Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08762/2012

THE IMMIGRATION ACTS

Heard at Field House	**Promulgated on:**
On 29 October and 17th December 2013	**On 25 March 2014**

Before

THE PRESIDENT, THE HON MR JUSTICE MCCLOSKEY
UPPER TRIBUNAL JUDGE DAWSON

Between

BACKO MENDENGUE
(No Anonymity Order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Hussain (of Counsel), instructed by Burton & Burton Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer.

DETERMINATION AND REASONS

INTRODUCTION

1. This is the decision of the panel to which both members have contributed.

2. The Appellant is a national of The Cameroon, who is now aged 34 years. He has been present in the United Kingdom for some 10 years. His appeal to this Tribunal has its origins in a decision made on behalf of the Secretary of State for the Home Department ("*the Secretary of State*") on 3 April 2012, whereby his application for asylum was refused for reasons given in a letter dated 27 March 2012. This was followed by a further letter dated 10 May 2012) communicating a decision to make a deportation order. The Appellant appealed to the First-Tier Tribunal ("*the FtT*"), unsuccessfully. He then appealed to this Tribunal which, by its determination dated 28th January 2013, held that the decision of the FtT was vitiated by an error of law, the nature whereof appears from the following passages:

> "*[23] In my view in order to make a proper sustainable finding in relation to section 55 of the 2009 Act and make a balanced assessment under Article 8, the First-Tier Tribunal should have made a clear and unambiguous finding in relation to the extent of the Appellant's relationship with his children. Two of the children are British citizens and all of them are citizens of the EU …*
>
> *[25] The First-Tier Tribunal considered the childrens' best interests but did not reach a conclusion. The assessment was not adequate. …*
>
> *A clear and unambiguous finding needs to be made in relation to the Appellant's relationship and contact with his children and their best interests and the decision under Article 8* [ECHR] *needs to be remade in light of those findings and there needs to be a proper consideration of the public interest.*"

The Upper Tribunal set aside the decision of the FtT to dismiss the appeal under Article 8 ECHR accordingly.

3. By this further determination, the Upper Tribunal, having conducted hearings on 29th October and 17th December 2013, remakes the decision. As the above résumé demonstrates, the issues to be determined centre on the deportation provisions of the Immigration act 1971, certain provisions of the Immigration Rules, Article 8 ECHR and section 55 of the Borders, Citizenship and Immigration Act 2009 ("*the 2009 Act*").

CHRONOLOGY OF MATERIAL EVENTS

4. The salient events in the history of this appeal are uncontentious. We summarise them thus:

   (a) The Appellant, who is a national of the Cameroon, now aged 34 years, arrived in the United Kingdom, entering and remaining unlawfully, on some unspecified date prior to November 2008.

   (b) On 2nd November 2008, he was arrested on suspicion of having attempted to use a false passport to open a bank account in another name. He was charged with possession of a false identity document.

(c) On the same date, 2nd November 2008, the Appellant claimed asylum, asserting that he had travelled to the United Kingdom in September 2003 via France, where he had lived for some 9 months.

(d) On 24th November 2008, the Appellant was sentenced to ten months imprisonment for possessing and using a false instrument. Further, the Court recommended his deportation.

(e) On 31st December 2008, the Appellant was notified of a decision to make a deportation order.

(f) On 3rd April 2009, following his release from prison, he was granted immigration bail, with the remainder of his sentence to be served in the community until 1st March 2010.

(g) On 15th May 2009 the Appellant was arrested on suspicion of having committed the offence of common assault. The victim was his first female partner, "A" (*infra*).

(h) On 16th July 2009, the child "J" was born to "A", the Appellant being the paternal father.

(i) On 6th November 2009, the Appellant, having pleaded guilty to the assault charge, was sentenced to 50 days imprisonment.

(j) When sentenced, the Appellant was time served.

(At this point in the chronology there is a reasonably substantial gap of approximately one year's dimensions.)

