Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/09739/2008

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision promulgated on**
On 12 April 2016	**On 15 July 2016**

Before

The Hon. Mr Justice McCloskey, President and
Deputy Upper Tribunal Judge Norton-Taylor

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

YM
(ANONYMITY DIRECTION MADE)

Respondent

ANONYMITY

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) I make an Anonymity Order. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

Representation

Appellant: Ms L Busch QC, instructed by Government Legal Department

Respondent: Mr P Lewis, of Counsel, instructed by Fisher Meredith Solicitors

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DECISION

Preliminary

1. This appeal having been heard on 12 April 2016, we deferred finalising our decision in order to give the parties' representatives an opportunity to provide further submissions in respect of the intervening decision of the Court of Appeal in MM (Uganda) – v – Secretary of State for the Home Department [2016] EWCA Civ 450.

Introduction

2. This case is known to many as YM (Uganda) – v – Secretary of State for the Home Department (reported at [2014] EWCA Civ 1292). By its decision promulgated on 10 October 2014, the Court of Appeal allowed the appeal of YM (the respondent in these proceedings) and, exercising its powers under section 14(2) of the Tribunals, Courts and Enforcements Act 2007, set aside the decision of the Upper Tribunal, which had allowed the appeal of the Secretary of State (the appellant in these proceedings) and remitted the appeal to this Tribunal for the purpose of remaking the decision. Aikens LJ, delivering the judgment of the appellate court in which the other two Judges concurred, formulated the framework of the further exercise now to be conducted by this Tribunal at [63]:

> "*…. I would allow the appeal on the Article 8 ground, but dismiss it on the Article 3 ground. The matter must be remitted to a differently constituted UT, in order to reconsider the Article 8 issues. The UT will have to re-find the necessary facts and apply them to the new statutory provisions and the 2014 Rules.*"

His Lordship was referring to Part 5A of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") , together with the new versions of paragraphs 362, 397, 398, 399 and 399A of the Immigration Rules operative from 10 July 2014. The contours of the exercise to be performed by this Tribunal at this juncture have been designed accordingly.

History

3. The history of this appeal is a rather protracted one, regrettably so and is summarised thus:

   (a) YM is a national of Uganda, now aged 31 years.

   (b) By a decision made on behalf of the Secretary of State dated 09 October 1993, the application of YM, then aged nine years, for asylum was refused. He was, however, granted exceptional leave to remain in the United Kingdom until 09 October 1994. This period was extended subsequently.

(c) On 13 March 2001 the Secretary of State granted YM indefinite leave to remain in the United Kingdom.

(d) By letter dated 11 November 2004, YM received an admonition from the Home Office to the effect that consideration having been given to his recent conviction on indictment for the offence of burglary, while it had been determined not to deport him, this would be reconsidered "…. *if you should come to adverse notice in the future ….*"

(e) By this stage YM's criminal record consisted of an earlier offence of robbery (when aged 14), assault occasioning actual bodily harm (when aged 15) and assaulting three police constables (when aged 18). For the above mentioned further offence of robbery YM was sentenced to detention of 3 ½ years in a Young Offenders Institution. He was released on 18 March 2005.

(f) Following his release, having converted to Islam while in detention, YM married and he and his spouse now have three sons aged 10, 6 and 4 years respectively.

(g) On 26 February 2008 YM was convicted of attending at a camp where terrorist training was taking place, contrary to section 8 of the Terrorism Act 2006, on his plea of guilty and was sentenced to imprisonment for 3 ½ years.

(h) YM was released on licence in June 2008. Meantime, on 22 May 2008, a decision had been made on behalf of the Secretary of State to make a deportation order against him, based on his terrorist conviction and invoking the "conducive to the public good" provisions of the Immigration Act 1971 (as amended) and paragraph 364 of the Immigration Rules.

(i) YM appealed. By its decision promulgated on 01 July 2009, the Asylum and Immigration Tribunal allowed his appeal under Article 8 ECHR and paragraph 364 of the Rules.

(j) On 27 November 2009, YM received a further warning, precipitated by his contact with a co-accused in contravention of one of the conditions of his release on licence.

