Michaelmas Term
[2016] UKSC 60
On appeals from: [2014] EWCA Civ 1304

JUDGMENT

Hesham Ali (Iraq) (Appellant) *v* Secretary of State for the Home Department (Respondent)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Kerr
Lord Wilson
Lord Reed
Lord Hughes
Lord Thomas

JUDGMENT GIVEN ON

16 November 2016

Heard on 12, 13 and 14 January 2016

Appellant (Hesham Ali)	*Respondent*
Raza Husain QC Duran Seddon David Chirico (Instructed by Wilson Solicitors LLP)	Lisa Giovannetti QC Neil Sheldon (Instructed by The Government Legal Department)

LORD REED: (with whom Lord Neuberger, Lady Hale, Lord Wilson, Lord Hughes and Lord Thomas agree)

1. This appeal raises two issues relating to the deportation of "foreign criminals" as defined in the UK Borders Act 2007. The first concerns the significance of sections 32 and 33 of that Act in appeals relating to deportation which are based on article 8 of the European Convention on Human Rights. The second concerns the significance, in the same context, of changes to the Immigration Rules which came into effect in July 2012.

The statutory framework

2. It is convenient to begin by considering the principal elements of the legislative framework, as it stood at the time of the events with which this appeal is concerned. It is unnecessary to consider more recent amendments to the legislation, including those effected by the Immigration Act 2014.

The Immigration Act 1971

3. 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. Section 3(6) provides that, without prejudice to the operation of section 3(5), a person who is not a British citizen shall also be liable to deportation if, after he has attained the age of 17, he is convicted of an offence for which he is punishable by imprisonment and on his conviction is recommended for deportation by a court empowered by the Act to do so.

4. Section 5(1) provides that, where a person is liable to deportation under section 3(5) or (6), the Secretary of State may make a deportation order against him. A deportation order is defined as an order requiring the person to leave and prohibiting him from entering the UK. Section 5(5) gives effect to the provisions of Schedule 3 with respect to the removal from the United Kingdom of persons against whom deportation orders are in force. In particular, paragraph 1 of Schedule 3 provides that, where a deportation order is in force against any person, the Secretary of State may give directions for his removal to a country or territory specified in the directions.

The Nationality, Immigration and Asylum Act 2002

5. Section 82(1) of the Nationality, Immigration and Asylum Act 2002 provides a right of appeal to the First-tier Tribunal against "an immigration decision". That expression is defined by section 82(2), and includes a decision to make a deportation order under section 5(1) of the 1971 Act (section 82(2)(j)). The giving of removal directions under Schedule 3 to the 1971 Act, following the making of a deportation order, is not an "immigration decision", and is therefore not subject to appeal.

6. In terms of section 82(3A) of the 2002 Act (as inserted by section 35(3) of the UK Borders Act 2007), section 82(2)(j) does not apply to a decision to make a deportation order which states that it is made in accordance with section 32(5) of the 2007 Act (to which it will be necessary to return). However, section 82(3A)(a) provides that a decision that section 32(5) applies is itself an immigration decision, with the consequence that an appeal lies under section 82(1).

7. The grounds on which an appeal can be brought under section 82(1) are set out in section 84(1). So far as material, they are:

> "(a) that the decision is not in accordance with immigration rules ...
>
> (c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights ...
>
> (e) that the decision is otherwise not in accordance with the law; …
>
> (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

8. On an appeal, the tribunal's task is not merely to review the decision made by the Secretary of State. It reaches its decision after hearing evidence, and on the

basis of its own findings as to the facts. Under section 86(3), it is required to allow the appeal in so far as it thinks that:

> "(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or
>
> (b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently."

9. An appeal against a decision of the First-tier Tribunal lies to the Upper Tribunal, on a point of law, under section 11 of the Tribunals, Courts and Enforcement Act 2007. A further appeal lies under that Act to the Court of Appeal, or the equivalent courts in Scotland and Northern Ireland, and ultimately to the Supreme Court.

The UK Borders Act 2007

10. Section 32(4) of the 2007 Act provides that, for the purposes of section 3(5)(a) of the 1971 Act, "the deportation of a foreign criminal is conducive to the public good". The liability of "foreign criminals" to deportation, under section 3(5)(a) of the 1971 Act, does not therefore depend on any assessment by the Secretary of State: it is automatic. The expression "foreign criminal" is defined by section 32(1) of the 2007 Act as meaning a person who is not a British citizen, who is convicted in the United Kingdom of an offence, and to whom one of the conditions in section 32(2) and (3) applies. The first of those conditions is that the person is sentenced to a period of imprisonment of at least 12 months. The second is that the offence is specified by an order made by the Secretary of State, and the person is sentenced to a period of imprisonment. No such order has yet been made.

11. Section 32(5) provides that the Secretary of State "must make a deportation order in respect of a foreign criminal (subject to section 33)". Section 33 provides, so far as material:

> "(1) Section 32(4) and (5) -
>
> (a) do not apply where an exception in this section applies (subject to subsection (7) below) ...

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach -

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention ...

(7) The application of an exception -

(a) does not prevent the making of a deportation order;

(b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;

but section 32(4) applies despite the application of Exception 1 or 4."

12. It follows from the concluding words of section 33(7) that the fact that the removal of a foreign criminal would breach his Convention rights does not affect the application of section 32(4), in terms of which his deportation is conducive to the public good. Nor does it prevent the making of a deportation order. On the other hand, it results in the disapplication of section 32(5) of the 2007 Act. Parliament made that clear in section 33(2)(a), read with section 33(1)(a). The Secretary of State is therefore under no duty to make a deportation order. It may seem puzzling that a person may be liable to deportation even when he cannot be deported, but a possible explanation is that the circumstances which may render deportation incompatible with the Convention can be temporary. For example, the risk of a breach of article 3 in the country to which the person would be deported may disappear following a change of regime, or be removed as a result of negotiated guarantees. Section 32(4) keeps open the possibility of automatic deportation under section 32(5) in the event of a material change of circumstances.

13. If the Secretary of State accepts that removal would breach a foreign criminal's Convention rights, then she will not make a deportation order: the Immigration Rules have stated since October 2000 that a deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's

obligations under the Convention. If, on the other hand, the Secretary of State rejects a claim that removal would breach the foreign criminal's Convention rights, she must decide to make a deportation order as required by section 32(5). As explained earlier, an appeal lies under section 82(1) and (3A) of the 2002 Act against the decision that section 32(5) applies, on the ground that the decision, or removal, is unlawful under section 6 of the Human Rights Act 1998, or on the ground that the decision is not in accordance with immigration rules, or is otherwise not in accordance with the law.

14. Sections 32 and 33 were enacted in response to Parliamentary and public concern about failures to deport large numbers of foreign citizens who had committed serious offences in the UK, due partly to the practices followed by the Home Office at that time (under which there was not, until July 2006, any presumption in favour of deportation), and partly to delays and uncertainty affecting the procedures for deportation. The level of that concern, and the justification for it, are apparent from the documents forming the background to the 2007 Act: see, in particular, *Immigration Control,* House of Commons Home Affairs Committee, Fifth Report for 2005-06, HC 775-I, paras 516-535, and *Fair, effective, transparent and trusted: Rebuilding confidence in our immigration system,* Home Office, July 2006. (One might observe, in parenthesis, that the present appeal illustrates the extent to which delays and uncertainty continue to affect the system: a deportation order was made in 2010, and the appeal proceedings have not yet been completed). Sections 32 and 33 make clear Parliament's view that there is a strong public interest in the deportation of foreign nationals who have committed serious offences, and that the procedures for their deportation should be expeditious and effective. The strength of that public interest is reflected in Laws LJ's observation that for a claim under article 8 of the ECHR to prevail, it must be "a very strong claim indeed": *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550; [2014] 1 WLR 998, para 54.

The Immigration Rules

15. Decision-making in relation to immigration and deportation is not exhaustively regulated by legislation. It also involves the exercise of discretion, and the making of evaluative judgments, by the Secretary of State and her officials. A perennial challenge, in such a situation, is to achieve consistency in decision-making while reaching decisions which are appropriate to the case in hand. The solution generally lies in the adoption of administrative policies to guide decision-making: something which the courts have accepted is legitimate, provided two general requirements are met. First, discretionary powers must be exercised in accordance with any policy or guidance indicated by Parliament in the relevant legislation: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997. In relation to the deportation of foreign offenders, the relevant legislation includes sections 32 and 33 of the 2007 Act. Secondly, decision-makers should not shut their ears to

claims falling outside the policies they have adopted: *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610). As Lord Reid observed in that case at p 625, there may not be any great difference between a policy and a rule: some policies may constitute more or less flexible guidance, but others may be more formal and prescriptive.

16. The Immigration Rules are an example of policies of the latter kind. They are unusual in having a statutory basis, in requiring the approbation of Parliament, and in being published as House of Commons papers. Section 1(4) of the 1971 Act refers to "the rules laid down by the Secretary of State as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode". Section 3(2) requires the Secretary of State to lay before Parliament "statements of the rules, or any changes in the rules, laid down by him as to the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons required by this Act to have leave to enter". As was said in *R (Munir) v Secretary of State for the Home Department* [2012] UKSC 32; [2012] 1 WLR 2192, para 29, the point of this provision is to give Parliament a degree of control over the practice to be followed by the Secretary of State in the administration of the 1971 Act for regulating immigration control.

17. The Rules are not law (although they are treated as if they were law for the purposes of section 86(3)(a) of the 2002 Act: see para 8 above), but a statement of the Secretary of State's administrative practice: see *Odelola v Secretary of State for the Home Department* [2009] UKHL 25; [2009] 1 WLR 1230, paras 6 and 7; *Munir,* para 37; *Mahad v Entry Clearance Officer* [2009] UKSC 16; [2010] 1 WLR 48, para 10; *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2011] UKSC 45; [2012] 1 AC 621, para 61; and *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 WLR 2208, paras 32 and 33. They do not therefore possess the same degree of democratic legitimacy as legislation made by Parliament: *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 AC 167, para 17. Nevertheless, they give effect to the policy of the Secretary of State, who has been entrusted by Parliament with responsibility for immigration control and is accountable to Parliament for her discharge of her responsibilities in this vital area. Furthermore, they are laid before Parliament, may be the subject of debate, and can be disapproved under the negative resolution procedure. They are therefore made in the exercise of powers which have been democratically conferred, and are subject, albeit to a limited extent, to democratic procedures of accountability.

18. The Secretary of State has a wide residual power under the 1971 Act to grant leave to enter or remain in the UK even where leave would not be given under the Rules: *Munir,* para 44. The manner in which that power should be exercised is not, by its very nature, governed by the Rules. There is a duty to exercise the power

where a failure to do so is incompatible with Convention rights, by virtue of section 6 of the Human Rights Act 1998.

The July 2012 changes to the Rules

19. Prior to July 2012, the Rules did not specifically address the requirements of article 8. From October 2000 onwards, rule 2 instructed the relevant officials to carry out their duties in compliance with the provisions of the Human Rights Act 1998. There were also specific rules dealing with deportation, which set out in rule 364 a non-exhaustive list of factors to be taken into account, and provided in rule 380 that a deportation order would not be made if removal would be contrary to the UK's obligations under the Refugee Convention or the ECHR. With effect from July 2006, rule 364 was amended so as to provide that, subject to rule 380, where a person was liable to deportation the presumption should be that the public interest required deportation. All relevant factors were to be taken into account in considering whether the presumption was outweighed in any particular case, but it was said that it would only be in exceptional circumstances that the public interest in deportation would be outweighed in a case where it would not be contrary to the ECHR or the Refugee Convention to deport. Rule 364A, introduced after the enactment of the 2007 Act, disapplied rule 364 where section 32(5) of that Act applied.

20. On 13 June 2012 the Secretary of State laid before Parliament a Statement of Changes in Immigration Rules (HC 194), which (so far as material) deleted a number of the previous rules, including rules 364, 364A and 380, and inserted a number of new rules (which will be referred to as the "new rules"). The new rules were formally made under the negative resolution procedure, and came into force on 9 July 2012. There was also a debate in the House of Commons on 19 June 2012, in which the changes to the Rules were discussed, on a motion "that this House supports the Government in recognising that the right to respect for family or private life in article 8 of the European Convention on Human Rights is a qualified right and agrees that the conditions for migrants to enter or remain in the UK on the basis of their family or private life should be those contained in the Immigration Rules." The motion was agreed without a vote (Hansard (HC Debates) 19 June 2012, cols 760-823).

21. It is apparent from the documents which accompanied the Statement of Changes that the changes to the Rules were intended to promote consistency, predictability and transparency in decision-making where issues under article 8 arose, and to clarify the policy framework. The changes were said to reflect the Government's and Parliament's view of how, as a matter of public policy, the balance should be struck between the right to respect for private and family life and the public interest in public safety by protecting the public from foreign criminals: Statement of Intent: Family Migration, Home Office, June 2012, para 33. The

changes were also intended to align the Rules with the body of case law concerning article 8, and in particular to reflect a consideration of the proportionality of deportation in accordance with article 8: paras 36-38.