(k) In October and November 2010, the Appellant enrolled for two educational courses.

(l) In the year 2011, the Appellant became the father of two children by two different mothers. The child "R" was born to "AA" on 29th January 2011. The child "M" was born to "A" on 26th November 2011.

5. Chronologically, the next material event was the Secretary of State's decision in April 2012 rejecting the Appellant's asylum claim. The claim was based on an asserted fear of the Cameroonian Secret Services arising out of the Appellant's political activities when a university student. The detailed letter of decision makes clear that the claim was rejected primarily on the ground that it was not genuine or credible. The reasons for this assessment were expressed in impressive detail which it is unnecessary to reproduce in the present context, as the Appellant subsequently abandoned his appeal against the refusal of refugee status. It suffices

to highlight that the Appellant did not pursue his appeal against a decision which contained findings of mendacity against him. The Secretary of State's also entailed that deportation of the Appellant would not infringe any of the rights of those concerned protected by Article 8 ECHR. This was followed by the separate decision to make a deportation order, in May 2012 (*supra*).

THE FAMILY FRAMEWORK

6. The family matrix under scrutiny is somewhat complex. It involves the Appellant, two women from whom the Appellant is estranged, three children born to these women and of whom the Appellant is the biological father and, finally, the Appellant's current female partner. We preface this summary with the observation that the dates, periods and sequences pertaining to the Appellant's unmarried relationships with the two ladies mainly concerned are far from clear. We do not consider it necessary to disentangle forensically and comprehensively this complex jigsaw. The most important finding which emerges, in our estimation, is that the Appellant moved swiftly backwards and forwards between the two female partners concerned and liberally deceived and cheated on them. This is illustrated most graphically by the fact that the Appellant fathered two children born separately to these two ladies within a period of ten months, in 2011: see paragraph [4](l) *supra*.

7. We elaborate on this complex web of adult/adult and parent/children relationships as follows:

   (a) 'AA' was, historically, the Appellant's first female partner. We accept the Appellant's assertion that this relationship began around 2006. At that time, AA was the mother of two children born in 1996 and 1999 respectively. The Appellant assaulted AA on 15th May 2009, shortly after his release from prison, giving rise to his second conviction, made on 6th November 2009. This relationship appears to have been re-established to some extent, resulting in 'AA' giving birth to 'M' on 17 November 2011.

   (b) 'AN' was the Appellant's second female partner. Based on the date of birth of their child, R, on 29th January 2011, this relationship appears to have commenced some time in 2010, not long after the Appellant's conviction for assaulting his first female partner 'AA'. n a letter dated 7th May 2011, written six months before 'M's' birth, AN roundly denounced the Appellant, declaring her relationship with him to be finished, complaining that he was providing her with no support.

   (c) We note that in support of his Article 8 ECHR claim, the Appellant submitted both a witness statement and a letter of support from 'AA', dated 15th and 17th January 2011 respectively. The Appellant's son 'R' was born to a different female partner, 'AN', some two weeks later.

(d) The Appellant's relationship with 'AA' appears to have ended, when she was expecting their second daughter. Notably, the FtT recorded in its determination the Appellant's claim that he was in an enduring relationship with "AA". We find that this was mendacious. We further find that neither of his female adult relationships had been in existence for a long time prior to the FtT hearing. This finding is reinforced by the consideration that both ladies refused to attend to testify on his behalf. We attribute no weight whatsoever to either the witness statement or letter of support purportedly emanating from "AA".

(e) The Appellant's relationship with his second female partner, 'AN' ended on some unspecified date before she wrote her letter dated 7 May 2011.

(f) 'MN' is the Appellant's present female partner. This relationship dates from early 2013. We shall elaborate on this topic *infra*.

(g) The child J was born on 16th July 2009 and is now aged 4 ½ years. Her mother is 'AN'.

