



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/13530/2017

**THE IMMIGRATION ACTS**

Heard at Field House  
On 29<sup>th</sup> January 2019

Decision & Reasons Promulgated  
On 6<sup>th</sup> February 2019

Before

LORD BECKETT  
SITTING AS AN UPPER TRIBUNAL JUDGE  
UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HW  
[ANONYMITY DIRECTION MADE]

Respondent

**Anonymity**

*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*

Whilst no anonymity direction was made earlier in the proceedings, we now make an anonymity direction because the case involves a child. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

**Representation:**

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Mr M Allison, Counsel, instructed by Duncan Lewis Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals against a decision of the First-tier Tribunal (FtT) to uphold HW's (the claimant) appeal, on human rights grounds, against the Secretary of State's decision of 5 December 2017 to refuse his claim against a deportation order being maintained.
2. The Secretary of State has sought to deport the claimant on the basis that he is a foreign criminal within the meaning of UK Borders Act 2007, section 32, and as such liable to automatic deportation.
3. The claimant is a national of Afghanistan born in January 1994 who entered the UK unlawfully on 30 March 2007 at the age of 13. He was refused asylum but granted discretionary leave to remain and placed in foster care in which context he repeatedly raped a boy of 7 who was in the same foster placement. On 26 March 2008 he was convicted of five counts of rape of a child under 13 and sentenced to a custodial term of detention of 4 years to be followed by 2 years subject to supervision.
4. From March 2009 onwards, he began to be served with notices of liability to deportation. Ultimately in 2014, he was refused permission to appeal further against service of a notice, on 29 August 2012, to make a deportation order.
5. Having married and had children in August 2013 and July 2014, he sought a review of the previous decisions in light of the birth of his second child. This was unsuccessful. A third child was born in June 2015. In November 2016 the Secretary of State refused to revoke the deportation order and on 17 March 2017 refused his human rights claim. The Secretary of State agreed to reconsider that decision and that reconsideration concluded with the decision of 5 December 2017.
6. At the date of the hearing before her, the FtT Judge (FtTJ) was made aware that a fourth baby was due in August 2018. We learned that the baby was born, is now aged 5 months and is currently in hospital.

*Determination of 28 May 2018*

7. The claim for asylum and humanitarian protection was refused and the claimant made no cross appeal in that regard and it is not necessary to set out the associated reasoning.
8. At paras 21 to 26 the FtTJ referred to relevant law including ECHR article 8, part V of the Nationality, Immigration and Asylum Act 2002 and associated Immigration Rules before noting certain case-law in paras 27 and 28. At para 33 the evidence available and heard is set out and at paras 35 to 43, under the heading "Factual Findings" some evidence, assessment of it and the conclusions reached are set out. Following discussion of country information and asylum, the FtTJ returned to consider the article 8 claim at paras 56 to 66.

