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.

102. The Appellant's case rests upon the sole ground that he has established a private life in the UK by virtue of the length of residence; there being no establishment of family life (that is as a partner or children) relied upon. We have therefore considered the length of that residence. The Appellant arrived in the United Kingdom on 1<sup>st</sup> December 1986 when aged 3 in the company of his brother and parents. He was granted indefinite leave to remain in 1991. On 26<sup>th</sup> June 2000 he submitted an application for British nationality which was refused on 22<sup>nd</sup> January 2003. The reason for refusing that application was as a result of his criminal convictions. He therefore remains a national of Cameroon. Thus his past conduct of offending has had a bearing on his ability to be recognised as a British citizen.
103. We find a significant factor in his favour is the length of lawful residence in the UK and that he had spent the majority of his life and youth here having arrived at the age of 3 years. Whilst length of residence is an important factor as we recognise, such residence can be outweighed where there is a strong public interest and in **Maslov** "very serious reasons" are required for expulsion of a foreign offender who is lawfully resident in the UK. In this context in considering whether or not "very serious" reasons exist in the Appellant's case, we note the emphasis placed in **Maslov** a case where the offences were committed as a juvenile. This does not

diminish the fact that such serious reasons are required for expulsion in the case of adult offending.

104. In the Appellant's case his offending history commenced when he was a juvenile aged 17 but he has continued to offend well beyond reaching his majority and was last convicted of an offence at the age of 25. Contrary to the circumstances in Maslov, this is not, therefore, a matter solely of juvenile delinquency.
105. First we consider that since the Appellant reaching his majority, the offences have escalated in their seriousness.
106. The Appellant has a number of criminal convictions which have been set out earlier in this determination at paragraphs 5 to 10. The offences that triggered the deportation proceedings are set out at paragraph 11.
107. We reach the following conclusions concerning the seriousness of the offences committed by the Appellant. The Appellant has a string of convictions that began in 2001 when aged 17. Those convictions involved offences of violence, dishonesty, possession of weapons in public, and offences involving drugs and a caution for assault on his partner. The offences which triggered the deportation proceedings related to convictions for three offences; possession of a prohibited weapon and possession of drugs (class A and class C). This was not the first conviction for an offence involving a weapon but his third and were his second offences involving drugs. In March 2001 he was convicted of possession of an offensive weapon in a public place and on 18<sup>th</sup> July 2008 was convicted of carrying an air weapon in a public place.
108. We consider the seriousness of the offences are reflected in the circumstances. They indicate that a prohibited weapon was found when a police raid had taken place at the home and upon his own evidence where his partner and two children (who were 3 and 2 at the time) were present in the house and a hand gun, namely a 8mm GAP BBM hand gun was found in his safe along with quantities of class A and class C drugs (cocaine and cannabis). The barrel of the gun had been drilled and that he had obtained that gun from friends who had access to firearms. He told us that he had had the gun for protection as he had been a drug dealer who needed the drugs for protection due to threats that he had sometimes received.
109. The information contained in the OASys report describes his criminal lifestyle; he described himself as a drug dealer prior to custody having become involved in drugs at 14 years old being introduced to skunk cannabis and crack cocaine. He described it as "being out of control for a couple of years and using drugs regularly". In interview in June 2009 he stated that he had used cocaine a couple of times a month and using cannabis daily and could be violent when under the influence.
110. The OASys report makes reference to the Appellant having been involved in gang culture "something he aspired to as a young person because choices were limited and he knew he needed to survive" (see 12.1 OASys report).