22. In relation to the deportation of foreign offenders, in particular, it was explained in the Statement of Intent that the Secretary of State considered that there were some offenders who should almost always be removed because of the seriousness of their crime and the overwhelming public interest in their deportation, despite their family or private life in the UK, and some other offenders who should normally be deported but who might be able to argue in individual cases that their family or private life outweighed the public interest in deportation. There were also cases where the level of criminality was below the automatic deportation threshold, but the offending was so harmful or persistent that deportation would normally be proportionate. The Government believed that a custodial sentence of four years or more represented such a serious level of offending that it would almost always be proportionate that it should outweigh private or family life, even taking into account that the best interests of a child were a primary consideration. Deportation would normally be proportionate where the foreign offender had received a sentence of between 12 months and four years, or where the sentence was of less than 12 months but, in the view of the Secretary of State, the offending had caused serious harm or the person was a persistent offender who showed a particular disregard for the law. Deportation would not, however, be proportionate if the offender had a parental relationship in the UK with a child who was a British citizen or had lived in the UK for the last seven years, the child could not reasonably be expected to leave the UK, and there was no other family member able to care for the child in the UK. Nor would it be proportionate if the offender had a relationship with a partner in the UK who was a British citizen or was in the UK with refugee leave or humanitarian protection, the offender had lived in the UK with valid leave for the last 15 years, and there were insurmountable obstacles to family life with the partner continuing overseas. Nor would it be proportionate if the offender had been continuously resident in the UK for the last 20 years, or was aged under 25 and had spent at least half his life in the UK, and in either case had no ties with his country of origin.

23. Those policies were given effect by the new rules, which provide:

> "396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.
>
> 397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's

obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

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

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

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

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

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

(i) the child is a British Citizen; or

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

(a) it would not be reasonable to expect the child to leave the UK; and

(b) there is no other family member who is able to care for the child in the UK; or

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

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

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

(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or

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

The Strasbourg jurisprudence

24. The Human Rights Act 1998 requires public authorities to act compatibly with Convention rights, and requires courts or tribunals to take into account the case law of the European Court of Human Rights. The Convention rights include the right set out in article 8, which provides:

> "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 wellbeing 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."

25. The question whether the deportation of a foreign offender would be incompatible with article 8 has been considered by the European court in numerous judgments. In cases concerning "settled migrants", that is to say persons who have been granted a right of residence in the host country, the court has accepted that the withdrawal of that right may constitute an interference with the right to respect for private and/or family life within the meaning of article 8. If there is an interference, it must be justified under article 8(2) as being "in accordance with the law", as pursuing one or more of the legitimate aims set out in that paragraph, and as being "necessary in a democratic society", that is to say justified by a pressing social need and proportionate to the legitimate aim pursued. The court has treated the legitimate aim pursued by deportation, on the basis of a person's conviction of a criminal offence, as the "prevention of disorder or crime" (although there are also a small number of cases in which public safety has been accepted to be an additional aim): see, for example, *AA v United Kingdom* [2012] Imm AR 107, paras 53-54. In practice, the critical issue is generally whether the "necessity" test is met. In that regard, the court has often said that the task of the court or tribunal applying article

8(2) consists in ascertaining whether the decision struck a fair balance between the relevant interests, namely the applicant's right to respect for his private and family life, on the one hand, and the prevention of disorder or crime, on the other.

26. In a well-known series of judgments the court 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 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.

27. As the Grand Chamber noted in *Jeunesse v Netherlands* (2014) 60 EHRR 17, para 105, these criteria cannot be transposed automatically to the situation of a person who is not a settled migrant but an alien seeking admission to a host country: a category which includes, as the facts of that case demonstrate, a person who has been unlawfully resident in the host country for many years. The court analysed the situation of such a person, facing expulsion for reasons of immigration control rather than deportation on account of criminal behaviour, as raising the question whether the authorities of the host country were under a duty, pursuant to article 8, to grant

the person the necessary permission to enable her to exercise her right to family life on their territory. The situation was thus analysed not as one in which the host country was interfering with the person's right to respect for her private and family life, raising the question whether the interference was justified under article 8(2). Instead, the situation was analysed as one in which the person was effectively asserting that her right to respect for her private and family life, under article 8(1), imposed on the host country an obligation to permit her to continue to reside there, and the question was whether such an obligation was indeed imposed.

28. In addition to identifying the issue in *Jeunesse* as concerning a positive obligation under article 8(1) rather than a negative obligation under article 8(2), the court also identified a number of factors as being relevant: factors which overlapped with those mentioned in the *Boultif* line of cases, but were also different in some respects. Factors to be taken into account were said in *Jeunesse* to include the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, whether there were insurmountable obstacles (or, as it has been put in some other cases, major impediments: see, for example, *Tuquabo-Tekle v Netherlands* [2006] 1 FLR 798, para 48, and *IAA v United Kingdom* (2016) 62 EHRR SE 19, paras 40 and 44) in the way of the family living in the country of origin of the alien concerned, and whether there were factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (para 107). Another important consideration was said to be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. Where this is the case, the court has said that it is likely only to be in exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8 (*Jeunesse,* para 108). The court has found there to be exceptional circumstances in situations where, notwithstanding the importance of that consideration, removal failed to strike a fair balance between the competing interests involved. In the *Jeunesse* case, for example, a prolonged delay in removing the applicant from the host country, during which time she had developed strong family and social ties there, constituted exceptional circumstances leading to the conclusion that a fair balance had not been struck (paras 121-122).

29. Where children are involved, their best interests are said by the court to be of paramount importance (by which it does not mean to say that they are determinative: see *Jeunesse,* para 109). Whilst alone they cannot be decisive, they must be afforded significant weight. Accordingly, national decision-making bodies should in principle advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it (*Jeunesse*, paras 108-109).

30. Counsel for the Secretary of State submitted in the appeal against the decision of the Court of Appeal in *Agyarko v Secretary of State for the Home Department* [2015] EWCA Civ 440; [2016] 1 WLR 390, heard after the present appeal, that in the light of this approach, the deportation of a foreign criminal unlawfully resident in the UK should similarly be analysed as raising the question whether the state is under a positive obligation to permit him to remain in the UK, applying the *Jeunesse* criteria, rather than whether his deportation can be justified under article 8(2), applying the *Boultif* criteria. The court was asked to treat those submissions as applying to the present case, and agreed to do so, counsel for the appellant being given an opportunity to respond in writing.

31. Considering first the question whether a positive or a negative obligation is in issue, liability to automatic deportation under section 32(5) of the 2007 Act is distinct from the regime governing admission to the UK. The aim pursued is more specific than the wider social and economic aims pursued by controls on admission. Nevertheless, it is a measure of immigration control, in that it involves the use of the instruments of immigration control to enforce the expectation that foreign citizens living in the UK should respect the criminal law, and risk having their right to stay withdrawn or denied if they fail to do so. Those foreign criminals who are residing in the UK unlawfully, and who resist their deportation on the basis of article 8, are in substance asserting that their right under article 8 to respect for their private and family life imposes on the UK an obligation to permit them to continue to reside here. They are, in that respect, in a similar position to the applicants in cases such as *Jeunesse.*

32. Whether the situation is analysed in terms of positive or negative obligations is, however, unlikely to be of substantial importance. Whether the person concerned enjoys private or family life in the UK depends on the facts relating to his relationships with others: whether, for example, he is married or has children. Where he does enjoy private or family life in the UK, he has a right under article 8 to respect for that life, whatever his immigration status may be (although that status may greatly affect the weight to be given to his article 8 right, as *Jeunesse* makes clear). Whether one poses the question whether, striking a fair balance between the interests of the individual in his private or family life and the competing interests of the community as a whole, his right to respect for his private and family life entails an obligation on the part of the state to permit him to remain in the UK; or whether, striking a fair balance between the same competing interests, his deportation would be a disproportionate interference, one is asking essentially the same question. It is true, as counsel pointed out, that the onus is on the state to justify an interference, whereas there is no such onus on the state to demonstrate the absence of a positive obligation, but questions of onus are unlikely to be important where the relevant facts have been established. Ultimately, whether the case is considered to concern a positive or a negative obligation, the question is whether a fair balance has been struck.

33. Considering next the factors which should be taken into account, those mentioned in the *Boultif* line of cases have a bearing on the proportionality of the deportation of foreign offenders, whether they are settled migrants or not. Where they are not settled migrants, it will also be necessary to have regard to the factors mentioned in *Jeunesse,* so far as relevant and not already taken into account: notably, whether there are insurmountable obstacles or major impediments in the way of the family living in the country of origin of the alien concerned; whether there are factors of immigration control, such as a history of breaches of immigration law; and whether the family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. Those factors were mentioned in *Jeunesse* in a context where family life was relied on to defeat immigration control at the point of admission to the host country. But it is also relevant to consider, in the context of liability to deportation because of criminal behaviour, whether the offender has a bad immigration history, or whether there are major impediments to continuing family life in his country of origin, or whether family life was established in the knowledge that, because of the immigration status of one of the persons involved, its continuation in the UK was uncertain. If that were not so, the perverse consequence would follow that these matters would be liable to carry greater weight if a non-offender were sought to be removed on account of his irregular immigration status than if an offender with the same immigration status were sought to be removed on account of serious criminal conduct.

34. It is, however, necessary to bear in mind that whether the continuation of family life in the UK is uncertain may be a more complex question than it might appear at first sight. For example, where a person was residing in the UK unlawfully at the time when the relationship was formed, but would have been permitted to reside here lawfully if an application were made from outside the UK, the latter point should be taken into account. That example illustrates how the distinction between settled migrants and aliens residing in the host country unlawfully may be, in some situations, of limited practical importance when translated into the context of UK immigration law (see, for example, *Chikwamba v Secretary of State for the Home Department* [2008] UKHL 40; [2008] 1 WLR 1420).

35. While the European court has provided guidance as to factors which should be taken into account, it has acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The ECHR can thus accommodate, within limits, the judgments made by national legislatures and governments in this area.

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".

37. How is the reference in rule 398 to "exceptional circumstances" to be understood, compatibly with Convention rights? That question was considered in the case of *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544. The Court of Appeal accepted the submission made on behalf of the Secretary of State that the reference to exceptional circumstances (an expression which had been derived from the *Jeunesse* line of case law) served the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who did not satisfy rules 398 and 399 or 399A, and that it was only exceptionally that such foreign criminals would succeed in showing that their rights under article 8 trumped the public interest in their deportation (paras 40 and 41). The court went on to explain that this did not mean that a test of exceptionality was being applied. Rather, the word "exceptional" denoted a departure from a general rule:

> "The general rule in the present context is that, in the case of a foreign prisoner (sic) to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the 'exceptional circumstances'." (para 43)

The court added that "the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence" (para 44). As explained in the next paragraph, those dicta summarise the effect of the new rules, construed compatibly with Convention rights.

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

39. The nature of appellate decision-making in the context of immigration cases involving article 8 was authoritatively considered in the case of *Huang*. The appellants in that case had entered the UK and were seeking leave to remain on the basis that their removal would violate their rights under article 8. They did not qualify for leave to remain under the Rules as they then stood.

40. The opinion of the Appellate Committee, delivered by Lord Bingham of Cornhill, made five important points. First, Lord Bingham recognised the importance of the Rules for administrative purposes, noting "the general administrative desirability of applying known rules if a system of immigration control is to be workable, predictable, consistent and fair as between one applicant and another" (para 16). He acknowledged that the Rules, and the supplementary administrative directions, must draw a line somewhere in order to be administratively workable. The rule under which Mrs Huang failed to qualify was unobjectionable.

41. Secondly, appellate decision-making was not governed by the Rules, but the Rules were nevertheless relevant to the determination of appeals:

> "[A]n applicant's failure to qualify under the rules is for present purposes the point at which to begin, not end, consideration of the claim under article 8. The terms of the rules are relevant to that consideration, but they are not determinative." (para 6)

42. Thirdly, an appeal under the 2002 Act was not equivalent to an application for judicial review:

> "[T]he task of the appellate immigration authority … is to decide whether the challenged decision is unlawful as incompatible with a Convention right or compatible and so lawful. It is not a secondary, reviewing, function dependent on establishing that the primary decision-maker misdirected himself or acted irrationally or was guilty of procedural impropriety. The appellate immigration authority must decide for itself whether the impugned decision is lawful and, if not, but only if not, reverse it ...
>
> [T]he appellate immigration authority ... is not reviewing the decision of another decision-maker. It is deciding whether or not it is unlawful to refuse leave to enter or remain, and it is doing so on the basis of up-to-date facts." (paras 11 and 13)

43. Fourthly, the first task of the appellate immigration authority was to establish the relevant facts, which might well have changed since the original decision was made, and which the authority was in any event much better placed to assess than the original decision-maker (para 15).