*Relevant facts - paras 35-43*

9. The sentencing judge had indicated that the offences were so serious that, as an adult, he would have been sentenced to 12 years but also considered that there was considerable potential for rehabilitation.
10. In para 36 the FtTJ noted that there was uncertainty about the claimant's true age and records that the Secretary of State accepted that he was 13 when he arrived in the UK and at the time when he committed the offences. She reports that in the trial there was medical evidence which suggested a possible range of ages, but the trial judge had treated him as being 14 at the time of the offences and 15 at the date of conviction. The FtTJ concluded that whilst he may have been sexually mature, the claimant was socially and morally immature when he committed his crimes.
11. In December 2011, a social worker had reported that detention had kept the claimant away from wider society such that he had no regular contact with the Afghan community and he looked to British citizens for guidance and support so that when his personal identity was established during his significant teenage development, it took place with British people in Britain.
12. Following release from custody, the claimant studied at college where he met his now wife JB who was 19 at a time when the claimant must have been almost 18. They developed a relationship which led to her being assaulted by her father and made homeless. The couple moved in together in May 2012 and went through an Islamic marriage ceremony in November 2012. Children were born in August 2013, July 2014, June 2015 (and August 2018.)
13. JB was born into a Bangladeshi family in the north of England, but she is a naturalised British citizen. Her father is now reconciled to JB and supports her, as does one of her siblings, but she has no contact with her mother and her other seven siblings. JB works in a shop and the claimant looks after their children to allow her to do so.
14. The family was reviewed by social services in November 2016. Social worker Sue Wells noted that the claimant had been supervised by probation teams on licence and had been compliant in revealing his criminal history to his partner, colleges and cricket teams. His education record was exemplary and he was well thought of by those he engaged with in clubs and other groups. Despite the claimant being in immigration detention for 15 months from March 2015 to June 2016 the relationship endured and Ms Wells noted a close and mutually supportive relationship.
15. Ms Wells had been involved in a child protection case conference after the birth of the first child which concluded that the claimant could live in family with his child despite her being a child under 16. A family support plan was put in place but no longer deemed necessary when the second child was born from which the FtTJ inferred that police and social services were confident that the claimant would not offend, at least not against his own children. Ms Wells observed a strong attachment between the children and the claimant.

16. Other agencies concluded that the claimant presented low risk and no longer needed supervision by the end of 2016 and that his compliance with sex offender notification requirements had been good.

*FtTJ assessment of article 8, paras 56-66*

17. The FtTJ recognised that considerable weight must be accorded to the gravity of the offences which will have caused lifelong damage to the victim. The custodial term of 4 years brought the claimant into the most serious category of offender in section 117C of the 2002 Act (para 56). At para 57 she noted that the claimant continued to be in denial about having committed the crimes which she recognised could inhibit rehabilitation.
18. At para 58 the FtTJ considered the risks of further offending which had been professionally assessed as being low. She noted that the offences had been committed when the claimant had undergone a turbulent time in which he had lacked guidance from family or others. General sentencing principles include a recognition that the culpability of young offenders is lower than it is for adults and that rehabilitation is a more prominent consideration. Noting also that the claimant is now in a stable heterosexual relationship, she concluded that whilst reoffending cannot be excluded, it was unlikely. The FtTJ found little weight attached to the claimant's private life (para 59.)
19. At para 60, the FtTJ accepted that the claimant has substantial and enduring family life with JB and their children. In para 61 she concluded that for them to go to Afghanistan would be very hard. In para 62 she concluded that for JB to stay behind with three or four young children, cut off from her wider family and without moral or practical support would be hard both financially and socially, even allowing for state financial support.
20. It would be harsh for the children to stay with their mother in the UK without the claimant and it would be in their best interests to be with both parents in the UK, (para 61).
21. We narrate paras 65 and 66 in full:

“This tribunal must weight and then balance the various factors of state interest and private and family life. There is undoubted public interest in not permitting criminals to remain. The offence was very serious as reflected in the sentence and the ongoing disability (in social and employment terms) of being on the sexual offences register. It attracts considerable weight and there must be deportation unless there are compelling circumstances not to. In weighting compelling circumstances, I take account of the appellant's youth at the time, his conduct since conviction, the context of the offending behaviour, the unlikelihood of reoffending, the lack of other trouble. This diminishes the weight that might otherwise be attached. Against it is the question whether he has a subsisting relationship with a qualified child: he does with three of them. The effect of his deportation will be harsh; it is not in their interest to live in Afghanistan, for the reasons already discussed. If they remain in the UK without their father they will

suffer the disadvantages of coming from a numerous single parent family, with a mother struggling to cope (as on account of family members she did when the appellant was in detention) and without much other family support, and they will lose their relationship with a loving and involved father. This case is unusual for the mother's own youth, and that she has forfeited her own family's sympathy and support, such that she will struggle more than most single mothers to be an adequate parent.

66. Balancing the diminished weight of the public interest with the harsh effect of deportation on the qualifying children, I conclude that the interests of the children, do amount to very compelling circumstances, that the public interest here does not displace the right to family life, and that the appellant should remain."