(h) The child 'R' was born on 29th January 2011 and is now aged almost 4 years. Her mother is 'AN'.

(i) The child 'M' was born on 26th November 2011 and is now aged 2 years. Her mother is 'AA'.

As the above sequence demonstrates, one of the Appellant's female partners, "AA", became pregnant by him within approximately one month of the Appellant's other female partner, "AN", giving birth to their second child. We shall examine further *infra* how this aspect of the Appellant's conduct, coupled with others, bears on the issues raised under Article 8 ECHR and section 55 of the 2009 Act.

8. As recorded above, most recently, the Appellant has begun a new relationship with a different female partner. We elaborate on this *infra*. Thus, in the overall matrix, there have been, in the span of some five years, three adult relationships involving the Appellant. Two of these have resulted in the birth of three children of whom the Appellant is the biological father and from whose mothers the Appellant has been estranged for at least two years. It would appear that, in total, these two relationships, which had the elastic element noted above, endured for a period of four years at most. Furthermore, there are five children in the picture. The Appellant is the biological father of three of them, all British citizens. We record, for completeness, that he was also nominally the stepfather of two sons born to 'AA' in 1996 and 1999 respectively.

THE EVIDENCE

9. Some of the evidence which this Tribunal has considered is identifiable from paragraphs [4] – [8] above. We refer also to the findings which we have incorporated within those paragraphs. The documentary evidence is voluminous. The sources from which it emanates include schools and nurseries, the relevant City Council, a hospital, a bank and a library. In addition there are sundry retail purchase receipts, witness statements and copy passports. There is also an extensive quantity of photographs, coupled with DVDs and summaries thereof. This is supplemented by a series of letters and the Appellant's asylum interview transcripts. We have also considered a social worker's report.

10. Evidence was given to this Tribunal by the Appellant, his present female partner and the aforementioned social worker. We record that we heard the evidence of the Appellant's present female partner, "MN", in his absence. It became necessary to interpose this evidence at a stage when the Appellant's evidence was incomplete. We considered it preferable, with a view to avoiding any risk of pressure on her or any possible contamination of her evidence, to hear this witness's evidence in the Appellant's absence. By virtue of this measure, this witness's evidence was more reliable and, simultaneously, the risk of the Appellant manufacturing or manicuring his incomplete testimony was minimised. Having raised this issue with the Appellant's legal representatives, the Appellant consented to absenting himself from the hearing for this limited purpose and period.

11. In addition to the findings and uncontested facts rehearsed in paragraphs [4] – [8] above, our further findings, assessments and conclusions are set out *infra*.

THE LEGAL FRAMEWORK

12. At this juncture, we turn to the task of identifying the applicable legal rules and principles. At the outset, we would highlight that, by virtue of the Appellant's sentence of imprisonment, ten months, this is not an automatic deportation case. Thus the regime constituted by section 32 of the UK Borders Act 2007 and paragraphs 398, 399 and 399A of the Immigration Rules does not apply to him. In principle, therefore, he is in a stronger position than those embraced by the automatic deportation regime . The legal rules governing his case are contained in, firstly, section 3 of the Immigration Act 1971, which provides in material part:

> "*(5) 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*

> *(6) Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so.*

In this case, the sentencing court recommended the Appellant's deportation from the United Kingdom. These provisions of primary legislation must be considered in conjunction with the relevant provisions of the Immigration Rules, which, in his case, are paragraphs 363, 396 and 397.

13. The generic subject matter of Part 13 of the Immigration Rules is "Deportation". We draw attention, firstly, to the issue of dates. As recorded above, the decision to deport the Appellant from the United Kingdom was made prior to 9th July 2012. The significance of the latter date is that it heralded the introduction of substantial changes to Part 13. We are satisfied that these new provisions apply to the Appellant's case, by virtue of paragraph 362, which provides:

> "*Where Article 8 is raised in the context of deportation under Part 13 of the Rules, the claim under Article 8 will only succeed where the requirements of these Rules as at 09 July 2012 are met,* ***regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.***"

[Our emphasis.]