44. Fifthly, in considering the issue arising under article 8 in the light of its findings of fact, the appellate authority should give appropriate weight to the reasons relied on by the Secretary of State to justify the decision under appeal. In that connection, Lord Bingham gave as examples a case where attention was paid to the Secretary of State's judgment that the probability of deportation if a serious offence was committed had a general deterrent effect, and another case where weight was given to the Secretary of State's judgment that the appellant posed a threat to public order. He continued:

> "The giving of weight to factors such as these is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed." (para 16)

45. It may be helpful to say more about this point. Where an appellate court or tribunal has to reach its own decision, after hearing evidence, it does not, in general, simply start afresh and disregard the decision under appeal. That was made clear in *Sagnata Investments Ltd v Norwich Corpn* [1971] 2 QB 614, concerned with an appeal to quarter sessions against a licensing decision taken by a local authority. In a more recent licensing case, *R (Hope & Glory Public House Ltd) v City of Westminster Magistrates' Court* [2011] PTSR 868, para 45, Toulson LJ put the matter in this way:

> "It is right in all cases that the magistrates' court should pay careful attention to the reasons given by the licensing authority for arriving at the decision under appeal, bearing in mind that Parliament has chosen to place responsibility for making such decisions on local authorities. The weight which magistrates should ultimately attach to those reasons must be a matter for their judgment in all the circumstances, taking into account the fullness and clarity of the reasons, the nature of the issues and the evidence given on the appeal."

46. These observations apply a fortiori to tribunals hearing appeals against deportation decisions. The special feature in that context is that the decision under review has involved the application of rules which have been made by the Secretary of State in the exercise of a responsibility entrusted to her by Parliament, and which Parliament has approved. 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.

47. The approach adopted in *Huang* has been followed in later decisions of the House of Lords and of this court, including *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] AC 1159, *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74; [2013] 1 WLR 3690, and *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 58; [2015] 1 WLR 5055. The latter case is particularly relevant for its consideration of the case of *Jeunesse.* In her judgment, Lady Hale noted the distinction drawn by the European Court between cases where lawfully settled migrants are facing deportation or expulsion, and cases where an alien is seeking admission to a host country. She also noted that, although the criteria developed in the first context cannot be transposed automatically into the second, the applicable principles are nonetheless similar. She went on at para 29 to state that, although Strasbourg analysed cases in the second category in terms of a "fair balance", domestic courts had, at least since *Huang,* applied the proportionality approach described in *Aguilar Quila*. That approach was criticised by counsel for the Secretary of State in the present case as being premised on the assumption that there was an interference with the right to respect for private and family life, whereas in cases where the individual was not lawfully resident in the UK the issue was whether the right gave rise to a positive obligation.

48. The structured approach to proportionality which has been adopted in the domestic law of the UK makes provision for consideration of the elements involved in an assessment of fair balance in the context of immigration and deportation, whether the assessment arises in relation to a potential positive obligation or in relation to an interference. It can be said that the first of the four stages of the analysis, as described in *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700, para 74 ("whether the objective of the measure is sufficiently important to justify the limitation of a protected right"), and in similar language in *Aguilar Quila* and other cases, is not entirely apt where the question is whether a positive obligation is imposed, since the language used presumes that the right in question is being limited. But the point is of no practical importance where, as in the context of immigration and deportation, there is no doubt as to the importance of the objective.

49. What has now become the established method of analysis can therefore continue to be followed in this context. The adoption of that method does not, of course, determine the outcome of the assessment. It is necessary to feed into the analysis the facts of the particular case and the criteria which are appropriate to the context, and, where a court is reviewing the decision of another authority, to give such weight to the judgment of that authority as may be appropriate. In that way, relevant differences between, for example, cases where lawfully settled migrants are

facing deportation or expulsion, and cases where an alien is seeking admission to a host country, can be taken into account.

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.

The present appeal

54. The facts of the present appeal, as found by the Upper Tribunal, are as follows. The appellant is an Iraqi national. He left Iraq in 1988, at the age of 12. With the exception of a few visits prior to 2000, he has not lived there since then. He lived unlawfully in Jordan until 2000, when he was 24 years of age. He then entered the UK unlawfully, and has lived in the UK unlawfully ever since. No attempt appears to have been made to remove him as an illegal immigrant. In 2002 he applied for asylum, but his application was refused, and his appeal against that decision was unsuccessful. In November 2005 he was convicted of possession of class A and C drugs and was fined. He had a serious drugs problem at that time. In March 2006 he was arrested and later charged with two counts of possession of class A drugs (11.1 grams of cocaine and 59 tablets of ecstasy) with intent to supply. In December 2006 he pleaded guilty and was sentenced to four years' imprisonment. In the meantime he had begun to address his drug taking.

55. He was released from custody in January 2009. He had by then stopped taking drugs, and has remained drug free since then. When he completed his sentence, in January 2011, his probation officer reported that he had complied with his licence conditions and that he was considered to present a low risk of re-conviction and a low risk of harm. In April 2014 he pleaded guilty to a count of driving while uninsured and with excessive alcohol in his system. He was fined and disqualified from driving for 12 months. He is not, and never has been, permitted to take employment in the UK. He has nevertheless worked in a variety of occupations.

56. In February 2005 he began a relationship with a British woman, Ms Harwood, who has lived all her life in the UK. They have had periods of cohabitation but were no longer cohabiting at the time when the appellant's appeal came before the Upper Tribunal. It is agreed that they nevertheless saw each other almost every day and spent most nights together. It is agreed that they wished to marry and have children. It is agreed that they have not done so as a result of the appellant's immigration status, his inability to take lawful employment, and a lack of finances. The appellant is also the father of two children who probably reside in the UK, and

who were born before he began his relationship with Ms Harwood. He has no contact with either child. He has no remaining family in Iraq.

57. In September 2007 the Secretary of State notified the appellant that she was considering his immigration status and that he was liable to removal. In response, his solicitors made a fresh claim to the effect that he was at risk of ill-treatment in Iraq, and that his deportation would also be contrary to article 8. In January 2008 the Secretary of State made a decision to make a deportation order, but in March 2008 withdrew that decision on the basis that the appellant's nationality was unclear. In April 2008 a "nationality interview" was conducted. In January 2010 an asylum interview was conducted. On 5 October 2010 the Secretary of State decided to make a deportation order in respect of the appellant on the basis that section 32(5) of the 2007 Act applied to him. She found that he did not fall within any of the exceptions in section 33. She rejected his claim to be at risk in Iraq, and also rejected his claim under article 8. She found that he had failed to demonstrate that he was in a subsisting relationship with Ms Harwood, and that in any case the relationship, if it existed, had been entered into at a time when they should both have been aware that it might not be possible to continue it in the UK. She accepted that deportation might interfere with the appellant's private life, but considered that this was proportionate to the aim of preventing disorder or crime and the maintenance of effective immigration control. Under the heading "Proportionality", the decision letter stated that the reason why the interference with the appellant's private life was not considered to be disproportionate was that:

> "Although you have been resident in the United Kingdom for a number of years you spent your youth and formative years in Iraq. In view of this it is not considered unreasonable to expect you to be able to readjust to life in Iraq."

58. The appellant appealed to the First-tier Tribunal. On 10 February 2011 the appeal was dismissed. The appellant then appealed to the Upper Tribunal. On 16 March 2012, the decision of the First-tier Tribunal was set aside. On 18 January 2013 the Upper Tribunal re-heard the appeal. By that stage, the only remaining ground of appeal was that the appellant's removal would breach the Refugee Convention and articles 3 and 8 of the ECHR. The new rules had by then come into force.

59. On 11 February 2013 the Upper Tribunal allowed the appeal on the ground that the appellant's removal would be incompatible with article 8. The judge found that the appellant was not a danger to the community: his last offence (at that time) had been almost seven years earlier, in March 2006. He had put drug-taking behind him. His relationship with Ms Harwood was genuine, and she could not reasonably be expected to live in Iraq. The judge identified the central issue as being whether

the interference with private and family life which would result from the appellant's removal to Iraq was proportionate to the proper purpose of deporting foreign criminals for the purpose of the prevention of disorder or crime. He acknowledged that the appellant had committed very serious offences, but concluded that the period of time which had elapsed since the appellant's last offence, the unlikelihood of his committing further offences, the strength of his relationship with Ms Harwood, and the weakness of the appellant's current links with Iraq, were in combination compelling, so that deportation would be disproportionate. In reaching that conclusion, he explained that he accepted that there was an interest in the appellant's being removed: Parliament had said so in section 32(4) of the 2007 Act.

60. The judge explained that he had not had regard to the new rules, stating that the Rules did not assist him with the proper application of the appellant's human rights. For the reasons explained earlier, they were a relevant and important consideration. He also does not appear to have taken account of the fact that the appellant's relationship with Ms Harwood had been formed at a time when his immigration status was such that the persistence of family life within the UK was uncertain. As was explained earlier, that also was an important consideration. The judge noted in his summary of the evidence that the appellant and Ms Harwood had acknowledged these circumstances, but they were not mentioned in the reasons which he gave for his decision.

61. The Secretary of State then appealed to the Court of Appeal on the grounds that the Upper Tribunal had erred (i) in failing to consider the new rules, (ii) in failing to recognise the importance of the public interest in deporting foreign criminals, (iii) in failing properly to apply the guidance established in *Üner*, and (iv) in allowing the appeal in circumstances in which no reasonable tribunal could have done so. On 22 July 2014 the Court of Appeal (Sullivan, Black and Richards LJJ) [2015] Imm AR 207 allowed the appeal on grounds (i) and (ii). The court found it unnecessary to consider grounds (iii) and (iv), and remitted the appeal for re-consideration by a differently constituted Upper Tribunal.

62. In relation to grounds (i) and (ii), the Court of Appeal proceeded on the basis, at para 27, that the new rules "tell the decision taker what weight they should give to the public interest in deporting foreign criminals". As counsel for the appellant submitted, that might be understood as meaning that the Rules determined the weight which tribunals must give to the public interest in deportation in all cases.

63. For the reasons already explained, that would be an overstatement of the significance of the new rules to appellate decision-making by tribunals. That does not, however, undermine the court's conclusion. As explained above, the reasoning of the Upper Tribunal failed to take any account of the new rules, and also failed to take account of the important fact that the appellant's family life had been

established when his immigration status was known to be precarious. In addition, no assessment of the compatibility of removal with article 8 has been carried out by reference to the facts currently known, as distinct from those which were known at the time of the hearing before the Upper Tribunal (*AA v United Kingdom* [2012] Imm AR 107, para 67). In the circumstances, it is appropriate that the appeal should be remitted for reconsideration, as the Court of Appeal ordered. This court should therefore forbear from further comment on the merits of the appeal.

Conclusion

64. For these reasons, I would dismiss the appeal against the decision of the Court of Appeal, and remit the appeal against the decision of the Secretary of State for reconsideration by a differently constituted Upper Tribunal.

LORD WILSON:

65. This is an important day in the life of our court. For it is the first occasion upon which either we or our predecessors in the House of Lords have had occasion to address the interface between the power of the Secretary of State to deport a foreign criminal and the latter's ability to resist deportation by reference to his right to respect for his family or private life under article 8 of the ECHR. It is a subject which generates strong views in our society.

66. In the *MF (Nigeria)* case, cited by Lord Reed at para 37 above, Lord Dyson MR, giving the judgment of the Court of Appeal, said at para 43:

> "The general rule in the present context is that, in the case of a foreign [criminal] to whom paragraphs 399 and 399A [of the Immigration Rules in force on 9 July 2012] do not apply, very compelling reasons will be required to outweigh the public interest in deportation."

Of the numerous issues raised in this appeal, the central issue is whether the Court of Appeal's exposition of what it called "the general rule" was correct. I subscribe to the majority view that it was indeed correct. I agree with the judgment of Lord Reed and I concur in the dismissal of the appeal.

67. A person is a "foreign criminal" under section 32(1) and (2) of the 2007 Act only if, not being a British citizen, he was convicted in the UK of an offence for which he was sentenced to imprisonment for at least 12 months. So the misleadingly

entitled "automatic" deportation, for which the section provides, applies in effect only to a serious offence. Subsection (4) provides that the deportation of a foreign criminal is conducive to the public good for the purpose of section 3(5)(a) of the 1971 Act, in other words with the result that he should be liable to deportation. So it is only the liability to deportation, not the deportation itself, which the section makes automatic.

68. Section 33 (7) of the 2007 Act, set out at para 11 above, provides, at first sight surprisingly, that the deportation of a foreign criminal remains conducive to the public good even when his rights under article 8 bar his removal. At para 12 above Lord Reed convincingly explains the provision: for the barrier to his removal arising from his rights under article 8 may prove to be temporary so there is no harm in maintaining his liability in principle to deportation by continuing to regard it as conducive to the public good. But there is a further feature of the subsection which is less easy to explain: for the effect of limb (a) of it is that the barrier to a foreign criminal's deportation arising from his rights under article 8 "does not prevent the making of a deportation order". Like Lord Kerr in his dissenting judgment at para 128 below, I have failed to make any sense of this further feature.