(k) In December 2009 YM was recalled to prison on the basis of a suspicion of having committed the offence of stolen goods, which did not result in any prosecution and he was subsequently released on licence in January 2010.

(l) On 05 October 2011 YM was formally cautioned arising out of a so-called "road rage" incident.

(m) On 23 July 2012, having pleaded guilty, YM was convicted of fraud in connection with an application for motor insurance, being sentenced to a 12

month community supervision order and a driving disqualification of 12 months duration.

(n) The caution and conviction noted in (l) and (m) above occurred in circumstances where the Upper Tribunal had set aside the decision of the AIT and the remaking decision was outstanding.

(o) On 23 October 2013 YM was sentenced to a conditional discharge of two years for an offence of criminal damage.

(p) On 09 May 2013, the Upper Tribunal allowed the Secretary of State's appeal.

(q) On 19 June 2014 the hearing in the Court of Appeal took place, followed by the promulgation of its decision on 10 October 2014.

(r) Between the two aforementioned dates, on 13 August 2014 YM pleaded guilty to making a false statement to obtain motor insurance and breach of a conditional discharge, giving rise to a further community order.

(s) In the wake of the Court of Appeal's remittal order and this Tribunal's ensuing case management directions dated 03 August 2015, further written evidence was adduced on behalf of YM and further representations, including a letter dated 21 March 2016, were provided on behalf of the Secretary of State.

4. The flesh to the headlines in [3] above can be found in [1] – [7] of the decision of the Court of Appeal, which we gratefully adopt:

> *"[1] YM was born in Uganda on 24 June 1984. He came to the UK with his mother and siblings in 1991 when he was aged six. He obtained indefinite leave to remain in the UK in 2001 when he was 16. His mother and siblings have obtained British nationality, but YM has not. That is because he started to commit crimes when he was 14, his age when he was convicted of robbery. He was subsequently convicted of assault occasioning actual bodily harm when he was 15, of three assaults on constables, committed when he was 18, and of aggravated burglary when he was 19. For this last offence he was sentenced in Croydon Crown Court on 5 September 2003 to 3 years 6 months in a Youth Offender Institution ('YOI'). On 11 November 2004 YM was warned in a letter from the Secretary of State for the Home Department ('SSHD') that a serious view was taken of the aggravated burglary offence and that YM was at risk of being deported if he should 'come to adverse notice in the future'".*
>
> *[2] Whilst in detention in the YOI, YM began seriously to practice Islam, the religion to which he was born. On the day of his release, 18 March 2005, YM married J, a British citizen, in an Islamic marriage ceremony. They have remained married and have had 3 children, who were born, respectively, in December 2005 (IS), October 2009 (AQ) and 25 December 2011 (IL). J, who*

converted to Islam before marrying YM, is a trained midwife who works part-time.

[3] After YM's release on licence in 2005 he used to attend the Croydon Mosque and that led him to go to meetings at the house of a man called Hamid, whom YM subsequently admitted was a fanatical Islamist. These encounters resulted in YM attending two terrorist training camps in the New Forest in 2006. He was arrested in September 2006 and charged on two counts of offences under section 8(2)(a) of the Terrorism Act 2006. Broadly speaking this sub-section makes it an offence for anyone to attend a place, in the UK or elsewhere, where he has instruction or training in (for short) activities that can be used for terrorist purposes or in the use of weapons, where instruction or training is wholly or partly for purposes connected with terrorism. Under section 8(2)(a) it has to be proved that the offender knew or believed that instruction or training is being provided at the particular place 'wholly or partly for purposes connected with the commission or preparation of acts or terrorism or Convention offences'. YM pleaded guilty to the two counts and on 26 February 2008, in the Crown Court at Woolwich, Pitchers J sentenced YM to 3 years 5 months imprisonment on each count, the sentences to run concurrently. Because YM had been in custody since his arrest, he was actually released on licence in June 2008.

[4] Meanwhile on 22 May 2008 YM was served with a deportation notice by the SSHD which stated that, as a result of his convictions and sentences for the terrorist offences, the SSHD deemed it to be conducive to the public good to make a deportation order against him pursuant to sections 3(5)(a) and 5(1) of the Immigration Act 1971 as amended. A letter dated 23 June 2008 set out the SSHD's reasons. It stated that 'it was not accepted' that the decision to deport would give rise to any interference with the family life of YM within the terms of Article 8 of the European Convention on Human Rights (ECHR), or, if there was any such interference, it 'could be justified in the circumstances' of his case.