Paragraph 363(i) is a mere rehearsal of section 3(5)(a) of the Immigration Act 1971 (*supra*). The next material provision in Part 13 is paragraph 396, which provides:

> "*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.*"

We interpose here the observation that the first, but not the second, part of this discrete rule applies to this Appellant. Next, paragraph 397 provides:

> "*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 out weighed.*"

14. We consider that, in this Appellant's case, two aspects of the public interest are engaged. The first is the public interest in the maintenance of firm immigration control. This arises from the fact that the Appellant is an illegal entrant and his consequential lack of lawful immigration status. The second is the public interest in

deportation in appropriate cases. Our analysis is that this discrete public interest is not engaged in a case of discretionary deportation unless and until the Secretary of State, in accordance with section 3(5)(a) of the 1971 Act, determines that it would be conducive to the public good to deport the person concerned. A determination of this kind is an evaluative judgment, to be made by the Secretary of State according to well established principles of public law. Where – as in the present case – the Secretary of State makes a determination to this effect, we consider that the presumption contained in the first sentence of paragraph 396 of the Immigration Rules is triggered. This is the second aspect of the public interest which arises in this Appellant's case. Bearing in mind that this is an Article 8 ECHR appeal, this means that, within the compass of Article 8(2), the impugned decision of the Secretary of State pursues two legitimate aims viz the maintenance of firm immigration control and the deportation of a person who has infringed the criminal laws of the United Kingdom and whose deportation has been assessed as conducive to the interests of the population of the United Kingdom as a whole.

15. While we are alert to the recent decision of the Court of Appeal in **MF (Nigeria) – v – Secretary of State for the Home Department** [2013] EWCA Civ 1192, which post dated the first instance Determination, we consider that it does not apply directly to the present appeal, given our analysis that the Appellant's case does not fall within the embrace of paragraphs 398 – 399A of the Immigration Rules. Subject to this material distinction, we are mindful that the Court of Appeal held, firstly, that in cases where it is necessary to decide whether the deportation of a foreign criminal would breach rights under Article 8 ECHR, great weight should be given to the public interest where the offender is unable to satisfy any of the provisions of paragraphs 398, 399 and 399A. The Master of the Rolls continued:

> "*[**40**] …… It is only exceptionally that such foreign criminals will succeed in showing that their rights under Article 8(1) trump the public interest in their deportation ….*
>
> *[**42**] ….. 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 …..*
>
> *[**43**] The word 'exceptional' is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom 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.*"

The Court held, secondly, that the new Rules constitute "*a complete code*". In the balancing exercise to be performed, the Tribunal applies a proportionality test as required by the Strasbourg jurisprudence. The words "*other factors*" refer to "*all other factors which are relevant to proportionality*": paragraph [**39**]. To summarise:

(a) If a claimant's case falls within paragraph 399 or 399A, the exercise for the Tribunal involves a single stage only.

(b) If a claimant's case does not fall within either of these provisions, it is necessary to consider, and determine, whether there are exceptional circumstances outweighing the public interest in deportation: this introduces further enquiry and evaluative assessment, which will entail the tribunal making such findings of fact as the context requires.

16. We are also alert to another important recent decision of the Court of Appeal, **SS (Nigeria) – v – Secretary of State for the Home Department** [2013] EWCA Civ 550. The central theme of this decision is the powerful weight to be attributed to the Parliamentary intervention in this field. By section 32 of the UK Borders Act 2007, a "*foreign criminal*" is any person who has received a sentence of at least 12 months imprisonment after 1st August 2008 or was in custody pursuant to such a sentence on that date and had not been served with a Notice of Deportation. Section 32 of the 2007 Act continues:

"*(4) For the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good.*

(a) *The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).*"

