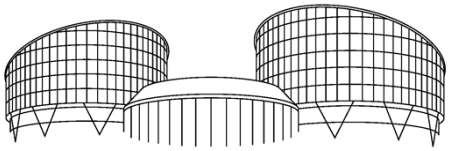

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF UNUANE v. THE UNITED KINGDOM

(Application no. 80343/17)

JUDGMENT

Art 8 • Private and family life • Deportation after conviction for falsifying immigration documents running counter to best interests of applicant's minor children • Courts and tribunals not precluded by domestic immigration rules from carrying out assessment of deportation in compliance with Court case-law • No balancing exercise carried out by tribunal • Nature and degree of the seriousness of the offence not outweighing best interests of the applicant's children in the circumstances of the case

STRASBOURG

24 November 2020

FINAL

24/02/2021

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Unuane v. the United Kingdom,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Yonko Grozev, *President,*
Iulia Antoanella Motoc,
Gabriele Kucsko-Stadlmayer,
Pere Pastor Vilanova,
Tim Eicke,
Jolien Schukking,
Ana Maria Guerra Martins, *judges,*

and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

The application (no. 80343/17) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Nigerian national, Mr Charles Unuane ("the applicant"), on 22 December 2017;

The decision to give notice of the application to the United Kingdom Government ("the Government");

The parties' observations;

Having deliberated in private on 13 October 2020,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applicant complained under Article 8 of the Convention that his deportation to Nigeria disproportionately interfered with his family and private life. He further complained, under Article 8 of the Convention taken alone and/or read together with Article 13 of the Convention, that domestic law had prevented the relevant decision-makers from conducting a detailed proportionality assessment.

THE FACTS

2. The applicant, Mr Charles Unuane, is a Nigerian national who was born in 1963. He is represented before the Court by Ms N. Burgess of the Joint Council for the Welfare of Immigrants, a lawyer practising in London.

3. The Government were represented by their Agent, Ms P. Fudakowska of the Foreign and Commonwealth Office.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Background

5. The applicant is a Nigerian national born in 1963. He has three children with his Nigerian partner: D (born 2002); B (born 2004); and C (born 2006). While D has been a British citizen throughout, B and C have since also been registered as British citizens. Shortly after birth D was diagnosed with pulmonary atresia with intact ventricular septum, a rare congenital heart defect.

6. The applicant first met his current partner in 1992 when both were living in Nigeria. They married in 1995, but the relationship broke down in 1998. In 1998, the applicant came to the United Kingdom as a visitor, whereupon he commenced a relationship with a Portuguese national. In 1999, the applicant dissolved his marriage with his partner and married the Portuguese national. The applicant was granted a right of residence in August 1999. In December 2000, the applicant's Nigerian partner entered the United Kingdom and shortly thereafter he re-commenced his relationship with her. Their three children were born thereafter.

7. In February 2005 the applicant was convicted of obtaining a money transfer by deception. He was sentenced to a period of unpaid work and ordered to pay a fine. In November 2009 the applicant and his partner were both convicted of offences relating to the falsification of some thirty applications for leave to remain in the United Kingdom. The applicant was ultimately sentenced to a period of five years and six months imprisonment, while his partner was sentenced to eighteen months imprisonment.

8. The applicant's custodial sentence ended on 26 October 2012. Thereafter he remained in immigration detention until 6 November 2012.

B. Deportation proceedings

9. On 2 June 2014, the Secretary of State for the Home Department made a deportation order against the applicant. Pursuant to section 32(5) of the United Kingdom Borders Act 2007 ("the 2007 Act") the Secretary of State was required to make a deportation order in respect of foreign criminals sentenced, *inter alia*, to a period of imprisonment of at least twelve months. The Secretary of State considered that the applicant was a foreign criminal as defined by section 32(1) of the 2007 Act and accordingly his deportation, by virtue of section 32(4) of the 2007 Act, was deemed to be conducive to the public good. A further deportation order was made against the applicant's partner for the same reasons. In addition, a deportation order was made against B and C as dependent family members of the applicant's partner. At the time, unlike D, B and C were not yet British citizens.

10. On 16 June 2014 the Secretary of State provided reasons for her decision. The Secretary of State considered the applicant's family and private life rights under Article 8 of the Convention in line with the Immigration Rules. By virtue of paragraph 398 of the Immigration Rules (see paragraphs 29-34 below), where a person had been sentenced to a period of imprisonment of at least four years, the person would be required to show "exceptional circumstances" outweighing the public interest before his or her Article 8 claim could succeed. The applicant had been sentenced to a period of imprisonment of at least four years. In relation to the impact on D, the Secretary of State considered that he could voluntarily depart the United Kingdom to continue his family life with his parents and siblings in Nigeria, where he could avail himself of treatment for his heart condition. Accordingly, the Secretary of State concluded that the applicant had failed to demonstrate any exceptional circumstances to outweigh the public interest in favour of deportation.

C. The appeal proceedings

11. The applicant appealed the Secretary of State's decision on the grounds that he had an established family life and private life in the United Kingdom and his deportation to Nigeria would be in breach of Article 8 of the Convention. In particular, the applicant argued that the Secretary of State had given insufficient weight to the applicant's children, particularly D, who was a British citizen. The applicant's partner, together with B and C, also appealed on similar grounds.

12. On 9 February 2015 the First-tier Tribunal dismissed the applicant's appeal. The First-tier Tribunal treated the applicant's family as his dependents, whose appeal fell to be determined in line with his. This meant that the applicant's partner could not succeed if the applicant himself did not succeed. In March 2015 the First-tier Tribunal granted the applicant permission to appeal the decision.

13. On 28 January 2016 the Upper Tribunal allowed the applicant's appeal. The Upper Tribunal found that the First-tier Tribunal had made a material error of law by treating the appeals as indivisible. The Upper Tribunal set aside the decision of the First-tier Tribunal and listed the appeals to be heard again by the Upper Tribunal.

D. Decision of the Upper Tribunal of 5 October 2016

14. On 4 June 2016 the Upper Tribunal heard the appeals of the applicant, his partner and B and C. It gave judgment on 5 October 2016.