111. Whilst in his oral evidence he stated that he was not part of a “named gang” but a group of friends who committed criminal activities, we consider that it matters not whether it was a named gang, but that his conduct demonstrates that he was involved in gang culture and that his only source of income came from criminal activity and dealings with drugs, which he has candidly and openly admitted to us.
112. We consider that the Appellant’s offending as recognised by the passing of a significant sentence of six years for the offences that he last committed, demonstrate an escalation in the seriousness of his offending. The possession of a firearm in the circumstances set out above and being in possession of class A and class C drugs in those circumstances posed a serious risk to the public not only in the terms of drugs being traded on the streets but the risk of discharge of a firearm. We do however note that he was charged with possession of the drugs and not intent to supply.
113. The Appellant’s offences were of a most serious kind and we consider the offences engage all three facets of the public interest, namely the need to deter other foreign nationals from committing similar offences, the importance of expressing society’s revulsion at such serious crimes.
114. We further note in **Maslov** that it did not involve a case where there was an equivalent mandatory nature of deportation proceedings as submitted by Mr Wilding. The legislative framework set out in the Australian Aliens Act 1997 states explicitly that an exclusion order can be issued and no such discretion applies in the context of automatic deportation; the deportation order must be made unless to do so would breach a person’s Convention rights.
115. We have been referred to the decision of the ECHR in **Balogun** and both advocates have sought to apply and distinguish that decision in their submissions before us. The case emphasises that very strong reasons are required to justify the deportation of settled migrants. This was a decision decided post-Maslov and the facts are similar to the present appeal. In **Balogun** the Appellant claimed to have entered the UK at the age of 3 and the ECHR accepted his length of stay and that he was a settled migrant who had spent virtually the whole of his childhood in the host country (at [50]). As an adult (aged 20) he was convicted of 2 drugs offences and sentenced to a period of imprisonment of 3 years. He also had previous offences for drugs and dishonesty. He had no established family life but it was accepted that he had established a private life and had been educated in the UK. There had been no recent risk assessment but he had not committed any further offences since his release. The appellant in Balogun had not been to Nigeria since the age of 3 and had little or no ties to that country.
116. The court’s assessment is set out at paragraph [43]. Taking into account the well established Strasbourg jurisprudence at [46], it held that the Uner/Boultif criteria were relevant irrespective of the age of the person or length of residence citing the Grand Chamber at [55] noting that
- “ while a number of Contracting States have enacted legislation or adopted policy rules to the effect that long-term immigrants who were born in those States or who arrived

there during early childhood cannot be expelled on the basis of their criminal record,... such an absolute right not to be expelled cannot, however, be derived from Article 8 of the Convention, couched, as paragraph 2 of that provision is, in terms which clearly allow for exceptions to be made to the general rights guaranteed in the first paragraph.”

117. However, they noted at [46] that the age of a person is of significant relevance in applying the criteria, when assessing the nature and seriousness of the offence in the context of whether they were committed as a juvenile or as an adult and the age at when they entered the host country and whether they had spent a large part or even all their childhood in that country. Again making reference to the prior Strasbourg jurisprudence of “very special reasons.”
118. Applying the criteria, the court found that the offences giving rise to the proceedings were very serious, involving class A drugs and a sentence of 3 years and that the Secretary of State was entitled to take a grave view of offences involving drugs, given the destructive effects on society as a whole. It was noted that he had previous convictions and that save for some offences, they were committed as an adult and therefore distinguished this case from that of Maslov. They took into account that he had not committed any further offences. As to length of stay, they accepted that he had been in the UK since the age of 3 and treated him as a settled migrant who had spent virtually all his childhood in the UK and that “very serious reasons” would be required to justify deportation. In respect of ties to his home country and the destination country, the main tie he may have, given the young age he left the country and consequent lack of memories or cultural experience, was that his mother appeared to reside there. He was not in contact with her nor had any knowledge of her whereabouts and not lived with her since arrival in the UK. They found that it was “not a strong familial tie” but one that could be pursued if he chose to. As to ties in the UK, whilst his relatives were in the UK and lawfully settled, his ties were characterised as limited as they were in Nigeria but his stronger ties were to the UK given his length of residence and his education and relationship with his girlfriend. Nonetheless, notwithstanding those ties to the UK, the specific circumstances of his upbringing, spending a far greater part of his childhood in the UK, his education in the UK and that his ties were stronger than those in Nigeria, the court stated “the fact remains that he is responsible for his own actions. Particularly in the light of the fact that the majority of his offences were committed when he was an adult..” (at [52]). They had no doubt that his deportation would have a very serious impact on his private life, but given the factors in his case, deportation would not be disproportionate.
119. Mr Bartram conceded that the facts were similar but that there was no reference to risk of re-offending or remorse and rehabilitation as in this appeal and that in view of his lack of ties and connections to Cameroon along with his lengthy stay of residence as a lawfully settled migrant, in the light of his stated motivation they constituted “exceptional circumstances” .

120. We find that the facts of **Balogun** are indeed strikingly similar to those of the present appeal. We have made reference to those earlier in the determination. There are some distinguishing factors; the appellant in Balogun had a much more troubled upbringing than this Appellant, he also received a sentence of 3 years compared to 6 years in the present case. The main tie to Nigeria was his mother who resided there but whom the appellant had no contact with and therefore was not a strong familial tie; finding that his ties to the UK and Nigeria were limited but that his ties to the UK were stronger than those to Nigeria. Nonetheless they found that his deportation was proportionate for the reasons they gave at paragraphs [52] and [53]. Those reasons apply, we find, to this Appellant.