Section 33 provides:

"*(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.*"

At this juncture, it is convenient to set out section 55 of the Borders, Citizenship and Immigration Act 2009, which is another important element in the primary legislation framework:

"*(1) The Secretary of State must make arrangements for ensuring that –*

> *(a) The functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom …*
>
> *(2) The functions referred to in subsection (1) are –*
>
> *(a) Any function of the Secretary of State in relation to immigration, asylum or nationality;*
>
> *(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer …..*
>
> *(3) A person exercising any of those functions must, in considering the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).*"

17. Delivering the main judgment of the Court in **SS,** Laws LJ, referring to the deportation of foreign criminals under the 2007 Act, stated:

> "*[48] ... Where such potential deportees have raised claims under Article 8, seeking to resist deportation by relying on the interests of a child or children having British citizenship, I think with respect that insufficient attention has been paid to the weight to be attached, in virtue of its origin in primary legislation, to the policy of deporting foreign criminals ……*
>
> *[49] The policy's source, however, is as we have seen one of the drivers of the breadth of the decision maker's margin of discretion when the proportionality of its application in the particular case is being considered.*"

Summarising, Laws LJ stated:

> "*[55] …. Proportionality, the absence of an 'exceptionality' rule and the meaning of 'a primary consideration' are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision maker's margin of discretion: the policy's source and the policy's nature and in particular to* ***the great weight which the 2007 Act attributes to the deportation of foreign criminals***."
>
> [Emphasis added.]

And in a later passage, Laws LJ refers to "*the extremely pressing public interest in the Appellant's deportation*": paragraph [58].

18. We consider that the decision in **SS**, in common with the decision in **MF**, does not apply directly to the Appellant's case, for the same reason viz the Secretary of State's decision to deport him was discretionary, rather than automatic, by virtue of his sentence of imprisonment being of less than 12 months duration. Hence our

observation in paragraph [12] above that the Appellant is, **in principle**, in a stronger position than those to whom the automatic deportation regime applies. In our opinion, the legal effect of this is that the proportionality assessment is somewhat more benign and less rigorous to offenders such as this Appellant. The legislature, in enacting section 32 of the 2007 Act and in making the new provisions in Part 3 of the Immigration Rules, could have included offenders whose criminality attracts sentences of imprisonment of less than 12 months. However, it chose not to do so. The main effect of this is, in our judgment, twofold. Firstly, the circumscribed proportionality regime contained in paragraphs 398 – 399A of the Rules does not apply in cases such as the present. Secondly, the second of the public interests identified above viz the public interest in deporting certain foreign criminals applies with somewhat less force. This, we would observe, is logically consistent with a more rigorous approach to more serious offenders and, correspondingly, a less severe approach to those whose offending is on a smaller scale.

19. At this juncture, we draw attention to the decision of the Upper Tribunal in **Bah – v – Secretary of State for the Home Department** [2012] UKUT 00196 (IAC), where the Secretary of State made a decision to deport a person who had been convicted of a series of offences over a period of time which attracted a variety of sentences ranging from fines to community orders and one sentence of imprisonment of five weeks, which was suspended. The Secretary of State determined that the deportation of the Appellant would be conducive to the public good. We consider that the decision of the Upper Tribunal is consistent with our view that, in cases of the present *genre*, where (as here) there is a human rights challenge, the task for the Tribunal is to conduct an orthodox human rights assessment. This will entail asking, and answering, the staged questions formulated by the House of Lords in **Razgar – v - Secretary of State for the Home Department** [2004] 2 AC 368 (*infra*).