### *The Secretary of State's Challenge*

22. In 9 enumerated paragraphs the Secretary of State contends that the FtTJ erred in law in finding that there were very compelling circumstances per section 117 C (6) of the 2002 Act.
- Para 3 - Since the only mitigating circumstance founded on by the FtTJ was the position of the children, this could not amount to very compelling circumstances without more: NA (Pakistan) v Secretary of State for the Home Department [2017] 1 WLR 207.
  - Para 4 - with reference to Ali v Secretary of State for the Home Department [2016] UKSC 60 paras 36-38 and AH Jamaica [2017] EWCA Civ 796 at para 35, the absence of offending on the part of the claimant since 2007 was not a compelling feature of the case and it was an error to treat it as such.
  - Para 7 contains a related contention that the public interest in deportation is multi-dimensional so that low risk of offending and/or rehabilitation carries little if any weight; with reference to PF (Nigeria) v Secretary of State for the Home Department [2015] Civ 251, Taylor v Secretary of State for the Home Department [2015] EWCA Civ 845, Olarewaju v Secretary of State for the Home Department [2018] EWCA Civ 557.
  - Para 6 - conclusions that it would be harsh for the claimant's children to remain in the UK without him and his departure would not be in their best interests did not meet the threshold of being unduly harsh far less very compelling.
  - Para 8 - the decision in Secretary of State for the Home Department v OP (Jamaica) [2018] EWCA Civ 316 showed that the position of the claimant's children and partner could not amount to very compelling circumstances.
  - Para 9 - the FtTJ had erred in finding that there was diminution in the weight to be accorded to the public interest, and there was a failure to provide clear reasons for the conclusion that there were compelling circumstances over and above harshness and undue harshness for them.

*Submissions for the Secretary of State*

23. Mr Tufan founded heavily on Secretary of State for the Home Department v OP (Jamaica) [2018] Civ 316 as a case with many parallels which tended to demonstrate that the FtTJ had erred in her assessment of “very compelling circumstances.” The decision of the Supreme Court in *Ali* vouched that it would only be a very strong claim indeed which could prevail over the public interest in deportation where the sentence was 4 years or more. The FtTJ had erred in finding that the effect on the children remaining in the UK on the claimant’s deportation was unduly harsh. The proper approach was explained by the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] 1 WLR 5273 at para 27. Whilst their life might be harder without their father, that is simply an ordinary consequence of deportation; AD Lee v Secretary of State for the Home Department [2011] EWCA Civ 348 at para 27. It must be doubtful whether the relative youth of the children’s mother was a material consideration. Insofar as rehabilitation could have any relevance, the claimant’s complete denial of his guilt pointed away from remorse and might be seen to increase the risk he presented. The reference to very compelling circumstances in para 65 amounted to no more than lip service being paid to this important provision.

*Submissions for the claimant*

24. Mr Allison founded on R (Kiarie) v Secretary of State for the Home Department [2017] UKSC 42 at para 55 where Lord Wilson had indicated that it would be legitimate to consider the risk of re-offending amongst other factors when considering the issue of very compelling circumstances. The relative youth of an offender was a germane, though not conclusive, consideration in this context as vouched by the Court of Appeal in Secretary of State for the Home Department v JZ (Zambia) [2016] EWCA Civ 116, citing Maslov v Austria [2009] INLR 47.
25. Counsel characterised the Secretary of State’s submissions as disagreement on the reasons but since the FtTJ had addressed and answered the correct questions in a manner consistent with that proposed by the Supreme Court in *Ali*, the only possible error of law could be whether adequate reasons were given.
26. On a proper analysis it was clear that the FtTJ knew and applied the correct tests and gave adequate reasons for her decision. She had reviewed family life at paras 39-43 which informed what was written at paras 62-65. Departing from written submissions presented as a Rule 24 response, counsel recognised that on a reasonable view the FtTJ may not have determined that there would be undue harshness for the children on the claimant’s deportation.