[5] YM appealed the deportation decision and on 1 July 2009 the Asylum and Immigration Tribunal (AIT) allowed his appeal both on human rights grounds under Article 8 and on immigration grounds under paragraph 364 of the Immigration Rules (HC 395) as amended. In August 2009 YM was warned for having contacted a co-defendant to the terrorist charges. (Non-contact was a condition of YM's licence). In December 2009 YM was recalled to prison at the same time as being arrested on suspicion of handling stolen goods. Those charges were not pursued and in January 2010 YM was released on licence again. Then on 5 October 2011 he was given a caution as a result of a 'road rage' incident. In June 2012 YM was arrested on a charge of fraud in connection with an application for motor insurance. He subsequently pleaded guilty and was sentenced to a 12 month community supervision order and disqualified from driving for 12 months.

[6] The SSHD appealed the AIT's decision and on 22 June 2011 the Upper Tribunal (UT) set aside the determination of the AIT for error of law and directed that the

UT should re-make the decision. At the re-determination hearing on 22 February 2013 the UT heard oral evidence from YM, his wife J, YM's mother and also J's mother. It had before it written evidence from various witnesses in support of YM's case. It also had expert written evidence from Professor Silke, someone the UT described as having 'considerable expertise' on terrorism generally and terrorist psychology in particular, and Professor Allen, an expert on East African and Ugandan affairs and professor at the London School of Economics. Lastly, the UT had reports from an independent social worker who had twice visited YM, J and their family to observe and comment upon the family relationships and the possible consequences if YM were to be deported.

[7] The UT promulgated its decision on 2 May 2013 and allowed the SSHD's appeal. In summary, it rejected arguments advanced by Mr Lewis of counsel that there was a real risk that YM's rights under Article 3 of the ECHR would be breached if he were to be returned to Uganda. The UT also rejected the argument that, with regard to YM's Article 8 rights, the case should be dealt with on the basis of the revised Immigration Rules that had come into force on 9 July 2012. However, the UT also found that YM could not have satisfied their terms even if they were applicable. Further, whilst the UT accepted that the deportation of YM would interfere with his Article 8 rights, it concluded that there were very serious reasons justifying deportation despite YM's long residence in the UK and the impact deportation would have on his family life. The UT was satisfied that 'the decision to deport the appellant is necessary and proportionate to a legitimate aim within Article 8(2)'. The effect was that, in re-making the AIT's decision, it dismissed YM's appeal based on Article 3 and Article 8 grounds 'as well as on humanitarian protection and immigration grounds'. Therefore the SSHD's decision to deport was upheld."

The Oral Evidence

5. We heard evidence from YM. He formally adopted his four witness statements. In the cross-examination and judicial questioning which followed, he testified that the activities giving rise to the Terrorism Act offence noted in [3]((g) above included the simulation of shooting in standing, crouching and lying positions. When pressed, he also admitted to certain jumping activities in water. His evidence regarding his criminality was, in the main, vague and evasive. He claimed, unimpressively, an inability to remember all that had taken place at the camps. He sought refuge under the assertion that he had made "*a lot of silly mistakes*". He protested, unconvincingly, that he had not acted rationally. When questioned about his respect for the laws of his country and his preparedness to expose his children to the risk of separation from him, he failed to respond in any convincing way.

6. YM's evidence about separations from his spouse and children lacked spontaneity and conviction. His acknowledgement of multiple separations of this kind was made only under pressure and reluctantly. His inability to date the duration of the most recent of these separations was highly unconvincing. The same observation applies to his assertion that he recalls virtually nothing of the first nine years of his

life, which were spent in Uganda. This evidence was given in the context of his equally untenable claim that Uganda is a country where "*I've never been*". The inconsistent and unpersuasive nature of YM's responses to questions about a recent foreign holiday was unmistakable. While he claimed that there were "What's App" messages from his children during this period, he followed this with a suggestion (in re-examination) that these were not received directly, but were relayed to him by his mother-in-law. Next, he described the communications as "texts". When probed further, he asserted that all of the messages had been erased, without more. Given YM's circumstances, this claim is fanciful. We find all of this evidence manifestly untruthful. Specifically, while there may have been some limited contact at most, we find that there was no contact of the frequency and intensity claimed during the period in question.