69. In para 14 above Lord Reed suggests that sections 32 and 33 of the 2007 Act were enacted in response to public concern about, in particular, the procedures for the deportation of foreign offenders. But it is clear to me that there was equal, if not greater, dissatisfaction with the decisions themselves, in particular when they rejected deportation. Why, in particular, did the people of the UK, by their elected representatives, take the unusual step of pre-empting the minister's decision whether a deportation was conducive to the public good by making a formal resolution in section 32(4) that the deportation of a foreign criminal was conducive to it? No doubt they did so primarily because of the strength of their wish to protect themselves from disorder and crime, which, of course, is an aim specifically recognised in paragraph 2 of article 8 of the ECHR and which the Strasbourg court "has consistently considered [to be] the legitimate aim pursued by deportation": para 53 of the *AA* case, cited at para 25 above. "This means", says Lord Kerr at para 96 below, "that, customarily, the risk of re-offending will be of predominant importance". Indeed Lord Kerr proceeds to ask: "If an individual is unlikely to commit crime or be involved in disorder, how can his expulsion on that ground be said to be rationally connected to the stated aim?" But, with respect, might Lord Kerr's analysis be too narrow? Might not the deterrent effect upon all foreign citizens (irrespective of whether they have a right to reside in the UK) of understanding that a serious offence will normally precipitate their deportation be a more powerful aid to the prevention of crime than the removal from the UK of one foreign criminal judged as likely to re-offend? See *DS (India) v Secretary of State for the Home Department* [2009] EWCA Civ 544; [2010] Imm AR 81, para 37, Rix LJ.

70. In the Court of Appeal in *OH (Serbia) v Secretary of State for the Home Department* [2008] EWCA Civ 694, [2009] INLR 109, I stated, at para 15(c):

> "A further important facet [of the public interest in deportation] is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes."

By his counsel, the appellant mounts a sustained objection to my statement and I am constrained to agree with part of it. I regret my reference there to society's revulsion at serious crimes and I accept Lord Kerr's criticism of it at para 168 below. Society's undoubted revulsion at certain crimes is, on reflection, too emotive a concept to figure in this analysis. But I maintain that I was entitled to refer to the importance of public confidence in our determination of these issues. I believe that we should be sensitive to the public concern in the UK about the facility for a foreign criminal's rights under article 8 to preclude his deportation. Even though, for the purposes of the present appeal, we must ignore section 19 of the Immigration Act 2014, the depth of public concern had earlier been made manifest not only in section 32(4) of the 2007 Act but also in the amendments to the immigration rules introduced on 9 July 2012 to which I will turn in the next paragraph. Laws serve society more effectively if they carry public support. Unless it lacks rational foundation (in which case the courts should not pander to it), the very fact of public concern about an area of the law, subjective though that is, can in my view add to a court's objective analysis of where the public interest lies: in this context it can strengthen the case for concluding that interference with a person's rights under article 8 by reason of his deportation is justified by a pressing social need.

71. In the document entitled "*Statement of Intent: Family Migration*", dated 12 June 2012, the Home Office sought to explain the forthcoming changes to the immigration rules. It said:

> "37. … previous Secretaries of State have asserted that if the courts think that the rules produce disproportionate results in a particular case, the courts should themselves decide the proportionate outcome on the facts before them rather than hold that the rule itself is incompatible with article 8. The courts have accepted this invitation to determine proportionality on a case-by-case basis and do not - indeed cannot - give due weight systematically to the Government's and Parliament's view of where the balance should be struck, because they do not know what that view is.

> 38. The new Immigration Rules are intended to fill this public policy vacuum by setting out the Secretary of State's position on proportionality and to meet the democratic deficit by seeking Parliament's agreement to her policy. The rules will state how the balance should be struck between the public interest and individual rights, taking into account relevant case law, and thereby provide for a consistent and fair decision-making process."

72. Accordingly rule 398, as was then introduced, provided that, other than in the narrow situations in which paras 399 or 399A applied, "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors" in the determination of an article 8 claim by a person liable to deportation.

73. Provided that the phrase is not misunderstood, there is nothing wrong with an analysis in certain contexts that "exceptional circumstances" will be necessary for a claim under article 8 to prevail. In certain situations, the public interest in a person's removal from the UK will be inherently so strong, and in other situations his claim to respect for his private and family life will be inherently so weak, that it is appropriate to identify a need for "exceptional circumstances" before his claim can prevail.

74. An example of the first type of situation is extradition. The public interest in a person's extradition in accordance with domestic law is inherently strong. In *Norris v Government of the United States of America (No 2)* [2010] UKSC 9; [2010] 2 AC 487, Lord Phillips of Worth Matravers, with whom all eight of the other members of the court agreed, said:

> "56. The reality is that only if some quite exceptionally compelling feature, or combination of features, is present that interference with family life consequent upon extradition will be other than proportionate to the objective that extradition serves. That, no doubt, is what the commission had in mind in *Launder v United Kingdom* (1997) 25 EHRR CD 67, 73 when it stated that it was only in exceptional circumstances that extradition would be an unjustified or disproportionate interference with the right to respect for family life."

75. An example of the second type of situation is where the appellant's family life with another person developed at a time when, to his knowledge, his immigration status rendered his ability to remain living in the UK precarious. In this situation his claim to respect for his family life is inherently weak. It is therefore

legitimate to describe it as likely to prevail only in exceptional circumstances. The court in Strasbourg has said so. Thus in *Rodrigues Da Silva, Hoogkamer v Netherlands* (2006) 44 EHRR 34, the Strasbourg court said:

> "39. … where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of article 8."

Two years ago, in *Jeunesse v Netherlands*, cited at para 27 above, the Grand Chamber at para 108 indorsed, almost word for word, the reference to the need in that situation for "exceptional circumstances".

76. In the *MF (Nigeria)* case the Secretary of State informed the court that, in referring to the need for exceptional circumstances in the new rule 198, she was "borrowing" the phrase from the Strasbourg court, which had used it in certain article 8 cases: see para 34 of the judgment. Although its application by the Strasbourg court had been to situations other than deportation, the Secretary of State was in my view entitled to borrow the phrase and, by the rule, to commend it to her case-workers. For deportation is another example of the first type of situation to which I have referred at para 73 above: the public interest in the deportation of a foreign criminal is inherently so strong, arguably even stronger than in the case of extradition, that it is appropriate to identify a need for "exceptional circumstances" before his claim under article 8 can prevail.

77. There is, however, a well-recognised danger that a decision-maker will misunderstand the significance of the phrase. It may lead him to slide away from the requisite inquiry into the *degree* of strength of the public interest in the deportation of this particular foreign criminal, strong though that will always be; and from inquiry into the gravity of the proposed interference with the exercise of his family life, judged in the light of all the factors upon which he relies insofar as they are relevant to it; and therefore from inquiry into the justification or otherwise for the proposed interference. It may lead him instead simply to ask himself "are these circumstances exceptional?" Even worse, it may even lead him simply to ask himself "are these circumstances unusual?"

78. The House of Lords has itself been constrained to recognise that use of the word "exceptional" is capable of being misunderstood. In *R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27; [2004] 2 AC 368, Lord Bingham said:

> "20. … Decisions taken pursuant to the lawful operation of immigration control will be proportionate [for the purposes of article 8] in all save a small minority of exceptional cases, identifiable only on a case by case basis."

But in the *Huang* case, cited at para 17 above, Lord Bingham, on this occasion giving the opinion of the committee, said:

> "20. … It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality. The suggestion that it should is based on an observation of Lord Bingham in *Razgar*, para 20. He was there expressing an expectation … that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test."

79. When it analysed the reference to "exceptional circumstances" in the new rule 398, the Court of Appeal in the *MF (Nigeria)* case had well in mind the risk that the phrase might be misunderstood. It concluded at paras 41 and 42, in my view correctly, that the rule was no more laying down a *test* of exceptionality than had been Lord Bingham in the *Razgar* case or indeed than had been the Strasbourg court in its analysis of the situation where family life was precarious. It continued:

> "Rather [the rule means] that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal."

Then, at para 43, the Court of Appeal articulated the general rule which I have set out at para 66 above and by which in effect it substituted the phrase "very compelling reasons" for that of "exceptional circumstances". In my view its substitution was wise and, as I have said, its general rule was correct. In July 2014, when introducing changes to the rules to accompany the coming into force of the 2014 Act, the Secretary of State made a corresponding amendment to rule 398 so as, among other things, to substitute the words "very compelling" for the word "exceptional".

80. In the *MF (Nigeria)* case, however, the Court of Appeal proceeded to make an insignificant but unfortunate error. It held at para 44 that the new rules were "a complete code" which fell to be applied not only by the Secretary of State's case-workers but on appeal by the First-tier Tribunal. It is one thing to suggest that the Secretary of State's rule 398 is relevant to the weight which the tribunal should give to the public interest. By doing so, the tribunal would do no more than, in the words of Lord Bingham in the *Huang* case, para 16, to accord "appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice". But it is another thing altogether to suggest that the rules provide the legal framework within which the tribunal should determine the appeal. Both Lord Reed at para 53 and Lord Kerr at para 163 powerfully demonstrate that it is a constitutional solecism for an appellate body to evaluate a person's human rights by the application of a rubric (however sound) which the Secretary of State has chosen to incorporate into her rules. Crucially, however, the Court of Appeal hastened to add:

> "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 [Upper Tribunal]. 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 paragraphs 399 or 399A do not apply."

81. This error in the *MF (Nigeria)* case was therefore insignificant. We should not allow it to distract us from the validity of the general rule which it articulated. I have come belatedly to realise that the use of a cliché can be a quick way of effectively communicating a point. So I make no apology for concluding that we should resist the appellant's invitation to us, by reference to this error on the part of the Court of Appeal, to throw the baby out with the bath-water. On the contrary we should lift the general rule carefully out of the bath … and embrace it.

LORD THOMAS:

82. I agree with the judgment of Lord Reed and in particular the matters he sets out at paras 37-38, 46 and 50. I add three paragraphs of my own simply to emphasise the importance of the structure of judgments of the First-tier Tribunal in decisions where article 8 is engaged. Judges should, after making their factual determinations, set out in clear and succinct terms their reasoning for the conclusion arrived at through balancing the necessary considerations in the light of the matters set out by Lord Reed at paras 37-38, 46 and 50. It should generally not be necessary to refer to any further authority in cases involving the deportation of foreign offenders.

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.

LORD KERR: (dissenting)

85. I agree with much of the legal analysis in Lord Reed's judgment. There are, however, some important differences of emphasis in our approaches to the proper application of article 8 in cases such as this.

Strasbourg jurisprudence concerning expulsion of 'foreign criminals'

86. In a series of cases, Strasbourg has given close attention to, and generally applicable guidance on, the requirements of article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) in the context of the expulsion of "foreign criminals". The court has recognised that the removal of a person from a country where close members of his family are residing may infringe his right to respect for family life (*Boultif v Switzerland* (2001) 33 EHRR 50, para 39), and that even where there is no family life, the expulsion of a settled migrant constitutes an interference with his private life (*Üner v Netherlands* (2006) 45 EHRR 14, para 59). The facts of these and subsequent cases, and the legal analysis applied to them, is illuminating of the approach required to be undertaken by domestic decision-makers when considering making a deportation order after conviction. As Lord Bingham noted in *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, para 18, these cases are valuable in demonstrating where the European Court of Human Rights (ECtHR), as the ultimate guardian of Convention rights, has drawn the line in a number of different factual scenarios, thus guiding national authorities in making their own decisions.

(i) Boultif v Switzerland (2001) 33 EHRR 50

87. Mr Boultif arrived in Switzerland from Algeria in 1992. He married a Swiss woman in 1993. In 1997 his conviction of offences of robbery and damage to property was confirmed by the Swiss Court of Appeal. Those offences had been committed in 1994. In May 1998 he began a period of imprisonment which the appeal court had imposed. In the same month it was decided that his residence permit would not be renewed. His appeal against that decision was dismissed despite his wife having complained that if he was returned to Algeria she could not be expected to follow him.

88. Ultimately, Mr Boultif complained to the ECtHR that his expulsion from Switzerland was in violation of his rights under article 8 ECHR. The court agreed that it was. That decision was reached notwithstanding the court's conclusion that expelling Mr Boultif from Switzerland was in accordance with law and was rationally connected to the legitimate aim of preventing disorder and crime. The court then addressed the question whether the undoubted interference with Mr Boultif's article 8 rights was "necessary in a democratic society". It immediately acknowledged, in para 48, that previously it had only considered this question to a limited extent. Mr Boultif's case required it to "establish guiding principles" on this question.