*Analysis*

27. The 2002 Act provides in section 117 C:

**“117C Article 8: additional considerations in cases involving foreign criminals**

- (1) The deportation of foreign criminals is in the public interest.

- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
- (4) Exception 1 applies where –
- (a) C has been lawfully resident in the United Kingdom for most of C's life,
  - (b) C is socially and culturally integrated in the United Kingdom, and
  - (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
- (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.”

28. These provisions, (or the almost identical Immigration Rules 398, 399 and 399A in the case of *Ali*) have been considered by authoritative courts on numerous occasions. We note in particular the observations of Lord Reed and Lord Thomas in *Ali*:

“38 The implication of the new rules is that paragraphs 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of paragraphs 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in the *SS (Nigeria)* case [2014] 1 WLR 998 . The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and paragraphs 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is

outweighed, other than those specified in the new rules \*4816 themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with the Huang case [2007] 2 AC 167 , para 20), but they can be said to involve “exceptional circumstances” in the sense that they involve a departure from the general rule.”

Lord Thomas proposed that an FtT judgment in a “very compelling circumstances” case might be structured in the following way:

“83 One way of structuring such a judgment would be to follow what has become known as the “balance sheet” approach. After the judge has found the facts, the judge would set out each of the “pros” and “cons” in what has been described as a “balance sheet” and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders.”

29. In *Kiarie*, at para 55, Lord Wilson observed:

“55 The third is that, particularly in the light of this court's decision in the Ali case, every foreign criminal who appeals against a deportation order by reference to his human rights must negotiate a formidable hurdle before his appeal will succeed: see para 33 above. He needs to be in a position to assemble and present powerful evidence. I must not be taken to be prescriptive in suggesting that the very compelling reasons which the tribunal must find before it allows an appeal are likely to relate in particular to some or all of the following matters: (a) the depth of the claimant's integration in United Kingdom society in terms of family, employment and otherwise; (b) the quality of his relationship with any child, partner or other family member in the United Kingdom; (c) the extent to which any relationship with family members might reasonably be sustained even after deportation, whether by their joining him abroad or otherwise; (d) the impact of his deportation on the need to safeguard and promote the welfare of any child in the United Kingdom; (e) the likely strength of the obstacles to his integration in the society of the country of his nationality; and, surely in every case; (f) any significant risk of his reoffending in the United Kingdom, judged, no doubt with difficulty, in the light of his criminal record set against the credibility of his probable assertions of remorse and reform.”

30. It is plain that in making this assessment, there is no restriction on the circumstances which may be relevant albeit in some of the judgments there are indications of which factors are more likely to be integral. At para 26 in HA, Lord Reed explained:

“26. In a well-known series of judgments the [European Court of Human Rights] has set out the guiding principles which it applies when assessing the likelihood that the deportation of a settled migrant would interfere with family life and, if so, its proportionality to the legitimate aim pursued. In *Boultif v Switzerland* (2001) 33 EHRR 50 , para 48, the court said that it would consider 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. Two further factors were mentioned in *Üner v The Netherlands* (2006) 45 EHRR 14 , para 58: 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 the social, cultural and family ties with the host country and with the country of destination. In *Maslov v Austria* [2009] INLR 47 , paras 72-75, the court added that the age of the person concerned can play a role when applying some of these criteria. For instance, when assessing the nature and seriousness of the offences, it has to be taken into account whether the person committed them as a juvenile or as an adult. Equally, when assessing the length of the person's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it makes a difference whether the person came to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult. Some of the factors listed in these cases relate to the strength of the public interest in deportation: that is to say, the extent to which the deportation of the person concerned will promote the legitimate aim pursued. Others relate to the strength of the countervailing interests in private and family life. They are not exhaustive."

31. This is consistent with the approach of the Court of Appeal as exemplified in *NA (Pakistan)*:

"29 In our view, the reasoning of the Court of Appeal in the *JZ (Zambia)* case [2016] Imm AR 781 applies to those provisions. The phrase used in section 117C (6), in paragraph 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paragraphs 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those exceptions and those paragraphs, which made his claim based on article 8 especially strong."