20. Given that we are desirous of promulgating some general guidance to Tribunals to be applied in cases of this kind, it is appropriate at this juncture to highlight the distinctive functions of the First-Tier Tribunal and the Upper Tribunal. Where an appeal against an order deporting a foreign criminal is pursued, it is incumbent on the First-Tier Tribunal to consider all relevant evidence, to make appropriate findings of fact and, finally, to make its decision, bearing in mind the distinction between cases of this kind and those embraced by **MF (Nigeria)** and **SS (Nigeria),** together with all of the other legal rules and principles in play in the particular case. These include the guidance provided by the highest courts on the correct approach to Article 8 ECHR and section 55 of the Borders, Citizenship and Immigration Acts 2009. The Upper Tribunal, however, has a different function. Where a further appeal is brought in this forum, permission having been granted, such appeal is, pursued, per section 11(1) of the Tribunals, Courts and Enforcement Act 2007 –

> "*…. on any point of law arising from a decision made by the First-Tier Tribunal …….*"

Thus the question to be determined by the Upper Tribunal is whether the First-Tier Tribunal has erred in law in making its decision. In thus deciding, the Upper Tribunal does not conduct an open - ended enquiry into or review of the first instance decision. Rather, both the appeal and the ensuing appellate tribunal's decision are circumscribed by the terms in which permission to appeal has been granted and the search for a material error of law. In determining such appeals, the Upper Tribunal, in common with the First-Tier Tribunal, must give full effect to all of the legal rules and principles in play, in every case. The decisions in **MF** and **SS** will frequently have a significant influence in deciding whether the First-Tier Tribunal has erred in law in any of the respects falling within the permitted grounds of appeal. In conducting this exercise, the Upper Tribunal will scrupulously examine the substance of the decision of the First-Tier Tribunal.

21. At this juncture, we remind ourselves that this is not an error of law appeal. By its determination dated 28th January 2013, this Tribunal, differently constituted, has already found that the decision of the FtT, which dismissed the Appellant's appeal, was vitiated by error of law consisting of a failure to make clear findings about the Appellant's relationship with his children and to identify their best interests, in breach of section 55 of the 2009 Act (infra). Accordingly, this Tribunal is engaged in the exercise of remaking the decision.

ARTICLE 8 ECHR AND SECTION 55 OF THE BORDERS, CITIZENSHIP AND IMMIGRATION ACT 2009

22. Section 55 of the Borders, Citizenship and Immigration Act 2009 ("*the 2009* Act") provides:

> "*(1) The Secretary of State must make arrangements for ensuring that –*
>
> *(a) the functions mentioned in sub-section (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom ….*
>
> *(2) The functions referred to in sub-section (1) are –*
>
> *(a) any function of the Secretary of State in relation to immigration, asylum or nationality;*
> (b) *any function conferred by or by virtue of the Immigration Acts on an Immigration Officer …*
>
> (3) *A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of sub-section (1).*"

While Article 8 ECHR and section 55 of the 2009 Act have separate juridical identities, they are clearly associated. Thus where the Article 8 family life equation

involves children, section 55 is immediately engaged. In **ZH (Tanzania**) [2011] UKSC4, Baroness Hale emphasised that the best interests of the child must be considered first – see paragraph [26] – while Lord Kerr stated:

> "*[46] …….. A primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them.*"

As was recognised in **Mansoor – v – Secretary of State for the Home Department** [2011] EWHC 832 (Admin), the onward march of the Strasbourg jurisprudence has involved the progressive development of the best interests of the child principle under Article 8.

23. Most recently, in **Zoumbas – v – Secretary of State for the Home Department** [2013] 1 WLR 3690, the Supreme Court has considered the interplay between the best interests of the child and Article 8 ECHR, rehearsing what might be termed a code compromising seven principles:

(1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;

(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;

(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;

(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;

(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;

(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and

(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

As Lord Hodge observed, the genesis of these principles is found in the United Nations Convention on the Rights of the Child 1989, particularly Article 3(1) which, in turn, influences the interpretation of Article 8 ECHR.