7. These findings are bolstered by YM's surprising inability to describe where his wife, a healthcare professional, has been working most recently. Nor could he say whether she had been working on the day of the hearing or the preceding day. Self-evidently, the contact which YM claims to have with his children must, if true, involve frequent communication with his spouse. We find that YM's inability to provide evidence of these elementary matters undermines his claims regarding the frequency and intensity of such contact. This finding is fortified by YM's evidence that he has not attended any of his children's schools for a period of approximately one year.

8. We treat the written statement of YM's spouse with caution, since she too airbrushes the multiplicity of marital separations and, further, fails to engage meaningfully with the impact on the family, the children in particular, of YM's repeated criminality.

The Main Issues Considered

9. In her exemplary skeleton argument on behalf of the Secretary of State, supplemented by appropriately focused and concise oral submissions, Ms Busch QC argued, in particular, that the offences of which YM has been convicted include very serious crimes; YM is a repeat offender who has failed to respond to the sentencing measures applied to him or to the various admonitions which he has received from time to time; in particular, he disregarded warnings and advice in opting to give encouragement and support to would-be terrorists; he has, throughout the extended history of the legal proceedings in which he has been involved, continued to show disrespect for the law; he cannot be considered to be culturally and socially integrated in the United Kingdom mainly on account of his repeated offending; he has demonstrated no obstacles, much less any very significant obstacles, in his integration in Uganda in the event of returning there; in particular, no issue relating to age, health, language or familiarity with Ugandan culture has been raised; should he return to Uganda alone, this will not have an unduly harsh effect on his wife or children; and it remains open to them in any event to maintain their family life with him in Uganda.

10. Ms Busch further submitted that in the span of four witness statements, including a recent one, coupled with a further witness statement of his spouse, YM has, firstly, failed to particularise his social and cultural integration in the United Kingdom; he has focused mainly on the life which he has with his spouse and children; he has provided no evidence demonstrating that his integration in Uganda, his country of origin, will be compromised by very significant obstacles. The submissions of Ms Busch further draw attention to the gravity of YM's offending and his failure to express remorse or acknowledge responsibility for his actions.

11. On behalf of YM Mr Lewis, in a comprehensive and tenacious submission, contended that his client's case has many positive and meritorious features. While we have considered this submission in its totality we summarise these features as follows: the factors mitigating YM's most serious offence; the basis of his guilty plea and the judge's sentencing comments; YM's subsequent reconversion to the religion of his birth, Islam; his active involvement in various community groups and organisations; his cooperation with his probation officer; the expert evidence that YM presents a low risk of future involvement in terrorism-related activity; the innocent nature of his breach of licence conditions; his positive conduct in prison during a remand period, related to alleged offences of dishonesty, which did not culminate in a successful prosecution; and the positive tone and content of the reports of an independent social worker relating to YM's involvement in his childrens' lives. We need not reproduce the particulars of any of these discrete issues, which we have considered.

The Statutory Roadmap

12. We remind ourselves of what we are mandated by Parliament to do, in the context of the present appeal, via the new regime contained in Part 5A of the 2002 Act:

    (a) Since YM is not a British citizen and has been convicted in the United Kingdom of an offence, attracting a sentence of imprisonment of at least 12 months, he is a "*foreign criminal*" within the meaning of Part 5A of the 2002 Act.

    (b) We must have regard to the public interest underpinning the maintenance of effective immigration controls.

    (c) The potent public interest in the deportation of foreign criminals is engaged.

    (d) The aforementioned public interest is enhanced the graver the offending of the person concerned.

    (e) YM must be deported unless his case falls within one of the two specified exceptions.

    (d) The first exception applies where the subject has been lawfully resident in the United Kingdom for most of his life; he is socially and culturally integrated in

the United Kingdom; and there would be very significant obstacles to his integration in Uganda.

(e) The second exception is that the subject has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of his deportation on the partner or child would be unduly harsh.