15. The medical evidence presented to the Upper Tribunal consisted of a report prepared by a consultant paediatric cardiologist at a leading children's hospital, who had been responsible for D's treatment throughout,

dated February 2016. This report explained that D had already undergone three open heart operations and that he would require further open heart surgery in order to replace a tube between the right ventricle and the lung arteries in the "reasonably near future". The report suggested that this could be required at some point in the next three to four years. The report further stated that the necessary surgery would not be available in Nigeria and accordingly sending D to Nigeria would have a "significant impact on his long-term future". The report's conclusion that the necessary surgery would not be available in Nigeria was not challenged by the Secretary of State.

16. The applicant further relied on the content of a report by the Offender Assessment System, in which the Probation Service apparently indicated that he was at "no risk of reoffending". However, his representatives were unable to produce a copy of the report.

17. In addition, there was evidence before the Tribunal that the applicant's parents and five of his siblings still lived in Nigeria, as did his partner's mother and five of her siblings.

18. The Upper Tribunal's determination began by considering the appeals on behalf of the children B and C, who had lived all their lives in the United Kingdom. They had no experience of life in Nigeria and, as their parents were not "well-connected" there, they would be unlikely to go back to "good circumstances". It therefore had "no hesitation" in saying that it was in the best interest of the children for them to remain in the United Kingdom with both their parents, who, notwithstanding their criminal activities, had managed to produce well-adjusted children. According to the Tribunal, it would be facile to pretend that the applicant had not contributed to this success. Nevertheless, it did not follow that any of the parties should be allowed to remain. The Tribunal then considered the position of D. It acknowledged that there was clear evidence that the necessary surgery which he would require in the future was not available in Nigeria. Furthermore, given that medical treatment under the National Health Service was residence-based, it would not be possible for D to go to Nigeria and return to the United Kingdom at some point in the future for the surgery. In any event, as D was a British citizen and a minor, he could not be expected to leave the United Kingdom. The Tribunal further accepted that on account of his medical condition and forthcoming surgery his need for parental support was enhanced and "as a matter of informed common sense, it would be good for him to have the support of his mother at that time just as it would be good for the mother to be able to be near him". Having accepted that D could not leave the United Kingdom, the Tribunal considered that it would be undesirable to split the siblings. It therefore concluded, having regard to the Immigration Rules with reference to Article 8 of the Convention, that the appeals of the applicant's partner and minor children were allowable because the effect of separating them would be "unduly harsh" on the children.

19. In relation to the applicant, the Tribunal concluded that they could not allow his appeal despite the fact that the "arguments in favour of his remaining for the sake of the children are in some cases the same as the case of the [wife]. The wife needs him and she is staying. The boys need him". Nevertheless, the Tribunal concluded that:

> "... Parliament has imposed requirements on the Article 8 balancing exercise which we have to follow. Paragraph 398 of HC395 requires that in a case where a person has been sentenced to at least four years' imprisonment (as has the first Appellant) then the public interest in deportation will outweigh other factors unless there are 'very compelling circumstances over and above those described in paragraphs 399 and 399A'.
>
> These are Rules that deal with people in genuine and subsisting parental relationships with the children and who have been in the United Kingdom for a long time themselves. We are quite satisfied that there is a genuine and subsisting parental relationship with the children but there are no 'very compelling circumstances over and above those described at paragraphs 399 and 399A'.
>
> We raised the point with Counsel at the beginning of the hearing. It is no discredit to him that he was not really able to point to anything that would satisfy the requirements of this Rule. The point is echoed in Section 117C of the Nationality, Immigration and Asylum Act 2002 which requires that in the case of a person sentenced to at least four years' imprisonment 'the public interest requires deportation unless there are very compelling circumstances, over and above those described in Sections 1 and 2'.
>
> For similar reasons, there are no such very compelling circumstances here."

20. The applicant's appeal was therefore dismissed.

E. Subsequent proceedings

21. The applicant sought permission to appeal the Upper Tribunal's decision on the ground, *inter alia*, that it did not consider the relevant "Strasbourg factors" which, following the judgment of the Supreme Court in *Hesham Ali v. Secretary of State for the Home Department* (see paragraphs 46-49 below), ought to have fed into its analysis. By a decision dated 2 October 2017, the Court of Appeal refused permission to appeal as it considered that the decision under challenge contained "no arguable errors of law".

22. The applicant was deported on 27 February 2018.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

A. Domestic law and practice

1. The Human Rights Act 1998

23. Section 2 of the Human Rights Act 1998 provides that, in determining any question that arises in connection with a Convention right,

courts and tribunals must take into account any case-law from this Court so far as it is relevant to the proceedings in which that question has arisen.

24. Section 3(1) provides that primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights so far as it is possible to do so and section 6(1) makes it unlawful for a public authority to act in a way which is incompatible with a Convention right.

2. Deportation of a foreign criminal

(a) The Immigration Act 1971

25. Section 3(5) of the Immigration Act 1971 provides that a person who is not a British citizen is liable to deportation from the United Kingdom if (a) the Secretary of State deems his deportation to be conducive to the public good, or (b) another person to whose family he belongs is or has been ordered to be deported.

(b) The United Kingdom Borders Act 2007

26. Section 32(4) and (5) of the United Kingdom Borders Act 2007 provides that, subject to section 33, the Secretary of State "must" make a deportation order in respect of a "foreign criminal", and, for the purposes of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good. A foreign criminal is defined as a person who is not a British citizen, who has been convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least twelve months.

27. According to section 33, section 32(4) and (5) does not apply where the removal of the foreign criminal in pursuance of the deportation order would breach his rights under either the Refugee Convention or the European Convention on Human Rights.

(c) Borders, Citizenship and Immigration Act 2009

28. Section 55 of the Borders, Citizenship and Immigration Act 2009 places the Secretary of State for the Home Department under a duty to make arrangements for ensuring that any functions in relation to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.