89. The court then proceeded to set out with some precision what those principles should be. It said this:

> "In assessing the relevant criteria in such a case, the court will 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 is going to be expelled; the time elapsed since the offence was committed as well as the applicant's conduct in 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; and whether there are children in the marriage, and if so, their age. Not least, the court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion."

90. Lord Reed has listed those criteria at para 26 of his judgment, but the preface given by the Grand Chamber to this outline of the relevant criteria is particularly important. These were to be guiding principles. Although the weight to be given to them was determined by an examination of their application to Mr Boultif's case, they were precisely what they were stated to be: guiding principles. In other words, principles which should be taken into account in *all* cases where the propriety of expelling or deporting someone from a member state of the Council of Europe had to be decided.

(ii) Üner v Netherlands (2006) 45 EHRR 14

91. Mr Üner came to the Netherlands in 1981 at the age of 12. Until then he had lived in Turkey where he was born. He obtained a permanent residence permit in 1988. In 1991 he formed a relationship with a Dutch national and this produced in 1992 and 1996 two children. Mr Üner was found guilty of relatively minor offences in 1989, 1990 and 1992. In 1994, however, he was convicted of wounding one man and the manslaughter of another. He was sentenced to seven years' imprisonment. While in prison, Mr Üner was visited regularly by his partner and children. He undertook various courses and qualified as a sports instructor. Despite his progress in prison his permanent residence permit was withdrawn. Throughout a number of appeals and other hearings that decision was confirmed and he was deported to Turkey. He claimed that he had virtually no familial contacts there and he returned illegally on a number of occasions to the Netherlands. He was deported again, finally in May 2006.

92. On an application to ECtHR, Mr Üner claimed that his expulsion represented a breach of his article 8 rights. The court disagreed. But it repeated and confirmed, setting them out in tabular form, what it described as the *Boultif* principles. At para 58 it referred to two criteria in particular. It said this:

> "The court would wish to make explicit two criteria which may already be implicit in those identified in the *Boultif* judgment:
>
> - the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
>
> - the solidity of social, cultural and family ties with the host country and with the country of destination.

> As to the first point, the court notes that this is already reflected in its existing case law (see, for example, *Sen v Netherlands* (2003) 36 EHRR 7, para 40; *Tuquabo-Tekle v Netherlands* [2006] 1 FLR 798, para 47) and is in line with the Committee of Ministers' Recommendation Rec (2002) 4 on the legal status of persons admitted for family reunification (see para 38 above).
>
> As to the second point, it is to be noted that, although the applicant in the case of *Boultif* was already an adult when he entered Switzerland, the court has held the "*Boultif* criteria" to apply all the more so (*a plus forte raison*) to cases concerning applicants who were born in the host country or who moved there at an early age (see *Mokrani v France* (2005) 40 EHRR 5, para 31). Indeed, the rationale behind making the duration of a person's stay in the host country one of the elements to be taken into account lies in the assumption that the longer a person has been residing in a particular country the stronger his or her ties with that country and the weaker the ties with the country of his or her nationality will be. Seen against that background, it is self-evident that the court will have regard to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there."

93. Although the court identified these two particular criteria as being of especial importance, the matter of significance (so far as the present appeal is concerned) is the court's proclamation that the *Boultif* criteria are fundamental in the examination of whether article 8 has been breached. Different emphasis might be placed on some of those criteria in different cases. Particular importance (as in Mr Ùner's case) may be accorded to some of them, reflecting the specific circumstances of an individual. But, the relevance of the factors in article 8 cases involving expulsion is not left in doubt. Their status as guiding principles, to be considered and, where appropriate, applied in all such cases, is clearly affirmed.

94. That was emphasised again by the Grand Chamber in *Maslov v Austria* [2009] INLR 47. I agree with Lord Reed's analysis at para 26 of his judgment as to the effect of that decision. In particular, I would stress that some of the Strasbourg criteria (such as the nature and seriousness of the offence) will be relevant to the weight to be afforded to the public interest in deportation, and that other criteria will go to the strength of the individual's private and family life. A consequence of the detailed guidance given by the ECtHR in these cases is that the domestic margin of appreciation is narrower than in many other contexts where article 8 is engaged.

(iii) AA v United Kingdom [2012] Imm AR 107

95. In this case the applicant came to the United Kingdom in 2000 at the age of 13. In 2007, when he was 15 years old he was convicted with others of the rape of a girl aged 13. He was sentenced to four years' detention at a Young Offenders' Institution. While there, it was assessed that he posed a low risk of re-offending or of causing harm to the public. Despite this, he was served with a deportation order. This was said to be necessary for the prevention of disorder and crime and for the protection of health and morals. When the application came before ECtHR, the government argued that AA's deportation would serve the aims of public safety and the protection of the rights of others, as well as the aims already referred to in the deportation order. Interestingly, the court observed in para 53 that it had "consistently considered that the legitimate aim [in this type of case] was the 'prevention of disorder and crime' …" citing *Bouchelkia v France* (1997) 25 EHRR 686; *Boujlifa v France* (1997) 30 EHRR 419; *Boultif* and *Maslov*; *Omojoudi v United Kingdom* (2009) 51 EHRR 10.

96. While this statement may not amount to a final conclusion by the ECtHR that the only legitimate aim possible for the expulsion of foreign criminals is the prevention of disorder and crime, it must be taken as an indication that that aim will normally be the basis on which deportation is to be justified. Indeed it is doubtful, in cases involving persons who hold indefinite leave to remain in the United Kingdom, whether "immigration control" (insofar as it is relevant to the "economic well-being of the country" under article 8(2)) is a legitimate aim under which deportation can be justified. This means that, customarily, the risk of re-offending will be of predominant importance. If the risk of re-offending is low, it will be more difficult to justify an interference with a person's article 8 rights on the basis that this is necessary in order to prevent disorder and crime. If an individual is unlikely to commit crime or be involved in disorder, how can his expulsion on that ground be said to be rationally connected to the stated aim?

97. On the question of whether the expulsion of the applicant was "necessary in a democratic society" the court said this at para 56:

> "The assessment of whether the impugned measure was necessary in a democratic society is to be made with regard to the fundamental principles established in the court's case-law and in particular the factors summarised in *Üner*, cited above, paras 57-85, namely:
>
> - 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 which has 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 any 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;

- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;

- the best interests and well-being of any 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."

98. This constitutes a restatement of the principles and guidelines in *Boultif* and *Üner.* It is important to note that these are expressed as a generally applicable set of "fundamental principles" which constitute a prescriptive set of rules to be applied in *all cases* involving expulsion of what are described as foreign criminals. "Foreign criminals" are defined in section 32(1)-(3) of the UK Borders Act 2007 as persons who are not British citizens, who are either convicted in the United Kingdom of an offence and sentenced to at least 12 months' imprisonment, or are sentenced to a period of an imprisonment for an offence which is specified as serious by the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002.

99. As it happens and as the cases above demonstrate, to describe all who might be subject to deportation as "foreign criminals" can be misleading. Some have lived most of their lives in the countries from which it is proposed that they be expelled. Indeed, in the case of the United Kingdom, some so-called "foreign criminals" may even have been born here or hold permanent residency in this country but, because they do not have British citizenship, they are liable to expulsion. Given the wide category of persons who can be expelled after having been found guilty of criminal offences, it is unsurprising that Strasbourg has given prominence, in the article 8 assessment, to the length of time that an individual who claims breach of that provision has spent in the "host" country and whether that person is a "settled migrant", in other words someone who has been granted a right of residence (even if temporary) in the host country.

(iv) Jeunesse v Netherlands (2014) 60 EHRR 17

100. This case does not involve a decision to deport a foreign criminal but it is worth considering because of the difference that is said to apply between settled migrants (ie persons with a right of residence, whether temporary or permanent), and those who do not have a right of residence. Although *Jeunesse* did not feature quite so prominently on the hearing of this appeal as in the subsequent case of *R (Agyarko) v Secretary of State for the Home Department* [2016] 1 WLR 390, it is relied on by the Secretary of State to advance a proposition that a person who is not a settled migrant, in order to rely on article 8, is obliged to establish a positive obligation on the part of the state to grant a right of residence. Absent such an obligation, no right to respect for a family or private life arose.

101. If this proposition is correct, it follows that a foreign criminal who is not a settled migrant and who cannot show that there was a positive obligation to grant him permission to reside, cannot rely on article 8. On that basis, discussion of interference with article 8 or justification of any such interference would be irrelevant.

102. Some consideration of the circumstances of *Jeunesse* is needed. The applicant and her partner were born and lived in Suriname. They had cohabited there. In October 1991 the applicant's partner went to stay in the Netherlands with his father and was granted Netherlands nationality. In March 1997 the applicant was granted a visa for the Netherlands for a short period to visit a relative. She entered the country on 12 March 1997 and did not return to Suriname when her visa expired. She had lived in the Netherlands since then. She made various applications for a residence permit, all of which were refused. In June 1999 the applicant married her partner and their first child was born in September 2000 and was a Netherlands national. She renewed her applications for a residence permit and, apart from a short-lived success in obtaining an injunction against removal, her applications were

refused. In December 2005 she had a second child, again a Netherlands national. Further applications for residence followed again with no success. Finally, in April 2010, while pregnant with her third child, the applicant filed a fifth request for a residence permit in order to stay with her children. This was also rejected, it being decided that the refusal did not contravene article 8. The relevant minister attributed "decisive weight" to the fact that the applicant had never resided lawfully in the Netherlands and that there was no indication that it would be impossible to exercise family life in Suriname.

103. Although the argument was not raised in the present appeal, in the subsequent case of *R (Agyarko) v Secretary of State for the Home Department* it was submitted for the Secretary of State that the effect of *Jeunesse* was that it was necessary for an applicant who was not a settled migrant to show that his or her circumstances were "sufficiently weighty" to oblige the state to allow him or her to remain before article 8 was engaged in their case. In other words, the applicant had to show that the state was under a positive obligation to admit the applicant. Implicit in this argument was that, in the case of someone who was not a settled migrant, the question of a state's negative obligation not to act in violation of that person's article 8 rights did not arise because access to those rights could only be obtained by such a person by showing that the state had a positive obligation to grant leave to remain.

104. Reference was made to paras 103-108 of the Grand Chamber's judgment in *Jeunesse*. It is not necessary to set out all of these passages but para 103 sets the scene:

> "Where a contracting state tolerates the presence of an alien in its territory thereby allowing him or her to await a decision on an application for a residence permit, an appeal against such a decision or a fresh application for a residence permit, such a contracting state enables the alien to take part in the host country's society, to form relationships and to create a family there. However, this does not automatically entail that the authorities of the contracting state concerned are, as a result, under an obligation pursuant to article 8 of the Convention to allow him or her to settle in their country. In a similar vein, confronting the authorities of the host country with family life as a fait accompli does not entail that those authorities are, as a result, under an obligation pursuant to article 8 of the Convention to allow the applicant to settle in the country. The court has previously held that, in general, persons in that situation have no entitlement to expect that a right of residence will be conferred upon them."

105. It is important to note that the Grand Chamber did *not* say that an applicant for permission to remain who prays article 8 in aid of his or her application must show, as a prerequisite to reliance on the rights enshrined in that provision, that the state is *obliged* to allow him or her to remain. The burden of the Grand Chamber's reasoning is that a person who has been allowed to remain while applications for a right of residence are being dealt with cannot expect that the period accumulated by those processes will *automatically* bring entitlement to a right to reside. Likewise, the creation of a family and the presentation of that circumstance to state authorities as a *fait accompli* carries no automatic right to the grant of leave to remain. And there is no *general* obligation to respect a married couple's choice of country for their matrimonial residence (para 107).

106. It is also relevant that, at the time that family life was created, the persons involved were aware that the immigration status of one of them was such that family life being permitted to continue in the host state was precarious. In para 108 of *Jeunesse* the Grand Chamber said that where this was the case, it was "likely only to be in exceptional circumstances that the removal of the non-national family member" would constitute a violation of article 8.

107. It is important to understand, however, that none of these considerations has been expressed by the Strasbourg court as determinative. Each, provided it is relevant to the particular circumstances of the individual case, must be taken into account. But the weight to be attached to them will depend upon the significance that they have according to those circumstances.