(f) Since YM's sentence of imprisonment was of less than four years, he does not have to demonstrate "*very compelling circumstances, over and above those described in Exceptions 1 and 2*", per section 117C(6) of the 2002 Act, but is not precluded from attempting to do so *(infra*) in resisting deportation.

13. This Tribunal has previously held that the factors detailed in section 117A – C of the 2002 Act do not constitute an exhaustive list: see Forman (Section 117A – C Considerations) [2015] UKUT 412 (IAC) at [17]. We refer also to the analysis adopted in Forman:

"We consider the correct analysis of sections 117A and 117B to be as follows

(i) These provisions apply in every case where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8 ECHR and, as a result, would be unlawful under section 6 of the Human Rights Act 1998. Where a Court or Tribunal is not required to make this determination, these provisions do not apply.

(ii) The so-called 'public interest question' is 'the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).', which appears to embrace the entirety of the proportionality exercise.

(iii) In considering the public interest question, the court or tribunal must have regard to the considerations listed in section 117B in all cases: per section 117A(1) and (2).

(iv) In considering the public interest question in cases concerning the deportation of foreign criminals, the court or tribunal must have regard to the section 117B considerations and the considerations listed in section 117C.

(v) The list of considerations in sections 117B and 177C is not exhaustive: this is clear from the words in parenthesis '(in particular)'.

(vi) The court or tribunal concerned has no choice: it must have regard to the listed considerations.'

To this we would add the following. While the court or tribunal is clearly entitled to take into account considerations other than those listed in section 117B (and, where appropriate, section 117C), any additional factors considered must be relevant, in the sense that they properly bear on the 'public interest question'. In this discrete respect, some assistance is provided by reflecting on the public law obligation to take into account all material considerations which, by definition, prohibits the intrusion of immaterial factors. We are not required to decide in the present case whether there is any tension between section 117A (2), which obliges the court or tribunal concerned to have regard to the list of considerations listed in section 117B and, where appropriate, section 117C) and the contrasting terms of section 117B (5) and (6) which are framed as an instruction to the court or tribunal to attribute little weight to the two considerations specified."

14. The constituent elements of the legal framework governing the further determination of this appeal extend beyond Part 5A of the 2002 Act. They are rehearsed *in extenso* in the various decisions of the Court of Appeal and do not require to be reproduced. They consist of, in summary:

    (a) Part 5A of the 2002 Act.

    (b) Paragraphs 362, 397, 398, 399 and 399A of the Immigration Rules, operative from 28 July 2014.

    (c) The binding jurisprudence of the Court of Appeal relating to the potency of the public interest underpinning the deportation of foreign offenders, constituted by the decisions in SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550, at [55] especially; LC (China) v Secretary of State for the Home Department [2014] EWCA Civ 1310, at [17] and [24] especially; and, most recently, Secretary of State for the Home Department v CT (Vietnam) [2016] EWCA Civ 488 at [10] – [14].

    (g) The recent decision of the Court of Appeal in MM(Uganda) v Secretary of State for the Home Department [2016]EWCA Civ 450,, relating to the "*unduly harsh*" test, at [24] – [26] especially.

    (h) The decision of the Upper Tribunal in Ogundimu (Article 8 – New Rules) Nigeria v Secretary of State for the Home Department [2013] UKUT 00060 (IAC), relating to the meaning of "ties", approved by the Court of Appeal in its decision in the present case, at [50]

    (i) Most recently, NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662, at [22] – [39] particularly.

15. Part 5A of the 2002 Act is, of course, complemented by the Immigration Rules. The relevant provisions are found in paragraphs 398, 399 and 399A. These are

reproduced in many of the reported cases to which we have referred above: see, for example, MM (Uganda) at [5]. Laws LJ summarised the effect of the new rules and their interaction with section 117C in the following terms:

> *"[17] The scheme given by the terms of section 117C of the 2002 Act and the amended Immigration Rules has the following features:*
>
> *(1) Foreign criminals are classified in three groups: (a) those sentenced to terms of imprisonment of four years or more, Rule 398(a); (b) those sentenced to between twelve months and four years, Rule 398(b); (c) those whose offending in the Secretary of State's view has caused serious harm or who are a persistent offender who shows a particular disregard for the law, Rule 398(c).*
>
> *(2) The provisions of paragraphs 399 and 399A and the exceptions set out at section 117C(4) and (5) have no application to a criminal in the first of these three categories. Such a criminal must therefore be deported unless there are very exceptional compelling circumstances over and above the circumstances mentioned in exceptions 1 and 2 at section 117C(4) and (5).*
>
> *(3) Rules 399 and 399A apply where the facts fit to the other two classes of foreign criminal. Where the facts do not fit so that neither rule in fact applies, then again the criminal is to be deported unless 'there are very compelling circumstances over and above those described in paras 399 and 399A' (see the closing words of Rule 398)."*

16. We also remind ourselves of the exacting and elevated nature of the "*unduly harsh*" test enshrined in section 117C(5), formulated in MK (Section 55 – Tribunal Options) Sierra Leone [2015] UKUT 223 (IAC), at [42] thus:

> *"As regards the Appellant's partner, we consider that the separation caused by deportation and the natural consequences thereof would undoubtedly be harsh as it would abruptly sever emotional ties and support, terminate a genuine and serious relationship of some four years vintage and remove the only father figure from the family unit and, hence, the life of the partner's seven year old son. However, we are obliged to recognise that these are normal and typical effects of deportation, in circumstances where the statutory criterion of 'unduly harsh' requires something over and above the usual consequences."*

Returning to MM (Uganda), we take cognisance of how the Court of Appeal construed the phrase "*unduly harsh*". First, it held that the expression has the same meaning in both section 117C(5) and Rule 399. Laws LJ continues, at [22]:

> *"I turn to the interpretation of the phrase 'Unduly harsh'. Plainly it means the same in section 117C(5) as in Rule 399. 'Unduly harsh' is an ordinary English expression. As so often, its meaning is coloured by its context. Authority is hardly needed for such a*

proposition but is anyway provided, for example by VIA Rail Canada [2000] 193 DLR (4th) 357 at paragraphs 35 to 37.

[23] The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights. In my judgment, with respect, the approach of the Upper Tribunal in MAB ignores this combination of factors. The first of them, the public interest in the removal of foreign criminals, is expressly vouched by Parliament in section 117C(1). Section 117C(2) then provides (I repeat the provision for convenience):

> *'The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.'*

[24] This steers the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the 'unduly harsh' provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term 'unduly' is mistaken for 'excessive' which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history."

We consider that the starting point in cases of this nature is the central theme expressed in SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550, namely the powerful weight to be attributed to the factor of Parliamentary intervention in the field of the deportation of foreign national offenders, beginning with the 2007 Act and extending through Part 5A of the 2002 Act and associated amendments of the Immigration rules, expressed by Laws LJ at [55] in these terms:

> "*Proportionality, the absence of an 'exceptionality' rule and the meaning of 'a primary consideration' are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision maker's margin of discretion: the policy's source and the policy's nature* ***and in particular to the great weight which the 2007 Act attributes to the deportation of foreign criminals.***"

[emphasis added]

This, Laws LJ added, is an "*extremely pressing public interest*", driven by the "*very great weight*" which Parliament has chosen to attach to the protection of the public and the condemnation of serious wrongdoers: see [53].

17. We have identified in [14] above the subsequent leading decisions of the Court of Appeal to like effect, culminating in NA (Pakistan) (*supra*). There the Court of Appeal devised the dichotomy of "medium" offenders, namely those who have been sentenced to a term of imprisonment of more than one year but less than four years and "serious" offenders, being those whose sentence exceeds four years imprisonment. Jackson LJ, delivering the judgment of the Court, highlighted the "*curious feature*" of section 117C(3) that no provision is made for medium offenders who fall outside Exceptions 1 and 2, contrasting this with the new version of rule 398 which proceeds on the basis that medium offenders do have the right to seek to demonstrate very compelling circumstances over and above Exceptions 1 and 2 in an attempt to avoid deportation: see [24]. For the reasons explained in [25] and [26], the Court construed section 117C(6) to mean that both serious offenders and medium offenders falling outside Exceptions 1 and 2 can avail of the "fall back" protection of section 117C(6).