(d) The Immigration Rules

29. As the House of Lords confirmed in its judgment in *Odelola v Secretary of State for the Home Department* [2009] UKHL 25 (per Lord Hoffmann at paragraph 6), the Immigration Rules are detailed statements by the Secretary of State for the Home Department which set out

how she proposes to exercise the power of the executive to control immigration. They are not subordinate legislation but they do create legal rights: for example, under section 84(1) of the Nationality, Immigration and Asylum Act 2002, one may appeal against an immigration decision on the ground that it is not in accordance with the Immigration Rules.

30. On 9 July 2012 the Secretary of State amended the Immigration Rules to include new rules on deportation. The new rules provided as follows:

> "Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these Rules as at 9 July 2012 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served."

31. Paragraphs 398 to 399A set out the situations in which a foreign criminal's private and/or family life would be deemed to outweigh the public interest in effecting his or her deportation. In the case of offenders sentenced to between twelve months and four years' imprisonment, the new rules identified a number of situations in which the public interest in deportation would be outweighed. However, for more serious offenders sentenced to four or more years' imprisonment, the public interest in deportation would only be outweighed in "exceptional circumstances".

32. The Explanatory Memorandum stated that:

> "The new Immigration Rules will reform the approach taken as a matter of public policy towards ECHR Article 8 – the right to respect for family and private life – in immigration cases. The Immigration Rules will fully reflect the factors which can weigh for or against an Article 8 claim. The rules will set proportionate requirements that reflect the Government's and Parliament's view of how individuals' Article 8 rights should be qualified in the public interest to safeguard the economic well-being of the UK by controlling immigration and to protect the public against foreign criminals. This will mean that failure to meet the requirements of the rules will normally mean failure to establish an Article 8 claim to enter or remain in the UK, and no grant of leave on that basis. Outside exceptional cases, it will be proportionate under Article 8 for an applicant who fails to meet the requirement of the rules to be removed from the UK."

33. On 13 June 2012, the Home Office issued a statement entitled "Immigration Rules on Family and Private Life: Grounds of Compatibility with Article 8 of the European Convention on Human Rights". According to the statement:

> "The intention is that the Rules will state how the balance should be struck between the public interest and individual right, taking into account relevant case law, and thereby provide for a consistent and fair decision-making process. Therefore, if the Rules are proportionate, a decision taken in accordance with the Rules will, other than in exceptional cases, be compatible with A8."

34. The statement concluded that "[i]t is the Department's view that the new Rules on family and private life are compatible with ECHR Article 8".

(e) Nationality, Immigration and Asylum Act 2002

35. Section 19 of the Immigration Act 2014 inserted Part 5A (Sections 117A to 117D) into the Nationality, Immigration and Asylum Act 2002, which came into force on 28 July 2014. Part 5A applies 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 of the Convention. In cases concerning the deportation of foreign criminals a court or tribunal must have regard to the considerations listed in section 117C, which provides as relevant:

> "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."

(f) The Immigration Rules as further amended in July 2014

36. On 10 July 2014, the Secretary of State laid before Parliament a Statement of Changes in Immigration Rules (HC 532), which made further amendments to the rules on deportation. Paragraph A362 of the Immigration Rules states:

> "Where Article 8 is raised in the context of deportation under Part 13 of these Rules [paragraphs A362 to 400], the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served."

37. The test in the amended rules echoes the test contained in section 117C of the Nationality, Immigration and Asylum Act 2002. In particular, paragraphs A398 to 399A state:

"Deportation and Article 8

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest 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, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

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

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

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

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

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

38. Following the 2014 amendment, the "exceptional circumstances" test in Paragraph 398 (see paragraph 31 above) became the "very compelling circumstances" test.

3. Judicial interpretation of paragraphs 398 to 399A of the Immigration Rules

(a) MF (Nigeria)

39. In both *MF* (Article 8 – new rules) *Nigeria* [2012] UKUT 393 (IAC) (31 October 2012) and *Izuazu* (Article 8 – new rules) *Nigeria* [2013] UKUT 45 (IAC) (30 January 2013) the Upper Tribunal indicated that in cases to which the Immigration Rules applied, judges should adopt a two-stage approach. First, they should consider whether a claimant was able to benefit under the applicable provisions of the Immigration Rules designed to address Article 8 claims. Where the claimant did not meet the requirements of the Rules it would then be necessary to make an assessment of Article 8 applying the criteria established by law.

40. In *MF (Nigeria)* the Tribunal held as follows:

"38. Whilst for the above reasons we consider that we are obliged by primary legislation to continue (ordinarily) to adopt a two-stage approach, we acknowledge that in practice where Article 8-specific provisions of the rules have application, the second stage assessment will take a different hue. It will now resemble that conducted under the rules to a greater or lesser extent. Clearly, if the new rules perfectly mirrored Strasbourg jurisprudence as interpreted by our higher courts, the second stage judicial exercise would largely cover the same canvas. The difficulty is that the new rules do not obviously constitute a perfect mirror. We do not seek in this decision to gauge the extent of the difference, but one particular difference is of great importance in the present case. This relates to their methodology. They do not set out in full the *Boultif* criteria (*Boultif v Switzerland*, 54273/00; [2001] ECHR 497) as restated by the Grand Chamber in *Maslov v Austria* 1683/03; [2008] ECHR 546 (see Appendix A). It is possible to read the new rules as encompassing some of these criteria, but the decision-maker is not mandated or directed to take all of them into account."

41. The Upper Tribunal's decision in *MF (Nigeria)* was the subject of an appeal to the Court of Appeal (*MF (Nigeria) v. Secretary of State for the Home Department* [2013] EWCA Civ 1192 (8 October 2013)). The court disagreed with the Upper Tribunal's approach to and interpretation of the Immigration Rules. Rather than adopt a two-stage approach, it held that the new Rules were a "complete code" and the exceptional circumstances to be considered in the balancing exercise involved the application of a proportionality test as required by the Strasbourg jurisprudence.

Therefore, in the case of a foreign prisoner to whom paragraphs 399 and 399A did not apply, very compelling reasons would be required to outweigh the public interest in deportation. These compelling reasons were the "exceptional circumstances".