24. Expanding on the seven principles set out above, Lord Hodge continued:

> "*[13] We would seek to add to the seven principles the following comments. First, the decision-maker is required to assess the proportionality of the interference with private and family life in the particular circumstances in which the decision is made. The evaluative exercise in assessing the proportionality of a measure under article 8 ECHR excludes any "hard-edged or bright-line rule to be applied to the generality of cases": EB (Kosovo) v Secretary of State for the Home Department [2009] AC 1159, per Lord Bingham at para 12. Secondly, as Lord Mance pointed out in H(H) (at para 98) the decision-maker must evaluate the child's best interests and in some cases they may point only marginally in one, rather than another, direction. Thirdly, as the case of H(H) shows in the context of extradition, there may be circumstances in which the weight of another primary consideration can tip the balance and make the interference proportionate even where it has very severe consequences for children.*"

In the case of **H(H),** the Supreme Court held, in an extradition context, that the United Kingdom's international treaty obligations prevailed over the best interests of the children in question. Lord Hodge continued:

> "*The third principle in para 10 above is subject to the first and second qualifications and may, depending on the circumstances, be subject to the third. But in our view, it is not likely that a court would reach in the context of an immigration decision what Lord Wilson described in H(H) (at para 172) as the "firm if bleak" conclusion in that case, which separated young children from their parents.*"

One of the obvious merits of the opinion of Lord Hodge in **Zoumbas** is that it consolidates in a single, accessible source one set of the principles which must be applied in cases of this nature. We would add that where, as in the present case, the context is one of deportation, it is incumbent on Tribunals to give full effect to the decisions in **MF (Nigeria)** and **SS (Nigeria)**: see paragraphs [10] – [14] *supra.*

25. We are mindful of the staged approach espoused by the House of Lords in **Razgar – v – Secretary of State for the Home Department** [2004] 2 AC 368, per Lord Bingham at paragraph [17], which has the great merit of minimising the risk of a Tribunal falling into error in the generality of cases involving Article 8 ECHR. In the present case – as agreed by both parties – the relevant question is the fifth and final one, namely whether the anticipated interference with the right to respect for the family life under scrutiny is proportionate to the legitimate public end sought to be achieved. We recall the observation of Lord Bingham, in the same case, that the

fifth question is: "*more judgemental*" than the others: paragraph [24]. We are also alert that the Razgar decision must be considered in the light of the changing legal landscape ushered in by HC 398 – 399A and the decisions in SS (Nigeria) and MF (Nigeria). In this context, we refer to the recent decision of the Upper Tribunal in Kabia v SSHD [2013] UKUT 569 (IAC).

26. In **Huang – v – Secretary of State for the Home Department** [2007] 2 AC 167, Lord Bingham, referring to the task of the appellate immigration authority in determining Article 8(2) issues, stated:

> "*[16] ….. The authority will wish to consider and weigh all that tells in favour of the refusal of leave which is challenged, with particular reference to justification under article 8(2). There will, in almost any case, be certain general considerations to bear in mind: 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; the damage to good administration and effective control if a system is perceived by applicants internationally to be unduly porous, unpredictable or perfunctory; 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; the need to discourage fraud, deception and deliberate breaches of the law; and so on. In some cases much more particular reasons will be relied on to justify refusal, as in Samaroo v Secretary of State for the Home Department [2001] EWCA Civ 1139, [2002] INLR 55 where attention was paid to the Secretary of State's judgment that deportation was a valuable deterrent to actual or prospective drug traffickers, or R (Farrakhan) v Secretary of State for the Home Department [2002] EWCA Civ 606, [2002] QB 1391, an article 10 case, in which note was taken of the Home Secretary's judgment that the applicant posed a threat to community relations between Muslims and Jews and a potential threat to public order for that reason. 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. It is to be noted that both Samaroo and Farrakhan (cases on which the Secretary of State seeks to place especial reliance as examples of the court attaching very considerable weight to decisions of his taken in an immigration context) were not merely challenges by way of judicial review rather than appeals but cases where Parliament had specifically excluded any right of appeal.*"

We have reproduced this passage in full as it invariably repays careful reading, mindful that it must now be considered in the manner indicated in the light of the subsequent statutory and jurisprudential developments noted above.