18. The Court then set about construing the phrase "*very compelling circumstances, over and above those described in Exceptions 1 and 2*", noting that the language of paragraph 398 of the Rules mirrors that of section 117C(6), while paragraphs 399 and 399A reflect the subject matter of Exceptions 1 and 2 but in greater detail. The Court provided the following construction and guidance:

> "*[30] In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of Article 8.*
>
> *[31] An interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament's intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having*

regard to the guidance given by the ECtHR in Maslov v Austria [2009] INLR 47, and hence highly relevant to whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2.

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

19. Jackson LJ followed this with an omnibus observation:

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

The judgment also provides guidance on the correct approach to the best interests of any affected child in this exercise:

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

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

The Court further held that sections 117A – 117D of the 2002 Act, in conjunction with paragraphs 398 – 399A of the Rules, constitute an exhaustive code.

20. Bearing in mind that YM falls into the category of "medium offender", the following passage is of particular significance in the context of this appeal:

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

Finally, the Court gave guidance on the function of the Strasbourg jurisprudence in cases to which this new self-contained regime applies.

> *"[38] …… The answer is that the Secretary of State and the tribunals and courts will have regard to the Strasbourg jurisprudence when applying the tests set out in our domestic legislation. For example, a tribunal may be considering whether it would be 'unduly harsh' for a child to remain in England without the deportee; or it may be considering whether certain circumstances are sufficiently 'compelling' to outweigh the high public interest in deportation of foreign criminals. Anyone applying these tests (as required by our own rules and legislation) should heed the guidance contained in the Strasbourg authorities. As we have stated above, the scheme of Part 5A of the 2002 Act and paras. 398-399A of the 2014 rules is to ensure compliance with the requirements of Article 8 through a structured approach, which is intended to ensure that proper weight is given to the public interest in deportation whilst also having regard to other relevant factors as identified in the Strasbourg and domestic case law. The new regime is not intended to produce violations of Article 8."*

In this context Jackson LJ further noted that by virtue of the margin of appreciation and the differing conditions prevailing in Council of Europe states the outcome of Article 8 assessments may vary from one state to another. See [39]:

> *"Even then it must be borne in mind that assessments under Article 8 may not lead to identical results in every ECHR contracting state. To the degree allowed under the margin of appreciation and bearing in mind that the ECHR is intended to reflect a fair balance between individual rights and the interests of the general community, an individual state is entitled to assess the public interest which may be in issue when it comes to deportation of foreign criminals and to decide what weight to attach to it in the particular circumstances of its society."*

21. In light of the decision in NA (Pakistan), it is appropriate to reflect on the nature of the distinction, if any, between medium offenders and serious offenders in the new combined regime of Part 5A of the 2002 Act and paragraphs 398 – 399A of the Rules. In our judgment the answer is found in section 117C(2) and (3), the effect whereof is

that those whose offending attracts a custodial sentence of less than four years will, subject to some exceptional circumstance, be considered less serious offenders than those who receive sentences of imprisonment exceeding four years. It follows that, giving effect to the plain language of section 117C(2), the public interest underpinning the deportation of medium offenders is less potent than that engaged in the case of serious offenders. The scales are tipped most heavily against those belonging to the latter category. This analysis is reinforced by the consideration that those offenders who are punished by a sentence of imprisonment of less than one year are excluded altogether from the statutory regime. It follows that the public interest in play, while of undeniable potency, is oscillating in nature.

Our Conclusions

22. In the judgment of the Court of Appeal in the present case Sir Stanley Burnton, concurring with Aikens LJ, stated at [66]:

> "*I add that in my judgment it would in general be difficult to see that in the case of someone who had committed offences as serious of those of the Appellant the lack of ties to his country of nationality would lead to a breach of his Article 8 rights, since the public interest in his deportation is so strong.*"

While Ms Busch QC, understandably, sought to place substantial weight on this passage, we must treat it as an *obiter* observation. We would point out that the exercise to be carried out by this Tribunal, as the framework contained in [10] – [14] above demonstrates, is altogether more elaborate than simply focusing on YM's lack of ties to his country of origin, Uganda. We would, further, highlight the intensely fact sensitive nature of every case in which this exercise falls to be performed, with the result that comparisons with the factual matrix of other cases will normally be arid.