108. The fact that an applicant is or is not a settled migrant - a settled migrant being someone who has been granted some form of residence, whether temporary or indefinite - is likewise a relevant factor. On that account, the Grand Chamber, in para 104, drew a distinction between Ms Jeunesse's case and those of settled migrants. As was pointed out, withdrawal of a right to residence inevitably involves an interference with family or private life. The same is not true in the case of someone who is not a settled migrant. The factual and legal situation of a settled migrant and that of an alien seeking admission to a host country are, self-evidently, not the same - see para 105. As the Grand Chamber there pointed out:

> "… the question to be examined … is whether, having regard to the circumstances as a whole, the Netherlands authorities were under a duty pursuant to article 8 to grant her a residence permit, *thus enabling her to exercise family life on their territory.*" (emphasis supplied)

109. The conjunction of the obligation to grant a residence permit and the facilitation of the exercise of family life in the host state is critical. The flaw in the argument made by the Secretary of State is the suggestion that these two issues should be considered disjunctively and, moreover, that the duty to grant a residence permit should be considered by way of anterior inquiry to the question of whether the article 8 rights of the individual are engaged and should prevail over the community interests at stake. It is true that the Grand Chamber in *Jeunesse* said that the case was to be seen "as one involving an allegation of failure on the part of the respondent state to comply with a positive obligation under article 8 of the Convention" (para 105), but that does not mean that it is to be considered *in isolation from* the conventional approach to the question of whether a right to respect for family and private life is engaged. Showing that the state is under a positive obligation to grant permission to reside must not be regarded as a gateway to reliance on article 8 rights. On the contrary, examination of the particular circumstances of the individual who seeks to rely on article 8 and which are claimed to constitute family life is central to the question of whether the article is engaged. This cannot be determined by some extraneous, abstract assessment of whether the state is under a positive obligation to grant a right to reside.

110. The Secretary of State, while acknowledging that the distinction between positive and negative obligations had recently tended to be downplayed by Strasbourg in many contexts, argued in the subsequent case of *Agyarko v Secretary of State for the Home Department* that, in cases such as that of Mr Ali, it was of especial significance. Unless it could be shown that there was a positive obligation to grant a right to remain, the question of whether there was an interference with article 8 did not arise, she argued. This does not chime well with observations of the Grand Chamber in para 106 of *Jeunesse*, where it said that:

> "… the boundaries between the state's positive and negative obligations under [article 8] do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole …"

111. This passage, which confirms the approach taken in *Nunez v Norway* (2011) 58 EHRR 17, para 69, exposes the essential nature of the debate. It is not a question of an applicant for leave to reside showing that they are owed a positive obligation to be allowed to remain before they can rely on article 8. Rather, what is required is an open-ended examination of the interests of the individual pitted against those of the community as a whole. In the *Jeunesse* case the interests of the community as a whole were, principally, control of immigration. In the present appeal the community interests are the prevention of disorder and crime. But the following passage from para 107 of *Jeunesse* is pertinent for either context:

> "… in a case which concerns family life as well as immigration, the extent of a state's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion."

112. The striking of a fair balance between general community interests and the particular circumstances of the persons involved is the cornerstone on which the dispute is to be resolved, so far as Strasbourg jurisprudence is concerned. Expressed in that way, one can recognise the distinction between, on the one hand, the generally constant, if not unalterable, nature of the community interests and, on the other, the potentially infinitely variable importance of individual family and private life interests. The distinction between positive and negative obligations has not been thought to be significant by our domestic courts. As Lord Bingham held in *Huang*, whether an article 8 claim involves a complaint of interference or a lack of respect, the ultimate question is proportionality:

> "In most cases where the applicants complain of a violation of their article 8 rights, in a case where the impugned decision is authorised by law for a legitimate object and the interference (or lack of respect) is of sufficient seriousness to engage the operation of article 8, the crucial question is likely to be whether the interference (or lack of respect) complained of is proportionate to the legitimate end sought to be achieved." (para 18)

113. Domestic law has developed somewhat differently from the Strasbourg jurisprudence in relation to the approach to be taken to the question of proportionality, as Lord Reed has explained in paras 47-50 of his judgment. But this does not affect the question of whether someone who is not a settled migrant must show, as a preliminary step, that he or she is owed a positive obligation by the state to grant leave to remain before they can canvass the normal factors that constitute article 8 entitlement.

114. The statement in the passage quoted at para 111 above "whether there are insurmountable obstacles in the way of the family living in the country of origin of

the alien concerned" is not of prominent importance to the issues arising in this appeal. But the expression "insurmountable obstacles" does appear in rule 399 of the 2012 Rules, and is discussed below, at para 150.

The message provided by the Strasbourg cases

115. 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. This can be readily exemplified: a significant prison sentence may be offset by the strength of family ties or progress on the part of the offender post-conviction, for instance. Or expulsion might be justified where the offending is relatively minor but the length of time spent in the host country is short and there are no strong family ties there. The *application* of the various factors as opposed to the *recognition of their relevance* involves a holistic, open-minded approach. For this reason, giving pre-emptive, indicative weight to particular factors on a generic basis is impermissible if it distorts the proper assessment of these in their peculiar and individual setting.

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. In *Boultif* the court said at para 46:

> "The court recalls that it is for the contracting states to maintain public order, in particular by exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry and residence of aliens. To that end they have the power to deport aliens 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 necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued."

117. Likewise in *Üner* the court said this in para 54:

> "The court reaffirms at the outset that a 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, *Abdulaziz v United Kingdom* (1985) 7 EHRR 471, para 67; *Boujlifa v France* (1997) 30 EHRR 419, para 42]. 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."

118. The Grand Chamber in *Maslov*, at para 68, quoted paras 54 to 58 of the *Üner* judgment in full, stating, at para 69, that in this judgment, as well as in *Boultif*, the court had "taken care to establish the criteria - which were so far implicit in its case law - to be applied when assessing whether an expulsion measure is necessary in a democratic society and proportionate to the legitimate aim pursued".

119. The entitlement of an individual state to set policy standards as to when deportation should normally occur must not be confused with a power to prescribe how article 8 is to be applied in its territory. Rules as to when deportation should generally take place may be unexceptionable, so long as they yield to an uninhibited assessment of an individual's article 8 right, where that right is claimed.

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.

121. This approach is also endorsed in *Maslov* where, at para 70, the Grand Chamber said:

> "The court would stress that while the criteria which emerge from its case law and are spelled out in the *Boultif* and *Üner* judgments are meant to facilitate the application of article 8 in expulsion cases by domestic courts, the weight to be attached

> to the respective criteria will inevitably vary according to the specific circumstances of each case. Moreover, it has to be borne in mind that where, as in the present case, the interference with the applicant's rights under article 8 pursues, as a legitimate aim, the 'prevention of disorder or crime' (see para 67 above), the above criteria ultimately are designed to help evaluate the extent to which the applicant can be expected to cause disorder or to engage in criminal activities." (emphasis added)

122. It follows that such of the criteria from *Boultif* and *Üner* as are relevant to a particular article 8 claim *must* be taken into account and evaluated according to the *circumstances of the individual case* rather than by reference to some preconceived weighting accorded to them by national rules. This was again made clear in *AA v United Kingdom* [2012] Imm AR 107 where, at para 57, the court said:

> "The court reiterates that these criteria are meant to facilitate the application of article 8 in expulsion cases by domestic courts and that the weight to be attached to the respective criteria will inevitably vary according to the specific circumstances of each case. Further, not all the criteria will be relevant in a particular case. It is in the first instance for the domestic courts to decide, in the context of the case before them, which are the relevant factors and what weight to accord to each factor."

123. This, then, is the setting in which the relevant immigration legislation and the status and effect of the Immigration Rules 2012 (which are the rules which were applied in Mr Ali's case) must be considered.

The Immigration Act 1971

124. Lord Reed has set out the relevant provisions of the Immigration Act 1971 at paras 3 and 4 of his judgment. Under this Act deportation was a two-stage process requiring: (i) a person to be liable to deportation under the provisions of the Act; and (ii) the Secretary of State, in the exercise of her discretion under section 5(1), to have decided whether a deportation order should be made in respect of him. If the deeming provision in play was (as here) section 3(5)(a), therefore, the Secretary of State, before deciding whether to make a deportation order, had to make a judgment that the deportation of the person concerned was conducive to the public good. If she made that judgment, she then had to exercise a discretion as to whether the

deportation order should be made. These functions underwent significant change as a result of the enactment of the UK Borders Act 2007.

UK Borders Act 2007

125. The purpose of the UK Borders Act 2007 was stated to be to make deportation the presumption for foreign criminals (p 11 of the Immigration and National Directorate review in July 2006, *Fair, effective, transparent and trusted: Rebuilding confidence in our immigration system*). Deportation of *certain* foreign criminals was to become mandatory.

126. As noted above, (at para 98) foreign criminals are defined in section 32(1)-(3) of the Act. By section 32(4) the deportation of those coming within that category is stated to be conducive to the public good. Effectively, therefore, this provision removes from the Secretary of State the function of deciding whether the deportation of someone who meets the criteria for designation as a foreign criminal conduces to the public good. But it goes further than that. The terms of the provision, that the deportation of a foreign criminal *is* conducive to the public good, purport to foreclose any legal debate as to whether the deportation of *anyone* who comes within that category can be other than conducive to the public good. Thus, the deportation of a person convicted of a criminal offence and sentenced to more than 12 months' imprisonment is to be considered as immutably in the public good, irrespective of, for instance, any philanthropy or other worthy endeavours in which he may have engaged since his incarceration.

127. The second major change brought about by the 2007 Act was the requirement in section 32(5) that the Secretary of State must make a deportation order against a foreign criminal *unless* he came within one or more of the exceptions stipulated in section 33. This transformed the open-ended discretion that the Secretary of State had under section 5(1) of the 1971 Act into a circumscribed judgment as to whether the person to be deported came within any of the exceptions in section 33 of the 2007 Act. Sub-sections (2) to (6A) of section 33 (as amended by section 146 of the Criminal Justice and Immigration Act 2008) contain six exceptions. The only one relevant to this appeal is the first. It is to the effect that section 32(4) and (5) do not apply where deportation would breach a person's rights under the ECHR. The disapplication of section 32(4) and (5) of the 2007 Act, provided for in section 33(1), is made subject to section 33(7), however. It provides:

> "The application of an exception -

> (a) does not prevent the making of a deportation order;
>
> (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;
>
> but section 32(4) applies despite the application of Exception 1 or 4."

128. So, even if a deportation order would, under the first exception provided for in section 33(2), breach a person's Convention right, section 33(7) states that this would not prevent its being made. This is difficult to reconcile with section 6 of the Human Rights Act 1998 (HRA) which provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. If the Secretary of State (a public authority) made a deportation order in the case of someone whose Convention right would thereby be breached, she would inevitably act in contravention of her section 6 HRA duty. In these circumstances, it appears to me that it would be problematic for the Secretary of State to have recourse to this particular power.

129. Moreover, it would not be easy to square the preservation of the operation of section 32(4) (that the deportation of a foreign criminal is conducive to the public good) with the breach of a potential deportee's Convention rights. For how could it be said to conduce to the public good to do something which conflicts with the Secretary of State's legal obligation not to act in a way which is incompatible with a Convention right? These difficulties may be theoretical rather than practical, however. It has not been suggested that the Secretary of State has used or would use her powers under section 32 in a way that would bring her into conflict with her duty under section 6 of HRA.

130. Indeed, after the hearing of the appeal in this case, the court received a letter dated 21 January 2016 from the Government Legal Department. This gave the Secretary of State's view as to how section 33(7) would be applied "when it is accepted that a person's deportation would breach the UK's obligations under the ECHR". The letter referred to the fact that, since at least 2000, para 380 of the Immigration Rules had provided that a deportation order would not be made against any person whose removal would be contrary to the United Kingdom's obligations under ECHR. That paragraph was deleted in July 2012, although replaced by the new para 397 which was to the same effect. The letter asserted that the Secretary of State would not make a deportation order "in the majority of cases where there is a

protection or human rights barrier to deportation … because it would not be right to do so, and in any event could not be enforced".

131. The letter went on to say, however, that a deportation order might be made, "despite the existence of an ECHR barrier to deportation … when it is known that the barrier will fall away". Two examples of when this might arise were given:

> "This could be because the breach (on the basis of article 8, for example) is known to be time-limited or because [the Secretary of State] will obtain reliable assurances from the country of return that the person will not be subjected to treatment that would breach the ECHR …
>
> Another example of when the [Secretary of State] might consider that a deportation order could be made … would be where the foreign criminal decides to leave the UK of his own accord … or the person waives his or her rights … In such circumstances the deportation order would not be enforced … but the foreign criminal would comply with the requirement to leave the UK and the order would serve as preventing re-entry to the UK while it is in force."

132. There are two principal difficulties in the examples given by the Secretary of State. In the first place, the distinction between making a deportation order and enforcing it does not signify when one is considering a Convention right. The imperative in section 6 HRA is not to act in a way which is incompatible with a Convention right. If deporting someone would conflict with his article 8 right, I cannot see how it can be said to be compatible with that right to make an order for his deportation, irrespective of whether, at the time of the making of the order, it is not intended to enforce it. Moreover, it is not the *enforcement* of an immigration order which is in contravention of a Convention right that animates a right of appeal but the making of the order or the refusal to revoke it - see section 82 of the Nationality, Immigration and Asylum Act 2002.

133. The second difficulty with the Secretary of State's examples is that, properly analysed, most of these do not involve any conflict with a Convention right at all and do not come within the first exception in section 33. Thus, for instance, if the Secretary of State receives assurances on which she can properly rely that the deported person's Convention rights will not be violated in the country to which he is deported, then no Convention right is in play. Likewise, if the "ECHR barrier to deportation" has fallen away, self-evidently, the Convention right no longer exists.