42. With regard to the meaning of "exceptional circumstances", Lord Dyson, delivering the judgment of the Court, stated that:

> "43. 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 paras 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'.
>
> 44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision-maker is not 'mandated or directed' to take all the relevant Article 8 criteria into account (para 38).
>
> 45. Even if we were wrong about that, it would be necessary to apply a proportionality test outside the new rules as was done by the UT. Either way, the result should be the same. In these circumstances, it is a sterile question whether this is required by the new rules or it is a requirement of the general law. What matters is that it is required to be carried out if paras 399 or 399A do not apply.
>
> 46. There has been debate as to whether there is a one stage or two stage test. If the claimant succeeds on an application of the new rules at the first hurdle ie he shows that para 399 or 399A applies, then it can be said that he has succeeded on a one stage test. But if he does not, it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. That is an exercise which is separate from a consideration of whether para 399 or 399A applies. It is the second part of a two stage approach which, for the reasons we have given, is required by the new rules. The UT concluded (para 41) that it is required because the new rules do not fully reflect Strasbourg jurisprudence. But either way, it is necessary to carry out a two stage process."

(b) NA (Pakistan)

43. In June 2016 the Court of Appeal gave judgment in the case of *NA (Pakistan) v. Secretary of State for the Home Department* [2016] EWCA Civ 662. It considered whether the "very compelling" circumstances could be of a kind mentioned in the Exceptions:

> "The phrase used in section 117C(6), in para. 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 paras. 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.

> 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.
>
> 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."

44. The court further observed that:

> "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."

45. The court also considered the role to be played by the Strasbourg jurisprudence:

> "Against that background, one may ask what is the role of the Strasbourg jurisprudence? In particular, how does one take into account important decisions such as *Uner v Netherlands* (2007) 45 EHRR 14 and *Maslov v Austria*? Mr Southey QC, who represents KJ and WM, rightly submits that the Strasbourg authorities have an important role to play. Mr Tam rightly accepted that this is correct. 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."

(c) Hesham Ali v. Secretary of State for the Home Department

46. In *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60 (16 November 2016), the Supreme Court provided guidance on how tribunals and courts should approach decision-making in the context of immigration cases involving Article 8 of the Convention. The leading judgment was given by Lord Reed, with whom Lord Neuberger of Abbotsbury, Lord Thomas of Cwmgiedd, Baroness Hale of Richmond,

Lord Kerr of Tonaghmore, Lord Wilson and Lord Hughes agreed. He stated, insofar as is relevant:

"*Administrative decision-making*

36. Considering the new rules in the light of the guidance given by the European court, rule 397 makes it clear that a deportation order is not to be made if the person's removal would be incompatible with the ECHR. Where article 8 claims are made by foreign offenders facing deportation, rule 398 explains that the Secretary of State will first consider whether rule 399 or 399A applies. Those rules, applicable where offenders have received sentences of between 12 months and four years, provide guidance to officials as to categories of case where it is accepted by the Secretary of State that deportation would be disproportionate. The fact that a claim under article 8 falls outside rules 399 and 399A does not, however, mean that it is necessarily to be rejected. That is recognised by the concluding words of rule 398, which make it clear that a claim that deportation would be contrary to article 8 will not be rejected merely because rules 399 and 399A do not apply, but that 'it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

... ...

38. The implication of the new rules is that rules 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 rules 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 *SS (Nigeria)*. 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 rules 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 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 *Huang* [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.

... ...

Appellate decision-making

... ...

46. ... It is the duty of appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on

the basis of their own findings as to the facts and their understanding of the relevant law. But, where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, they should attach considerable weight to that assessment: in particular, that a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life; that great weight should generally be given to the public interest in the deportation of a foreign offender who has received a custodial sentence of more than 12 months; and that, where the circumstances do not fall within rules 399 or 399A, the public interest in the deportation of such offenders can generally be outweighed only by countervailing factors which are very compelling, as explained in paras 37-38 above.

... ...

50. In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders, as explained in paras 14, 37-38 and 46 above, and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in *MF (Nigeria)* - will succeed.

A complete code?

51. In *MF (Nigeria)* [2014] 1 WLR 544 the Court of Appeal described the new rules set out in para 23 above as 'a complete code' for article 8 claims (para 44). That expression reflected the view that the concluding words of rule 398 required the application of a proportionality test in accordance with the Strasbourg jurisprudence, taking into account all the article 8 criteria and all other factors which were relevant to proportionality (para 39). On that basis, the court commented that the result should be the same whether the proportionality assessment was carried out within or outside the new rules: it was a sterile question whether it was required by the rules or by the general law (para 45).

52. The idea that the new rules comprise a complete code appears to have been mistakenly interpreted in some later cases as meaning that the Rules, and the Rules alone, govern appellate decision-making. Dicta seemingly to that effect can be found, for example, in *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ 1310; [2015] Imm AR 227, para 17, and *AJ (Angola) v Secretary of State for the Home Department* [2014] EWCA Civ 1636, para 39.

53. As explained at para 17 above, the Rules are not law (although they are treated as law for the purposes of section 86(3)(a) of the 2002 Act), and therefore do not govern the determination of appeals, other than appeals brought on the ground that the decision is not in accordance with the Rules: see para 7 above. The policies adopted by the Secretary of State, and given effect by the Rules, are nevertheless a relevant and important consideration for tribunals determining appeals brought on Convention grounds, because they reflect the assessment of the general public interest made by the responsible minister and endorsed by Parliament. In particular, tribunals should

accord respect to the Secretary of State's assessment of the strength of the general public interest in the deportation of foreign offenders, and also consider all factors relevant to the specific case before them, as explained at paras 37-38, 46 and 50 above. It remains for them to judge whether, on the facts as they have found them, and giving due weight to the strength of the public interest in deportation in the case before them, the factors brought into account on the other side lead to the conclusion that deportation would be disproportionate."

47. Lord Thomas, in a separate opinion, stated:

"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.