23. We have taken into account everything embraced within [3] – [11] above. We refer also to our earlier assessment of certain aspects of the evidence. YM's case is a classic curate's egg. The negative, unsavoury aspects are, in a nutshell, constituted by his criminality and all the offshoots thereof. He has been a frequent offender since the age of 14. His offending has spanned a period of some fifteen years. In making this assessment we disregard entirely any charges against him which did not culminate in conviction. YM has been given ample opportunities and warnings, outlined in [3] above. He has not taken them. He has, rather, consciously and wilfully contravened the laws of the United Kingdom with regularity. In thus acting he has not been deterred by pending Tribunal and court proceedings. Nor have his parental responsibilities acted as a check. Furthermore, as our findings above indicate, he has not engaged candidly with this Tribunal and has in our judgement prevaricated.

24. On the other side of the scales, there are some positives. These, duly distilled, are essentially twofold. First, taking account of the absence of any challenge, we accept broadly YM's evidence of his community activities during recent years. Within this

discrete equation we include his positive interaction with the probation officer. Second, while bearing in mind the findings made in [7] – [9] above, we accept that YM has an important role in the lives of his children. Given the findings made, we do not consider this role to be of the highly elevated or indispensable nature asserted by YM and claimed in the supporting evidence. His role is important: but it does not qualify for the more effusive eulogies formulated. We cannot overlook that YM's criminal career is antithetical to the lifestyle of a truly responsible and devoted father and dedicated husband. Nor can we overlook that his criminality has, not once but on multiple occasions, irresponsibly and recklessly exposed his children to the real risk of long-term separation from their father. Linked to this is the consideration that reoffending remains a possibility. The application of the legal rule that the best interests of YM's children are a primary consideration falls to be conducted within this framework.

25. Since the sentencing of the Appellant has not, to date, in the course of his criminal career (albeit by a narrow margin) entailed imprisonment of four years or more, the law does not require his deportation from the United Kingdom if his case falls within either Exception 1 or Exception 2 in Part 5A of the 2002 Act or paragraph 399(a) or paragraph 399(b) of the Rules. The first of these pairs of provisions focuses on undue harshness impacting on the offender's children. The second has a different focus, concentrating on undue harshness affecting the offender's British citizen partner. This appeal has been presented with an intense focus on the first and not the second.

26. The undisputed facts, coupled with our findings and evaluative assessments rehearsed above, lead indelibly to the following conclusions:

    (i) YM's integration in United Kingdom society is manifestly inadequate. Properly integrated citizens do not pose the kind of threat to others and the menace to society posed by YM's criminality. This assessment is not offset by our acceptance of his attempts at redemption or his parental activities, which pale by comparison. Furthermore, we consider that in a society governed by the rule of law properly integrated members of United Kingdom society will show respect for courts and tribunals and, as a minimum, will be proactively and unremittingly candid in their dealings with them and will not engage in prevarication.

    (ii) The evidence falls well short of demonstrating that YM would encounter very significant obstacles in integrating into the country of his birth.

    (iii) We are persuaded by a narrow margin that YM has a genuine and subsisting relationship with his children. In this context we refer to our findings above relating to the true strength and profundity of this relationship.

    (iv) Having regard to our findings above coupled with the decision of the Court of Appeal in MM (Uganda), YM's case fails, by some distance, to overcome

the threshold of an unduly harsh impact on his children consequential upon his deportation.

(v) While the continued presence and role of YM in the lives of his children will, albeit by a far from decisive margin, probably further their best interests this undeniably important factor is comfortably outweighed by the public interests impelling towards YM's deportation from the United Kingdom.

(vi) It follows that YM's case does not fall within either of the statutory exceptions.

(vii) YM did not make the case that there were any "*very compelling circumstances over and above those described in paragraphs 399 and 399A*" of the Rules. We find no circumstances of this distinctive and elevated quality in any event.

Decision

27. It follows inexorably from our findings and conclusions above that we set aside the decision of the FtT, we dismiss YM's appeal to the FtT and allow the Secretary of State's appeal.

Signed: Edward McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 12 July 2016