And if the Convention right has been waived, there is no question of the Secretary of State acting in contravention of it.

134. That does not mean that the Secretary of State may deport in anticipation of a Convention right disappearing. So long as the right is in existence no public authority may act in a way that is incompatible with it. Plainly, to deport someone in contravention of a subsisting Convention right which is expected to vanish (but has not done so) is just as much a breach of section 6 of HRA as is acting in violation of a right which, it is believed, will endure.

135. Although these difficulties may be no more than theoretical, they demonstrate the error of the approach taken by the Court of Appeal in *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550; [2014] 1 WLR 998, where at para 54 Laws LJ suggested that the effect of section 33(7) was to demonstrate the strength of the public interest in deportation.

The 2012 Immigration Rules

136. The 2012 rules were made under Section 3(2) of the 1971 Act. On 12 June 2012 the Secretary of State published her *Statement of Intent: Family Migration.* Explaining the reasons for making the new rules she said, in paragraph 7, that they would "reflect fully" the factors that weigh for and against an article 8 claim. Paragraph 11 stated:

> "The Immigration Rules will reflect all the factors which, under current statutes and case law, can weigh in favour of an article 8 claim, eg a child's best interests, or against an article 8 claim, eg criminality and poor immigration history. The courts will continue to determine individual cases according to the law but, in doing so, they will be reviewing decisions taken under Immigration Rules which expressly reflect article 8. If an applicant fails to meet the requirements of the new Immigration Rules, it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK would breach article 8."

137. It is interesting to note two of the themes from this passage. First, the claim that the rules would reflect *all* the factors engendered by applicable statute and case law. Secondly, that, although courts would "determine individual cases according to the law", they would be reviewing decisions under rules that expressly reflected article 8. The somewhat Delphic nature of the latter of these statements can be

viewed in at least two ways. On the one hand, it might appear to recognise the courts' autonomous function in applying the law, independent of any guidance that the rules purported to give. On the other, there is more than a hint that it was expected of judges that, in their review of immigration decisions, they should acknowledge and give due weight to the fact that those decisions had been informed by consideration of what was claimed to be a complete charter of all relevant Convention factors. Moreover, the statement that removing from the UK an applicant who fails to meet the requirements of the rules would only breach article 8 in exceptional circumstances is not expressed to be for the guidance of immigration officers only.

138. Paragraph 12 reiterates that where article 8 is prayed in aid, whether under the Immigration Rules or on an asylum application, or if it is raised in the course of an appeals or enforcement process, the applicant is expected to *meet the requirements of the Immigration Rules* in order to be granted leave on article 8 grounds. This again indicates an intention that the article 8 assessment should be contained within and conducted according to the precepts of the 2012 rules, rather than as an exercise freestanding of them.

139. The 2012 rules took effect on 9 July 2012. So far as concerns the present appeal, the relevant provisions are contained in rules 396-399A. Rule 396 expresses an important presumption and makes a significant statement about the public interest. It stipulates that where a person is liable to deportation, it is to be presumed that the public interest requires deportation. And where the Secretary of State must make a deportation order in accordance with section 32 of the 2007 Act, it is in the public interest to deport.

140. Rule 397 provides that a deportation order will not be made if the person's removal would be contrary to the UK's obligations under the Refugee Convention or ECHR. Where, however, it would not be contrary to those obligations, it is stated that the public interest in deportation is only to be outweighed in "exceptional circumstances".

141. Rule 398 makes provision for circumstances where a person claims that their deportation would be contrary to the UK's obligations under article 8 but their deportation is deemed to be conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least four years (sub-paragraph (a)); or a period of imprisonment of less than four years but at least 12 months (sub-paragraph (b)); or 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 (sub-paragraph (c)). In any of the specified circumstances, the Secretary of State, in assessing the claim, is required to consider whether paragraph 399 or 399A applies and if neither does,

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

142. Rules 399 and 399A need to be set out in full. They are in these terms:

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

> (ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> 399A. This paragraph applies where paragraph 398(b) or (c) applies if -
>
> (a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or
>
> (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

143. These complicated provisions require to be unravelled. It is probably easiest to consider them as a series of categories. The first category arises under rule 398(a). This relates to persons liable to deportation who have been sentenced to at least four years' imprisonment. Paragraphs 399 and 399A do not apply to this category of persons - (see the opening words of each of those provisions), although it is clear from ECtHR jurisprudence that persons falling within this category may be able to succeed in resisting deportation under article 8. A number of recent cases involving the UK exemplify this: *Omojudi v United Kingdom* (2009) 51 EHRR 10, *AW Khan v United Kingdom* (2010) 50 EHRR 47, *AA v United Kingdom* (2011) Imm AR 107.

144. The effect of rule 398 is that, notwithstanding a claim by such persons that their deportation would contravene their article 8 rights, the public interest in having them deported can only be outweighed by *other* factors in "exceptional circumstances". This means that the article 8 assessment in relation to this class of persons is necessarily skewed. Their claim that deportation would disproportionately interfere with their right to respect for private and family life will only avail if they are able to demonstrate exceptional circumstances. Otherwise, the compulsorily assumed public interest in having them deported will prevail.

145. The threshold imposes two requirements. In addition to demonstrating "exceptional circumstances", the factors which such persons can call upon to substantiate their article 8 claim are factors "other" than those in paragraphs 399/399A. A similar two-fold threshold applies in the 2014 Rules: "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".

146. The second category relates to those who are liable to deportation and who have been sentenced to a period of at least 12 months' but less than four years' imprisonment and who have "a genuine and subsisting parental relationship with a child under the age of 18 years". Several requirements as to the condition of the child are stipulated. First he or she must be a British citizen. So a child with leave to remain, but without British citizenship, will not bring a parent within the provision. Alternatively, the child must have lived in the UK continuously for at least seven years before the date of the immigration decision. In either case, in order to come within para 399, it must be established that it would not be reasonable to expect the child to leave the UK and that there is no other family member able to care for the child in the UK.

147. It goes without saying that vibrant family life can exist in circumstances other than those specified in this second category. It is not difficult to envisage tight-knit families where it would be *possible* under the rules to separate a parent from his or her child if that child is not a British citizen or is less than seven years old or where there is another family member who might care for her or him. But whether to bring about a separation in those circumstances would violate the right of the parent and the child to respect for his or her family life is an entirely different matter. Family life is not to be defined by the application of a series of rules. Disturbance of that precious aspect of existence is not avoided by a limited set of exemptions. While a limited area of discretionary judgment must be allowed the government in the matter of justification of an interference with the rights enshrined in article 8(1) of ECHR, it is important, as a first step in an examination of whether there has been a breach of that article, that one should recognise that family life and the requirement to respect it are not susceptible to verification solely by a system of checks against a set of prescriptive rules.

148. It is crucial, also to draw attention here to the obligation under section 55 of the Borders, Citizenship and Immigration Act 2009, incorporating article 3(1) of the United Nations Convention on the Rights of the Child, to treat the child's best interests as a primary consideration (as discussed in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] 2 AC 166). The rules do not permit consideration of the best interests of the children concerned. Indeed, insofar as they envisage that where an alternative family member can care for a child deportation will be proportionate, the rules positively disregard the child's interests.

149. The third category involves those who have a "genuine and subsisting relationship" with someone who comes within one of the groups specified in para 399(b): British citizens, persons with indefinite leave to remain, and those who have been granted refugee or humanitarian protection. Again, conditions are applied in order to qualify for the exemption provided for in this sub-paragraph. The person with whom the relationship exists must have lived in the UK for at least 15 years and there must be "insurmountable" obstacles to continuing family life with that partner outside the UK. Similar observations about these requirements may be made as those that pertain to the second category.

150. Some comment in particular is required on the use of the phrase "insurmountable obstacles". In the article 8 contexts, our domestic courts have repeatedly emphasised that the test for whether a family can be expected to relocate abroad to continue their family life is whether relocation would be "reasonable". In *Huang* at para 20, Lord Bingham refers to "circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere"; in *EB (Kosovo) v Secretary of State for the Home Department* [2009] 1 AC 1159, para 12, whether the spouse can "reasonably be expected to follow the removed spouse to the country of removal", (see also para 18); and in *ZH (Tanzania)*, where Lady Hale at para 15 observes that "of particular importance is whether a spouse or … a child can reasonably be expected to follow the removed parent to the country of removal" (see also para 29). The issue was laid to rest in *VW (Uganda) v Secretary of State for the Home Department* [2009] EWCA Civ 5; [2009] Imm AR 436 (paras 19, 24)). The ECtHR, although it uses the phrases "insurmountable obstacles", "major impediments", "serious impediments" or, in the French version of certain judgments, merely "*obstacles*", looks in substance at the difficulties facing families and whether it is reasonable to expect family members to relocate. This is so, not only in cases involving "settled" migrants (see *Boultif*, paras 48, 52-55) but also in cases involving a "precarious" immigration status. For example, in *Mokrani v France* (2003) 40 EHRR 5, which involved a relationship commenced after a deportation order had been issued, the court, noting that the applicant "could not have been unaware of the relative precariousness of his situation" went on to say, in finding a violation of article 8, "it is hardly conceivable that the wife, a French national who has never lived in Algeria and who has no links with that country, should be expected to follow the applicant to Algeria" (para 34).

151. The fourth and fifth categories under para 399A (the article 8 "private life" provisions, whilst para 399 purports to deal with "family life") involve those who have been living in the UK for a prescribed number of years or who are less than 25 years old and have spent at least half their life in the UK and have no ties with the country to which they would be deported. This is an extremely high threshold to meet. Despite having lived in the UK for many years, a person may continue to speak the language of their country of origin, or may have family who remain living there. But this does not mean that their deportation would not be disproportionate.

Furthermore, the rules do not take into account the personal, cultural, linguistic and economic ties that a person has with the United Kingdom, or assess their degree of integration in this country, factors which are indisputably relevant to an article 8 assessment.

152. One can accept that all five categories describe groups of people who may readily be supposed to have established a family or private life in the UK. It cannot be said, however, that these groups are comprehensive of all whose circumstances might properly come within that rubric. Indeed, the rules also make the mistake of addressing family and private life separately, rather than recognising that the impact of expulsion on private and family life must be considered cumulatively (*Maslov* para 63; *AA v United Kingdom* [2012] Imm AR 107, para 49). 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.

Exceptional circumstances

153. In requiring exceptional circumstances to be established for a claim made by someone who does not come within one of the narrowly prescribed exemptions in the various categories described above, the Immigration Rules are contrary to a long line of authority, beginning with *Huang*. At paras 39 to 44 of his judgment in this case, Lord Reed has set out the background to the appeal in *Huang* and quoted a number of passages from the speech of Lord Bingham which, as Lord Reed has said, remain entirely pertinent to the issues in the present appeal.

154. It is of supreme importance to recognise two features of the *Huang* decision. The first of these is that consideration of whether an individual's article 8 rights will be infringed by a decision to deport her or to refuse her permission to reside in this country, notwithstanding her article 8 right, does not lend itself naturally to the application of a series of rules. The essential nature of the inquiry into whether (i) the article 8 right is engaged; (ii) there has been an interference with it; and (iii) if so, the interference is justified, inevitably involves a fact sensitive focus. Of course, Immigration Rules, in order to be administratively workable, must contain a series of checks or filters. But two points need to be made about this. First, the primary function of such checks should be to determine whether the applicant *qualifies* under the rules. And the second is that failure to qualify under the rules should not inhibit the open-minded examination of whether article 8 mandates that a decision to grant

leave to enter or remain or, as in this case, to refuse to make a deportation order, should be made.

155. The second feature of the *Huang* decision mirrors the second point made above. At para 20 of *Huang* Lord Bingham said:

> "In an article 8 case … the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality."

156. So, the ultimate question is whether the refusal of leave to enter or remain (or, as in this case, the decision to make a deportation order) prejudices the family or private life of the individual sufficiently seriously to amount to a breach of the article 8 right. That quest should not be encumbered by pre-emptive considerations of exceptionality. It is, in essence, a simple exercise. Of course, the fact that the person liable to deportation has committed a criminal offence looms large in the "considerations weighing in favour of the refusal". But that consideration is no more than a factor to be accorded the weight that the particular circumstances of the case warrant. It must not be an intrinsic impediment of unvarying significance which creates a hurdle of identical weight in all cases and which can only be overcome by the existence of closely defined exceptional circumstances.

157. A proper understanding of the role of the appellate immigration authority, on an appeal from a decision to refuse leave is, as Lord Reed has pointed out (in paras 42-43), vital to an appreciation of how it is to perform its function. It is not a reviewing body. It is not inhibited by findings previously made. On the contrary, it is its duty to find facts for itself and these must include, where relevant, circumstances which have arisen since the original findings were made. For this reason, although the Upper Tribunal in the present case was bound to take account of the Secretary of State's reasons for making a deportation order, that was only because these were relevant considerations to which appropriate weight should be given. The fact that the Secretary of State had decided to make a deportation order has no significance for the Upper Tribunal beyond that.