84. The use of a 'balance sheet' approach has its origins in Family Division cases (see paras 36 and 74 of the decision of the Court of Appeal In *re B-S (Children) (Adoption Order: Leave to Oppose*) [2014] 1 WLR 563). It was applied by the Divisional Court in *Polish Judicial Authority v Celinski [2016] 1 WLR 551 to extradition cases where a similar balancing exercise has to be* undertaken when article 8 is engaged - see paras 15-17. Experience in extradition cases has since shown that the use of the balance sheet approach has greatly assisted in the clarity of the decisions at first instance and the work of appellate courts."

48. In a separate opinion, Lord Kerr said the following:

"A consistent thread running through the cases which I have discussed (and others which preceded them such as *Benhebba v France* (Application No 53441/99) (unreported) 10 July, 2003 and *Mehemi v France* (1997) 30 EHRR 739) is the need to review and assess a number of specifically identified factors in order to conduct a proper article 8 inquiry. Another theme is that this examination must be open-textured so that sufficient emphasis is given to each of the factors as they arise in particular cases. Of their nature factors or criteria such as these cannot be given a pre-ordained weight. Any attempt to do that would run counter to the essential purpose of the exercise. ...

116. ECtHR jurisprudence does not expressly forbid the making of policies in relation to the normal circumstances in which expulsion of foreign criminals should take place but it has not sanctioned the setting of policy standards as to how article 8 might be applied.

... ...

120. The ECtHR cases do not permit a national policy which limits or dictates the weight to be given to the *Boultif* factors in the article 8 balancing exercise. This is clear from, for example, the court's judgment in *Üner* where in para 60 it said '... that all the [*Boultif*] factors ... should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction'. When it comes to applying article 8, therefore, as opposed to following a purely domestic policy, it is not open to the state to say that some of the *Boultif* factors should not be taken into account or should be subservient to others. If those factors are relevant to a potential deportee's situation, they must be taken into account and they must be given the weight that they deserve, following an open-ended and rounded evaluation of the case."

49. He continued:

> "Many who fall outside the categories set out in the rules enjoy a full family or private life in every sense. The significance of that inescapable truth is that, under the 2012 Immigration Rules, anyone who does not come within any of the specified categories and who is liable to deportation as a result of their status as a foreign criminal must demonstrate 'exceptional circumstances' in order to outweigh the statutorily imposed public interest in their deportation. That requirement runs directly counter to a proper assessment of whether an interference with the right to respect for family or private life on the part of those who do not come within one of the exemptions is justified."

4. R (on the application of Agyarko) v Secretary of State for the Home Department *[2017] UKSC 11*

50. In *R (on the application of Agyarko)* Lord Reed summarised the position thus:

> "Cases are not, therefore, to be approached by searching for a unique or unusual feature, and in its absence rejecting the application without further examination. Rather, as the Master of the Rolls made clear, the test is one of proportionality. The reference to exceptional circumstances in the European case law means that, in cases involving precarious family life, 'something very compelling ... is required to outweigh the public interest', applying a proportionality test. The Court of Appeal went on to apply that approach to the interpretation of the Rules concerning the deportation of foreign criminals, where the same phrase appears; and their approach was approved by this court, in that context, in *Hesham Ali*."

B. International law and practice

51. The relevant texts adopted by the Council of Europe in the field of immigration are set out in *Üner v. the Netherlands* [GC], no. 46410/99, §§ 35-38, ECHR 2006-XII.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

52. The applicant complained that his deportation constituted a disproportionate interference with his right to respect for his family and private life and that the Upper Tribunal, in searching for "very compelling circumstances", did not conduct a proper assessment of his rights under Article 8 of the Convention.

53. Article 8 reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

54. The Government submitted that the applicant's complaint under Article 8 of the Convention should be declared inadmissible as it was manifestly ill-founded.

55. In the Court's view, however, this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

56. The applicant contended that the domestic authorities did not carry out an adequate assessment of the proportionality of his removal, since they did not properly balance his right to respect for his private and family life with the public interest in deportation. In his view, Article 8 required an assessment of whether an interference was in accordance with the law and was necessary in a democratic society for one of the proscribed aims in Article 8 § 2. Whether an interference was "necessary" in turn required a consideration of whether an interference was "proportionate". In other words, a balancing exercise was required when applying Article 8 § 2 of the Convention, and section 117C and paragraph 398 were inimical to such an approach.

57. Although the applicant acknowledged that the Supreme Court had now endorsed the "balance-sheet approach" (see paragraph 47 above), he nevertheless submitted that in his case the Tribunal had not carried out such a "free-wheeling" balancing exercise. On the contrary, the exercise carried out by the authorities was quite different. Rather than give thorough and careful consideration of the proportionality test required by the Convention, they inquired whether there were very compelling circumstances over and above those identified in Exceptions 1 and 2. The applicant could only rely on Exception 2, which required deportation to be "unduly harsh" on a British child with whom he had a genuine and subsisting relationship. However, as he had to show very compelling circumstances over and above that exception, he could only succeed if the impact of his deportation on his son was "extra unduly harsh". Such a concept lacked the clarity necessary to protect the individual against arbitrary interference. Furthermore, for persons sentenced to more than four years the risk of re-offending could only be taken into account if it amounted to a "very compelling circumstance". This was not consistent with Article 8 § 2.

58. The applicant further argued that pursuant to section 117C and paragraph 398, the domestic decision-maker was unable to adjust the weight of the public interest according to the nature and seriousness of the crimes involved. All foreign criminals with sentences of up to four years were lumped together in one group, and those with sentences of over four years were lumped together in another group, and there was no scope for the public interest to vary within either group, no matter the length of the sentence, the seriousness of the crime, or the risk of reconviction. Such an approach was incompatible with the difficult evaluative exercise required by Article 8 of the Convention.

59. The applicant relied on the dissenting opinion of Lord Kerr in *Hesham Ali*, in which he made it clear that the Convention did not permit a national policy which limited or dictated the weight to be given to the *Boultif* factors in the Article 8 balancing exercise. In Lord Kerr's view, the quest to strike the appropriate balance should not be encumbered by pre-emptive considerations of exceptionality (see paragraphs 48-49 above).