32. From the passages we have quoted, it is clear that rehabilitation is not excluded from consideration and nor is the absence of further convictions following an offence; eg Lord Reed's reference in *Ali* at para 38 to the conduct of an offender since he committed the offence. Low risk of reoffending can be considered according to Lord Wilson in *Kiarie*. Notwithstanding the appellant continuing to deny committing his crime, in this case the position before the FtTJ was that a number of agencies were in agreement that the claimant presents a low risk of reoffending which has been the position for some years now.

33. We recognise that a low risk of reoffending cannot be a complete answer as the protection of the public is only one aspect of the public interest in deporting foreign criminals. The deterrent effect which deportation of foreign criminals should have in deterring others from offending is a material aspect of the public interest in this context along with ensuring that the public will have confidence that offenders will be properly punished. We note that in *Ali* Lord Wilson agreed with Lord Kerr that the emotive language he had used in referring to reflecting public revulsion, OH (Serbia) v Secretary of State for the Home Department [2009] INLR 109 ought not to be used.
34. We are not convinced that considerations of general deterrence ought to be accorded particular weight in a case involving a crime committed 11 years ago by a 13 or 14 year old. It appears to us that the FtTJ recognised the gravity of the crime and the public interest in not allowing criminals to remain. We consider that she recognised the strength of the public interest in deportation arising from this crime.
35. We do not agree with the submission that the FtTJ made a finding that it would be unduly harsh for the claimant's partner or children to remain in the UK on his being deported to Afghanistan. The FtTJ chose her words carefully and referred to circumstances being hard and harsh, but she did not misapply the test. She recognised that her findings fell short of meeting Exception 2, but meeting Exception 2 would not, of itself, have availed the claimant where the sentence under consideration was for 4 years.
36. We note that some of the circumstances found in *OP (Jamaica)* bear some resemblance to some of the features relied on by the FtTJ in the present case, but note also that the appellant in that case arrived in the UK when he was almost 18 and committed his qualifying crime of robbery when he was 27. The facts of the cases are different in a number of material respects and the evaluation is inevitably fact-sensitive: KE (Nigeria) v Secretary of State for the Home Department [2018] 1 WLR 2610 at paras 30 and 31.
37. We understand the FtTJ to have been undertaking an analysis of all of the circumstances of the kind proposed by the Supreme Court in *Ali* as described by Lord Reed at para 38 and Lord Thomas at para 83. We consider this to be clearly illustrated in her paragraph 65 in particular.
38. Seen in this light, we consider that the FtTJ recognised that the best interests of the children did not of themselves necessarily amount to a very compelling circumstance.
39. In the House of Lords, Lady Hale explained why sentencing children involves particular considerations which seem to have at least some relevance in the deportation context, in Regina (Smith) v Secretary of State for the Home Department [2006] 1 AC 159.

"23 On 1 March 2005, the United States Supreme Court decided, in *Roper v Simmons* , that the Eighth and Fourteenth amendments of the United States

Constitution forbade the imposition of the death penalty upon offenders who were under 18 when the offence was committed. In doing so, the majority explained, at pp 15-16, three general differences between juveniles and adults:

"First, as any parent knows and as the scientific and sociological studies respondent and his amici cite tend to confirm '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' [ *Johnson v Texas* (1993) 509 US 350 , 367] ... It has been noted that 'adolescents are overrepresented statistically in virtually every category of reckless behaviour.' Arnett, 'Reckless Behaviour in Adolescence: A Developmental Perspective' (1992) 12 *Developmental Review* 339 ... The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure ... This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, 'Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty' (2003) 58 *Am Psychologist* 1009, 1014 ... ('[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting'). The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E Erikson, *Identity: Youth and Crisis* (1968)."