## Summary

121. On considering whether there are very serious reasons or whether there are "exceptional circumstances" in this Appellant's case we have reached the following conclusions.

122. The Appellant has been convicted of a serious offence meriting a substantial period of imprisonment of six years. Those offences are aggravated by the Appellant's admission of having the gun for protection and it being due to his involvement as a drug dealer. Those offences have to be seen in the context of his offending history which commenced at the age of 17 but continued well beyond reaching his majority and he was last convicted at the age of 25. It is not solely a matter of juvenile delinquency as we have noted. We have found that his offences have escalated in their seriousness. He has been assessed as posing a high risk of harm to members of the public and the risk of re-offending is also noted to be high; we recognise that this was an assessment of risk made some time ago however for the reasons set out earlier whilst we note that he has completed a course towards minimising that risk and towards the aim of rehabilitation, and whilst we commend the progress made on that course, we do not find that the risk has diminished significantly. Whilst we accept his stated intention to stay free of crime, it remains untested and uncorroborated. We have voiced concerns earlier as to his continued association with his criminal associates and his lack of plans for the future. In any event, when considering the weight to be attached to the public interest the need for deterrence is also a facet of the public interest. We take into account the significant weight attributed to the state's policy of deporting foreign criminals as reflected in the primary legislation in the UK Borders Act 2007 over and above the public interest considerations of deterrence and society's revulsion.

123. As regards his private life we accept that it is a significant factor in his favour is the length of residence in the UK having spent the majority of his life in the UK having arrived at the age of 3. The First-tier Tribunal did not identify any features of the Appellant's private life and viewed it only in the sense of his length of residence. In this we accept that the Appellant has been educated in the UK and has grown up alongside the cultural life of the UK and grown up in the knowledge of the British way of life. This is compared with Cameroon with which he has little or no memory or experience. However we note that it is not the case that he has never lived there;

he has lived in Cameroon with his parents at a young age and returned at the age of 10 spending a year there with his parents and siblings before returning to the UK. Whilst his parents have been settled in the UK they have spent most of their lives in Cameroon and we do not consider that it can be said that he has no cultural knowledge of Cameroon having grown up with his parents.

124. In terms of his employment, he has had no long term secure employment relying on casual jobs and his own evidence is that his only source of income has been from the illegitimate source from dealing in drugs and committing crime as evidenced by his antecedent history. Thus his private life has been characterised for a significant period of time by his criminal offending.
125. The offences have led to his application for British nationality being refused in 2003 and therefore we consider that he must have reasonably known before committing the index offences (which triggered the deportation proceedings) that this would be a relevant consideration and had a bearing on his ability to be recognised as a British citizen.
126. There has been little positive in terms of his private life advanced on behalf of the Appellant. We have not heard any evidence from family, friends or from those in the community or any character references from those who know him. As set out earlier, his claim is not based on any family life established in the light of the findings of the First-tier Tribunal. Therefore this case differs from those most usually before the Tribunal in that there is no established family life relied upon with a partner or child and that his Article 8 rights are assessed in effect as a single adult who has lived independently.
127. We have therefore considered and weighed up all of those factors that we have identified and acknowledge the Strasbourg jurisprudence that it is required for their to be "very serious reasons" for the expulsion of a lawfully settled migrant who has spent a lengthy period of residence in the host country. We have reached the conclusion that the circumstances relied on are not "exceptional circumstances" within the Immigration Rules and that deportation is justified despite the Appellant's lengthy residence here and the young age that he left his country of nationality and noting that his residence in the UK has been lawful.
128. In reaching this conclusion we have recognised and taken account of all the evidence that his links to Cameroon are weak, although we note that he has some knowledge of French and that he has some cultural awareness of Cameroon as a result of his family background. Conversely despite his length of residence in the UK, little of a positive nature of private life has been advanced on his behalf. We have found this a difficult case to determine and one that has been finely balanced and we do not under estimate the difficulties that there may be in re-establishing himself but note his motivation that he has expressed to change his life and that he is still a young man and find that those difficulties are outweighed by the strong public interest in his deportation.

129. Consequently, we do not consider that his deportation would breach his Article 8 human rights.

130. We find, accordingly, that the appellant has failed to establish that he falls within the exceptions set out at Section 33 of the UK Borders Act 2007 and his appeal must be dismissed under the immigration rules and on human rights grounds.

**DECISION**

131. The making of the decision of the First-tier Tribunal involved an error on a point of law and the decision has accordingly been set aside. We re-make the decision by dismissing the appeal on all grounds.

Signed

Date 7/3/2014

Upper Tribunal Judge Reeds