60. Finally, the applicant argued that in any event his deportation had disproportionately interfered with his right to respect for his family life. Carrying out the proper balancing exercise, he had enjoyed a genuine and subsisting relationship with his children established at a time when he had leave to remain; the children were going to suffer financial hardship on account of his deportation; they would also suffer emotionally on account of his absence, especially his eldest son, who would need further heart surgery in the foreseeable future; the children's mother would also suffer emotionally; and the applicant had been at low risk of re-offending.

(b) The Government

61. The Government argued that where there was serious criminality, attracting substantial terms of imprisonment, the public interest in favour of expulsion carried great weight (*Boultif v. Switzerland*, no. 54273/00, ECHR 2001-IX, *Üner v. the Netherlands* [GC], no. 46410/99, § 54, ECHR 2006-XII and *Maslov v. Austria* [GC], no. 1638/03, ECHR 2008). Therefore, in cases of serious criminality, expulsion would be compatible with Article 8 in the absence of private and family life factors of commensurately compelling weight. Furthermore, while the Court had repeatedly emphasised that the best interests of the child are paramount, in the context of the removal of a non-national parent as a consequence of a criminal conviction it had indicated that the decision first and foremost concerns the offender and, as a consequence, the nature and seriousness of the offence committed or the offending history might outweigh the other criteria (*Jeunesse v. the Netherlands* [GC], no. 12738/10, 3 October 2014 para 109).

62. Paragraph 398 of the Immigration Rules and section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") were

designed to reflect the public interest in the deportation of serious and/or persistent offenders, while recognising that there would be cases where the making of a deportation order would be incompatible with Article 8 of the Convention. In the Government's view, their proper application was consistent with the principles laid down by the Court and facilitated the striking of a fair balance in individual cases. Moreover, by providing a framework for the domestic decision-maker, those provisions also proved a safeguard against arbitrariness and inconsistent decision-making.

63. The Government further argued that the framework provided by the Immigration Rules and the 2002 Act did not in any way prevent the domestic authorities from considering the criteria in *Boultif, Üner* and *Maslov*, or any other factors upon which an individual wished to rely. Rather, it ensured that the domestic decision-maker appreciated that in a case of serious offending, the family and/or private life factors relied upon by the applicant would need to be commensurately weighty before the striking of a fair balance under Article 8 precluded expulsion. In this regard, the domestic courts had repeatedly made clear that paragraph 398 of the Immigration Rules and section 117C of the 2002 Act provided scope for all relevant factors to be taken into account in the proportionality assessment whilst at the same time ensuring that when the balance came finally to be struck, the public interest was accorded its proper weight. Critically, the domestic courts had repeatedly held that the legislative provisions had to be interpreted and applied so as to produce a result that was, in the individual case, compatible with Article 8 of the Convention (see, for example, *NA (Pakistan) & Ors v. Secretary of State for the Home Department* [2016] EWCA Civ 662 at paragraph 45 above).

64. In addition, the domestic courts had clarified that the "very compelling circumstances" test did not provide a comprehensive list of the factors to be taken into account. On the contrary, all relevant factors, including, for example, evidence of reform and rehabilitation, were to be looked at cumulatively and placed in the balance – and could, therefore, outweigh the public interest in deporting a foreign national who had been involved in criminal offending. Indeed, the domestic courts had made it clear that in giving effect to the domestic legislative scheme, the Tribunal had to continue to strike the proportionality balance by applying the principles laid down in *Boultif, Üner* and *Maslov*; and in *Hesham Ali v Secretary of State for the Home Department* the Supreme Court held that the domestic legislative scheme governing deportation "can and should" accommodate a "balance sheet approach" (see paragraph 47 above).

65. Moreover, the "unduly harsh" test focused simply on the impact on the child, and provided a domestic exception to deportation, in cases where the parent's offending attracted a sentence of less than four years, even if deportation would not be disproportionate once the nature and severity of the offending was weighed in the balance. Even where an individual did not

succeed on any of the specific statutory domestic exceptions to deportation (including the "unduly harsh" exception), the Tribunal nevertheless had to ultimately consider whether deportation would be disproportionate.

66. It therefore followed that a full proportionality balancing exercise always had to be conducted, preferably by way of a "balance sheet exercise", and that even where the "unduly harsh" test was not satisfied, an individual could still succeed on Article 8 grounds once all the factors in his or her favour were weighed against the public interest in deportation, having regard to the nature and severity of the offending, on the basis of the guiding principles laid down by the Court.

67. In the case at hand, the Government submitted that the Upper Tribunal, in a careful and detailed decision extending to 118 paragraphs, had considered the relevant facts. It did not, however, allow the applicant's appeal. Having assessed all the circumstances, the Upper Tribunal did not consider that they were sufficiently compelling to outweigh the public interest in the applicant's deportation, given the seriousness of his offending.

68. In the Government's view, the Upper Tribunal was entitled to reach that conclusion. The applicant had been given community punishment for his first offence of deception in 2005, but nevertheless went on to commit far more serious offences of dishonesty, which involved undermining immigration control on a substantial scale. Thus, there was a weighty public interest in the applicant's deportation, and the Upper Tribunal was correct in so concluding.

69. Should the Court disagree, and conclude that the Upper Tribunal's conclusion fell outside the ambit of the margin of appreciation on the facts of the case, the Government submitted that that could not be attributed to the domestic legislative scheme, since neither Rule 398 nor section 117C compelled the domestic decision-makers, courts or tribunals to reach conclusions that were not in conformity with Article 8. In this regard, the Government reiterated that both the Court of Appeal and Upper Tribunal had made clear that the relevant provisions of domestic law called for a "wide-ranging evaluative exercise ... in the case of all foreign criminals, in order to ensure that Part 5A of the 2002 Act produces, in each case, a result that is compatible with the United Kingdom's obligations under Article 8 of the ECHR".