24 In the court's view, the first of these meant that a juvenile's irresponsible conduct was not as morally reprehensible as that of an adult; the second meant that juveniles had a greater claim to be forgiven for failing to escape the negative influences around them; and the third meant that even the most heinous crime was not necessarily evidence of an irretrievable depraved character. Furthermore, at p 19:

"It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. See Steinberg & Scott 1014-1016."

25 These considerations are relevant to the retributive and deterrent aspects of sentencing, in that they indicate that the great majority of juveniles are less blameworthy and more worthy of forgiveness than adult offenders. But they also show that an important aim, some would think the most important aim, of any sentence imposed should be to promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity. That is no doubt why the Children and Young Persons Act 1933, in section 44(1), required, and still requires, every court dealing with any juvenile offender to have regard to his or her welfare. It is important to the welfare of any young person that his need to develop into fully functioning, law abiding and responsible member of society is properly met. But that is also important for the community as a whole, for the community will pay the price, either of indefinite detention or of further offending, if it is not done."

40. We consider it to have been of particular importance that the claimant was aged 13 (as accepted by the Secretary of State) or 14 (as found by the trial judge) when he committed his series of rapes of a boy aged 7. He had found himself in foster care in a substantially alien environment. This does not excuse what he did, but it is relevant context which the FtTJ was entitled to weigh in the balance.
41. The age of the offender is a relevant consideration as Lord Reed confirmed in *Ali* at para 26. It is of course true that very considerable effect was given to the claimant's age by the trial judge who indicated that had he been an adult he would have considered a sentence of 12 years. However, in the particular circumstances of this case, we do not consider that the trial judge giving great mitigating effect to the claimant's youth when he offended means that relevance of this consideration is thereafter exhausted.
42. As we have noted it is accepted that the possibility of rehabilitation is accorded greater importance in the case of children than in the case of adults and, at least in the circumstances of this case, we consider it to be of significant relevance in the deportation context which is concerned with the public interest, one aspect of which is protection of the public. In this case we consider that the FtTJ was right to give weight to the claimant's age, his conduct since he was convicted, his apparent rehabilitation and his low-risk of reoffending, the passage of time since he had offended and what had happened to him in the meantime.
43. The FtTJ found that he was in a genuine and subsisting relationship with a British partner and, more importantly, three young children with whom he had very close bonds. The partner's particular circumstances which included a significant degree of ostracism from her own family and her own relative youth were recognised and considered. She recognised that those circumstances would not of themselves be sufficient to meet the threshold of the exceptions if those had applied. However, the weight of the family life and the factors relating thereto were relevant thereafter to the balancing exercise which the Judge had to conduct per *Ali*.
44. The FtTJ assembled the combination of circumstances we have summarised and then analysed it against the obviously strong public interest in the deportation of the claimant for committing a crime so heinous and which attracted a sentence bringing him within the scope of section 117 C (6). The FtTJ conducted the sort of balancing exercise advocated by the Supreme Court in *Ali*, carefully balancing the weight to be given to the "harsh" effects on family life against the public interest which, although very weighty, fell to be considered in the light of the factors which we set out above; the background to the offending, and the low risk/rehabilitation since the offence was committed more than 11 years ago when he was 13 or 14.
45. We recognise that another Judge might have reached a different conclusion having conducted the same balancing exercise, but an evaluation of Article 8 is necessarily a matter of assessment and the conclusion which the FtTJ reached based on her assessment was open to her for the reasons she gives. Based on our foregoing

analysis and for the reasons we give, the grounds do not disclose any error of law in the FtTJ's decision.

**Notice of Decision**

**The decision of the FtT does not involve the making of an error of law. We uphold the decision of First-tier Tribunal Judge Goodman promulgated on 3 October 2018 with the consequence that HW's appeal remains allowed.**

Signed

A handwritten signature in black ink, appearing to read 'Lord Beckett', written in a cursive style.

Dated 1 February 2019

pp. Lord Beckett sitting as an Upper Tribunal Judge.