158. Lord Reed refers at para 45 to a licensing decision case, *Sagnata Investments Ltd v Norwich Corpn* [1971] 2 QB 614, which quotes, at p 637, from a much older licensing case, *Stepney Borough Council v Joffe* [1949] 1 KB 599, 603. I question the relevance of those decisions in the present context. In a human rights appeal, the function of the Tribunal is to anxiously scrutinise the decision of the Secretary of State, and to assess the proportionality of the interference with the individual's rights for itself. I find myself unable to agree with the statement, in the human rights context, that a court "ought not lightly … to reverse" the Secretary of State's decision. My view that this is not the correct approach is reinforced by the existence of a statutory appeal right on human rights grounds.

159. As Lord Reed has observed at para 47, *Huang* has been followed and developed in such cases as *EB (Kosovo) v Secretary of State for the Home Department* [2008] UKHL 41; [2009] 1 AC 1159; *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74; [2013] 1 WLR 3690, para 13, and *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 58; [2015] 1 WLR 5055. Observations made by Lord Bingham in *EB (Kosovo)* as to the impossibility of subjecting article 8 assessments by appellate tribunals to general rules are reflected in the more recent cases referred to, and are thus worthy of particular emphasis:

> "Thus the appellate immigration authority must make its own judgment and that judgment will be strongly influenced by the particular facts and circumstances of the particular case. The authority will, of course, take note of factors which have, or have not, weighed with the Strasbourg court ... [T]here is in general no alternative to making a careful and informed evaluation of the facts of the particular case. The search for a hard-edged or bright-line rule to be applied to the generality of cases is incompatible with the difficult evaluative exercise which article 8 requires." (para 12)

160. I agree with Lord Reed's rejection at para 48 of counsel for the Secretary of State's criticism of the decision in *Bibi*. For the reasons given earlier, although the fact that a person resisting deportation is not a settled migrant is relevant, it does not mean that they are debarred from relying on the same type of circumstances as would a settled migrant in advancing an article 8 claim. And as Lady Hale said in *Bibi* the applicable principles are similar in both instances.

161. Moreover, as Lord Reed has explained, the analytical structure by which the proportionality of a decision or measure should be assessed can, with modest modification, be applied to the present circumstances. That structure has been developed and refined through such cases as *Huang*; *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2011] UKSC 45;

[2012] 1 AC 621, and *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39; [2014] AC 700. It is now firmly established as the appropriate means by which the proportionality of an impugned decision should be determined and it comprehends the fair balance element. It should be applied in this case.

MF (Nigeria) v Secretary of State for the Home Department and later cases

162. In *MF (Nigeria)* the Secretary of State had asserted (in a statement produced during the hearing of the appeal and at the request of the court) that the new rules sought "to reflect the Strasbourg jurisprudence when applied to the deportation of foreign criminals": see para 34. In as much as the Court of Appeal's statement in *MF (Nigeria)*, at para 44, that the new rules were "a complete code" suggests that article 8 factors which are not covered by the rules need not be considered, I would strongly disagree. As I have said, the primary function of the checks which the rules contain is to determine whether the applicant qualifies under them. They cannot be regarded as a comprehensive means by which a person's article 8 rights are determined and, indeed, on the hearing of this appeal, Ms Giovanetti made no such claim. In the words of Lord Bingham, "an applicant's failure to qualify under the rules is … the point at which to begin, not end, consideration of the claim under article 8" (*Huang*, para 6).

163. The approach to proportionality can be structured; indeed, the formulation of the correct approach in such cases as *Aguilar Quila* and *Bank Mellat* is positively helpful in ensuring that examination of whether a decision or measure is proportionate is conducted in a controlled way. But the content of Convention rights and whether interference with them can be said, in any given context, to be proportionate cannot be prescribed. Indeed, although the ECtHR has set out a number of factors that will frequently require to be examined, these do not purport to be exhaustive of the circumstances in which a Convention right is in play or whether interference with such a right is proportionate. Nor will all of those factors be relevant in every conceivable situation. Much less will it be appropriate to attempt to attach a particular weight to individual factors in any general, pre-emptive way. For these reasons, the suggestion (made in *AJ (Angola) v Secretary of State for the Home Department* [2014] EWCA Civ 1636, para 39) that "an official or a tribunal should seek to take account of any Convention rights of an appellant through the lens of the new rules themselves, rather than looking to apply Convention rights for themselves in a free-standing way outside the new rules" cannot be accepted. Nor can it be accepted, as was said in *Secretary of State for the Home Department v AQ (Nigeria)* [2015] EWCA Civ 250; [2015] Imm AR 990, para 70, that national policy as to the strength of the public interest in the deportation of foreign criminals is a "fixed criterion". That proposition cannot be accepted if it was intended to convey that this was a factor of unvarying, immutable weight.

The public interest

164. The strength of the public interest in favour of deportation must depend on such matters as the nature and seriousness of the crime, the risk of re-offending, and the success of rehabilitation, etc. These factors are relevant to an assessment of the extent to which deportation of a particular individual will further the legitimate aim of preventing crime and disorder, and thus, as pointed out by Lord Reed at para 26, inform the strength of the public interest in deportation. I do not have trouble with the suggestion that there may generally be a strong public interest in the deportation of foreign criminals but a claim that this has a fixed quality, in the sense that its importance is unchanging whatever the circumstances, seems to me to be plainly wrong in principle, and contrary to ECtHR jurisprudence.

165. It is important for the decision-maker to scrutinise the elements of public interest in deportation relied upon in an individual case, and the extent to which these factors are rationally connected to the legitimate aim of preventing crime and disorder. That exercise should be undertaken before the decision-maker weighs the public interest in deportation against the countervailing factors relating to the individual's private or family life, and reaching a conclusion on whether the interference is proportionate.

166. Three component factors of the public interest in deportation were discussed in *OH (Serbia) v Secretary of State for the Home Department* [2008] EWCA Civ 694; [2009] INLR 109, para 15): risk of re-offending, deterrence and societal revulsion towards the commission of criminal offences. I have touched upon the risk of re-offending at para 96 above. Where an individual is assessed to pose a low risk of re-offending, interference with his article 8 rights on the basis that it is necessary to prevent crime and disorder is more difficult to justify, and the weight to be attached to the public interest in deportation in such a case will be reduced.

167. As to deterrence, Lord Bingham at para 16 of *Huang* acknowledged "the need to discourage non-nationals admitted to the country temporarily from believing that they can commit serious crimes and yet be allowed to remain". This observation posits an appropriate distinction between migrants admitted *temporarily* to the United Kingdom, and persons who hold permanent residence or who have resided in this country for a substantial period of time, for example, children who have lived in this country all or most of their lives. It is at least open to question whether deterrence is a relevant component of the public interest in deportation so far as this latter group is concerned. Where the threat of a custodial sentence has failed to deter such persons from offending, one must query whether the threat of deportation would have any greater effect. No evidence has been presented to support such a contention.

168. Expression of societal revulsion, the third of the factors applied in *OH (Serbia)*, should no longer be seen as a component of the public interest in deportation. It is not rationally connected to, nor does it serve, the aim of preventing crime and disorder. Societal disapproval of any form of criminal offending should be expressed through the imposition of an appropriate penalty. There is no rational basis for expressing additional revulsion on account of the nationality of the offender, and indeed to do so would be contrary to the spirit of the Convention.

169. Much has been said of the public interest in the deportation of foreign national criminals. But the public interest is multi-faceted, and there are other important factors which contribute to the positive development of our society and are thus matters in the general public interest. These factors may be a relevant consideration in the article 8 proportionality assessment, and have a free-standing value, independent of that which attaches to the individual facing deportation. For example, there is a public interest in families being kept together, in the welfare of children being given primacy, in valuing a person who makes a special contribution to their community, and in encouraging and respecting the rehabilitation of offenders. These factors all play a role in the construction of a strong and cohesive society. They are recognised outwith the immigration context, and certain factors are given statutory recognition. Where relevant they should be part of the proportionality equation.

The proceedings

170. I agree with and gratefully adopt Lord Reed's account of the proceedings, save for his review of the Upper Tribunal's consideration of the appellant's circumstances. Lord Reed has said (in para 60) that it is not apparent that the judge took account of the fact that the appellant's relationship with Ms Harwood had been formed at a time when his immigration status was such that the persistence of family life within the UK was precarious and that its continuance after his release from prison took place when he was facing deportation proceedings.

171. At para 42 of the judge's reasons he recorded that the appellant had "accepted that his relationship with [Ms Harwood] developed when his immigration status was uncertain". And at para 64, the judge observed that Ms Harwood had learned of "the appellant's precarious immigration status" following his involvement in criminal offences. At para 70, Ms Harwood is recorded as having said that she wanted to marry the appellant and have a "proper wedding" but that this was difficult because of his "uncertain immigration status". Quite apart from these items of evidence and the judge's express reference to them, the appellant's precarious immigration status and the fact that he was facing deportation proceedings when he was released from prison are indisputable facts. I find it hard to believe in these circumstances that the judge did not attach weight to them. The fact that they were not discussed

prominently among the welter of matters that the judge was required to consider does not mean that they were left out of account. On the contrary, his mention of the appellant's and Ms Harwood's awareness of them seems to me to suggest that he had them well in mind in reaching his conclusion.

172. Lord Reed also considers that the Upper Tribunal erred in failing to take any account of the new rules on the basis that they did not assist with the proper assessment of the applicant's human rights (paras 60 and 63). I do not consider that the Upper Tribunal's failure to take account of the rules impaired its approach to the article 8 proportionality assessment. In my opinion, the Upper Tribunal succinctly, but correctly, expressed the proper approach to article 8, apart from its reference to society's disapproval as a basis on which deportation could be justified. (Since the Upper Tribunal found that the decision to deport was disproportionate, however, this error does not signify.) At para 95 of his Determination and Reasons the judge said:

> "I have to decide if the interference in (*sic*) the private and family life consequent on removal is proportionate to the proper purpose of deporting foreign criminals for the purposes of the prevention of disorder and crime. I have to do that knowing that it is unlikely that this appellant will commit further offences. The point is the deterrent effect or general expression of society's disapproval of foreign criminals, rather than preventing further trouble from this particular man, that is important in this case."

173. The judge also recognised that the 2007 Act had expressed a legitimate public interest in the deportation of foreign criminals and acknowledged that he was bound to respect the policy as set out in section 32(5) of the 2007 Act (para 96), and subsequently referred to the "imperative of removal" in his discussion (paras 98 and 102). He then set out a number of reasons which, taken in combination, led him to the conclusion that his deportation would be disproportionate. These included that the appellant had no family in Iraq and had not lived there since the age of 12 (this was "not determinative", but "a factor against removal" - para 100); the appellant's "length of stay" in the UK "and positive attitude to future behaviour" were "significant factors to weigh in the balance against the imperative of removal" (para 102); and his "genuine", "strong" and "important" relationship with his fiancée (paras 94, 99), whose being required to relocate to Iraq would not be "reasonable" (para 88). This is precisely the type of fact-sensitive proportionality assessment that both ECtHR jurisprudence and binding domestic authority requires and I cannot fault it.

The Court of Appeal decision

174. The Court of Appeal's basic error was its misunderstanding of the significance of sections 32 and 33 of the 2007 Act, and its conclusion that *MF (Nigeria)* [2014] 1 WLR 544 and *SS (Nigeria)* [2014] 1 WLR 998 required tribunals to give preponderant weight to the public interest in the deportation of foreign criminals at the expense of a proper examination of the circumstances of individual cases. All article 8 claims had to be refused if they fell outside rules 399 and 399A unless they could identify exceptional or compelling circumstances. The inevitable circumscription of a proper article 8 inquiry that such an approach entails cannot be upheld for the reasons earlier given.

175. The second ground of appeal (that the Upper Tribunal had failed to recognise the importance of the public interest in deporting foreign criminals) is plainly unsustainable once the correct approach to sections 32 and 33 is understood. As I pointed out in para 172 above, the judge actually overstated the scope of the public interest but, for the reasons given, this had no impact on the otherwise correct decision that he reached.

176. Grounds (iii) and (iv) (which the Court of Appeal found it unnecessary to consider in light of its conclusion on grounds (i) and (ii)) are unarguable, in my opinion. Ground (iii) averred that the Upper Tribunal had failed to apply the guidance given in *Üner*. I need not repeat my discussion of the guidance to be derived from that case. There is nothing in that guidance which is in conflict with the approach of the Upper Tribunal. Since, for the reasons that I have given as to the general propriety of the Upper Tribunal's approach, I consider that ground (iv) is unsustainable.

Conclusion

177. I would allow the appeal and restore the decision of the Upper Tribunal.