2. The Court's assessment

(a) General principles

70. The State is entitled, as a matter of international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there (see, among many other authorities, *Üner*, cited above, § 54; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985,

§ 67, Series A no. 94, and *Boujlifa v. France*, 21 October 1997, § 42, Reports of Judgments and Decisions 1997‑VI). The Convention does not guarantee the right of an alien to enter or to reside in a particular country and, in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences. However, their decisions in this field must, in so far as they may interfere with a right protected under paragraph 1 of Article 8, be in accordance with the law and necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see *Üner,* cited above, § 54; see also *Boultif*, cited above, § 46, and *Slivenko v. Latvia* [GC], no. 48321/99, § 113, ECHR 2003-X).

71. These principles apply regardless of whether an alien entered the host country as an adult or at a very young age, or was perhaps even born there (see *Üner,* cited above, § 55).

72. Nonetheless, even though Article 8 of the Convention does not 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 Article 8 of the Convention (see *Üner,* cited above, § 57, and the references therein). In *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 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.

73. In *Üner,* the Court made explicit two further criteria implicit in those identified in *Boultif*:

– 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.

74. All the above factors should be taken into account in all cases concerning settled migrants who are to be expelled and/or excluded following a criminal conviction (see *Üner,* cited above, § 60).

75. In assessing whether an interference with a right protected by Article 8 was necessary in a democratic society and proportionate to the legitimate aim pursued, the Contracting States enjoy a certain margin of appreciation (see *Slivenko*, cited above, § 113, and *Boultif*, cited above, § 47). However, as the State's margin of appreciation goes hand in hand with European supervision, the Court is empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8 (see *Maslov v. Austria* [GC], no. 1638/03, § 76, ECHR 2008).

76. The requirement for "European supervision" does not mean that in determining whether an impugned measure struck a fair balance between the relevant interests, it is necessarily the Court's task to conduct the Article 8 proportionality assessment afresh. On the contrary, in Article 8 cases the Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant's personal interests against the more general public interest in the case, it is not for it to substitute its own assessment of the merits (including, in particular, its own assessment of the factual details of proportionality) for that of the competent national authorities. The only exception to this is where there are shown to be strong reasons for doing so (see *Ndidi v. the United Kingdom*, no. 41215/14, § 76, 14 September 2017; *Hamesevic v. Denmark* (dec.), no. 25748/15, § 43, 16 May 2017; and *Alam v. Denmark* (dec.), no. 33809/15, § 35, 6 June 2017).

(b) Application of the general principles to the case at hand

77. In the present case the Government accepted before the Upper Tribunal as well as before this Court that the applicant's deportation would constitute an interference with his rights under Article 8 § 1 of the Convention. Moreover, it does not appear to be in doubt that the deportation order was "in accordance with the law" and "in pursuit of a legitimate aim" (the prevention of disorder and crime) for the purposes of Article 8 § 2 of the Convention. Consequently, the principal issue to be determined is whether the applicant's deportation would be "necessary in a democratic society", or, in other words, whether the deportation order struck a fair balance between the applicant's Convention rights on the one hand and the community's interests on the other (see *Ndidi*, § 74, *Slivenko,* § 113, and *Boultif* , § 47, judgments cited above). In that respect the applicant has made two distinct complaints: that due to the requirements of paragraphs 398 and 399 of the Immigration Rules, the Upper Tribunal was not able to conduct a thorough assessment of the proportionality of his deportation; and that his

deportation from the United Kingdom disproportionately interfered with his right to respect for his family and private life.

(i) The Immigration Rules

78. The Court would stress that the criteria which emerge from the Court's case-law and which are spelled out in the *Boultif* and *Üner* judgments are primarily meant to facilitate the application of Article 8 in expulsion cases by domestic courts. Furthermore, the Court reiterates that nevertheless, in applying these criteria, the respective weight to be attached to them will inevitably vary according to the specific circumstances of each case (see *Maslov*, cited above, § 70 and *A.A. v. the United Kingdom*, no. 8000/08, § 57, 20 September 2011).

79. As a consequence, where the domestic courts properly apply Article 8 of the Convention with reference to the criteria which emerge from the aforementioned judgments, the Court will only substitute its own assessment of the merits where there are shown to be strong reasons for doing so (see *Ndidi*, cited above, § 76). On the other hand, where such "strong reasons exist", or where the domestic courts do not carefully examine the facts, apply the relevant human rights standards consistently with the Convention and the Court's case-law, and adequately balance the interests of the applicant against those of the general public, the Court remains empowered to give the final ruling on whether an expulsion measure is reconcilable with Article 8 (see *Maslov*, cited above, § 76).

80. In the present case the applicant argues that the Tribunal was precluded by the Immigration Rules from conducting such an assessment and that the Tribunal's only discretion outside the Rules would be to consider whether there existed "exceptional circumstances" or, following the 2014 amendment, "very compelling circumstances". As Lord Kerr observed, such a requirement would appear to run directly counter to a proper assessment of whether an interference with the right to respect for family or private life on the part of those who do not come within one of the exemptions is justified (see paragraphs 48-49 above).

81. That being said, the domestic courts have confirmed, and the Government has reiterated before this Court, that the Immigration Rules and section 117C of the Nationality, Immigration and Asylum Act 2002 provide scope for all relevant factors to be taken into account in the proportionality assessment and that, in considering whether "exceptional" or "very compelling circumstances" exist, the authorities should consider the proportionality test required by this Court. In *MF (Nigeria)*, the Court of Appeal found that "the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence (see paragraph 42 above). In *NA (Pakistan)*, the Court of Appeal held that any court or tribunal applying the tests required by the Immigration Rules and the 2002 Act

"should heed the guidance contained in the Strasbourg authorities" since the scheme of Part 5A of the 2002 Act and paragraphs 398-399A of the Immigration Rules was "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" (see paragraph 45 above).

82. Furthermore, in *Hesham Ali* (see paragraphs 46-49 above) the Supreme Court made it clear that it was "the duty of appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law", although it acknowledged that in doing so "they should attach considerable weight to [the policy adopted by the Secretary of State]." Lord Thomas, in a separate opinion, recommended that tribunals conducting the proportionality assessment "follow what has become known as the 'balance sheet' approach". The "balance-sheet" approach requires a judge, having found the facts, to set out each of the "pros" and "cons" 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. This has since been affirmed in *R (on the application of Agyarko)* (see paragraph 50 above).

83. In light of the foregoing, the Court does not consider that the Immigration Rules necessarily preclude the domestic courts and tribunals from employing the *Boultif* criteria for the purpose of assessing whether an expulsion measure was necessary and proportionate.

(ii) The applicant's deportation

84. In the context of the present case the Upper Tribunal neither made any substantial further findings adverse to the applicant nor conducted a separate balancing exercise as required by the Court's case law under Article 8. In fact, the Upper Tribunal merely noted that it "cannot allow his appeal" on the basis that paragraph 398 of the Immigration Rules "imposed requirements" to identify "very compelling circumstances" over and above the accepted genuine and subsisting parental relationship with the children, something which the applicant could not establish.

85. In light of the above, it therefore falls to the Court, in exercise of its supervisory jurisdiction, to give the final ruling on whether an expulsion measure is reconcilable with Article 8.

86. In this context, the Court notes that in November 2009 the applicant was convicted of offences relating to the falsification of some thirty applications for leave to remain in the United Kingdom for which he was sentenced to a period of five years and six months imprisonment (see paragraph 7 above). The offence was undoubtedly serious, as evidenced

by the length of the prison sentence. Furthermore, it was not his first criminal conviction in the United Kingdom. In February 2005 he had been convicted of obtaining a money transfer by deception, for which he was sentenced to a period of unpaid work and ordered to pay a fine (see paragraph 7 above).

87. That being said, the Court has tended to consider the seriousness of a crime in the context of the balancing exercise under Article 8 of the Convention not merely by reference to the length of the sentence imposed but rather by reference to the nature and circumstances of the particular criminal offence or offences committed by the applicant in question and their impact on society as a whole. In that context, the Court has consistently treated crimes of violence and drug-related offences as being at the most serious end of the criminal spectrum (see, for example, *Maslov*, cited above, § 85; *A.W. Khan v. the United Kingdom*, no. 47486/06, § 40, 12 January 2010; *Dalia v. France*, 19 February 1998, § 54, Reports of Judgments and Decisions 1998 I; and *Baghli v. France*, no. 34374/97, § 48, ECHR 1999 VIII but see also *Lukic v Germany*, no, 25021/08, 20 September 2011 involving multiple convictions for fraud). In any event, the fact that the offence committed by an applicant was at the more serious end of the criminal spectrum is not in and of itself determinative of the case. Rather, it is just one factor which has to be weighed in the balance, together with the other criteria which emerge from the judgments in *Boultif* and *Üner*.

88. In the present case the Upper Tribunal did weigh those other criteria in the balance, albeit exclusively with reference to the applicant's partner. After all, having concluded that they had no hesitation in saying that it would be in the best interests of the children to remain in the United Kingdom with both of their parents and that it would be "unduly harsh" to separate them, they allowed his partner's appeal and those of the minor children including under Article 8 of the Convention. Although many of the factors relevant to applicant's partner's appeal were essentially the same as those relevant to his own, his appeal was dismissed on the sole basis there were no "very compelling circumstances" over and above those which had applied in respect of his partner.

89. In the Court's view, this conclusion is not reconcilable with Article 8 of the Convention. The Upper Tribunal itself acknowledged the strength of the applicant's ties to his partner and children, all of whom would stay in the United Kingdom. It also acknowledged that his partner and children needed him, and this need for parental support was particularly acute in the case of D on account of his medical condition and forthcoming surgery. Finally, it accepted that it was in the best interests of the children for him to remain in the United Kingdom, a factor which, according to the Court's case-law, must be accorded significant weight (see *Krasniqi v. Austria*, no. 41697/12, § 47 25 April 2017). Having regard to these careful and

detailed findings by the Upper Tribunal, which must carry significant weight in the overall assessment of proportionality, the Court considers that in the circumstances of the present case the seriousness of the particular offence(s) committed by the applicant was not of a nature or degree capable of outweighing the best interests of the children so as to justify his expulsion. It therefore considers that the applicant's deportation was disproportionate to the legitimate aim pursued and as such was not "necessary in a democratic society".

90. There has accordingly been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION READ TOGETHER WITH ARTICLE 8

91. The applicant further complained that he did not have an effective remedy before a national authority for the breach of his rights under Article 8 of the Convention.

92. Article 13 of the Convention provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

93. However, the applicant was able to appeal against the deportation order, first to the First-tier Tribunal and then to the Upper Tribunal. From the Upper Tribunal, he was able to seek permission to appeal to the Court of Appeal, and in doing so he was able to argue that the Tribunal had not considered all the factors relevant to the Article 8 proportionality assessment. He was not, therefore, denied an effective remedy within the meaning of Article 13 of the Convention and this complaint must be declared inadmissible as manifestly ill-founded pursuant to Article 35 § 3(a) of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

94. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

95. The applicant claimed twenty-five thousand euros (EUR) in respect of non-pecuniary damage.

96. The Court considers that the applicant must have suffered distress and anxiety as a result of his deportation and separation from his family. Making an assessment on an equitable basis it awards the applicant EUR 5,000 under the head of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

97. The applicant also claimed "costs and expenses, to be particularised on an up-to-date basis in line with section 4 of the Practice Direction on just satisfaction claims in the event of this application being declared admissible". No further particulars of his claim have been submitted to the Court.

98. Both the Practice Direction to which the applicant refers and Rule 60 of the Rules of Court provide that an applicant who wishes to obtain an award of just satisfaction under Article 41 of the Convention must submit itemised particulars of all claims, together with any relevant supporting documents, within the time-limit fixed for the submission of his or her observations on the merits unless the President of the Chamber directs otherwise. If the applicant fails to comply with this requirement the Chamber may reject the claims in whole or in part.

99. The applicant was therefore required to submit itemised particulars of his claim for costs and expenses within the time-limit fixed for the submission of his observations on the merits. As he did not do so, the Court rejects any claim for costs and expenses.

C. Default interest

100. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning Article 8 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amount**,** to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 November 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth	Yonko Grozev
Deputy Registrar	President