27. As appears above, we are alert to the more recent developments in the jurisprudence in this field, in particular the decisions of the Court of Appeal in **SS (Nigeria)** and **MF (Nigeria)**. While we are mindful that the most important consideration in cases involving the more serious offenders is that the public interest in play is an especially powerful one, we consider ourselves obliged to bear in mind that the public interest in the present case is diluted slightly by the consideration that the Appellant received a sentence of imprisonment below the relevant statutory threshold of 12 months. This, in turn, will influence the primacy of importance which tribunals must accord to the best interests of any affected children, which finds its juridical home in the proportionality assessment. Statements such as that of Lord Bingham in **EB (Kosovo)** [2009] 1 AC 1159, paragraph [*], must be considered in their full juridical context, as this has evolved. Furthermore, in a succession of decisions, the higher courts have emphasised the intensely fact sensitive nature of every case: see, for example, **EB,** paragraph [9], per Lord Bingham. We also bear in mind the guidance to be derived from **Huang**, paragraph [18]:

> *"Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant. The Strasbourg court has repeatedly recognised the general right of states to control the entry and residence of non-nationals, and repeatedly acknowledged that the Convention confers no right on individuals or families to choose where they prefer to live. 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.*"

We also remind ourselves that there is no legal test of exceptionality: **Huang**, paragraph [20] and **MF (Nigeria)** paragraphs [40] – [43]. Furthermore, there is no hard-edged or bright line rule to be applied in the difficult evaluative exercise which Article 8 requires in cases such as the present: **EB (Kosovo)**, paragraph [12].

FINDINGS AND CONCLUSIONS

28. We begin by finding that if the Appellant is deported from the United Kingdom this will entail an interference with the right to respect for family life enjoyed by the Appellant and his three biological children because the strong likelihood is that they will remain here with their respective mothers. We are satisfied that this right is not engaged in respect of any other person. In particular, there is no family life viz-a-viz the Appellant or either of his former female partners or their children. Furthermore, we find that the relationship between the Appellant and his present girlfriend does not give rise to family life between them, given its recent vintage and the frequent and lengthy periods of separation consequent upon the employment which she has obtained in Northern Ireland . In addition, there is no established family life between the Appellant's present girlfriend and any of the children concerned.

29. Having found that there will be an interference with family life of the nature rehearsed above, we record that it is not disputed that such interference will be in accordance with the law and pursues a legitimate aim. Thus the central question to be addressed and determined is that of the proportionality of the interference, in circumstances where the sentence of imprisonment concerned is less than 12 months. We begin this exercise by addressing the best interests of the three children concerned. We find that the Appellant plays an active part in their lives. He is a normal, unexceptional caring and loving father. The children benefit from his attention, care, love and involvement in their respective lives. These benefits are constrained by considerations of the Appellant's very limited finances, the three separate residential addresses involved, the two different family units and factors of time and distance.

30. We consider that the care and attention which the Appellant invests in his three children has mixed motives. One of the motives in play is undoubtedly that of normal parental love and dedication. However, we are satisfied that the Appellant's conduct has also been motivated by self interest, namely his strong desire to avoid deportation. In this respect, we highlight the significant qualitative and quantative differences between the evidence presented to the FtT in August 2012 and the evidence amassed for this Tribunal in December 2013. We consider that the substantially greater quantity of evidence of family involvement now available is attributable to the mixed motives to which we have referred.

31. Having examined all of the evidence scrupulously, we are of the opinion that the conception of the two children born to the Appellant's different female partners on 29th January 2011 and 26th November 2011 was motivated, at least in part, by pure self interest on the Appellant's part. These children were conceived at a time when the Appellant's asylum claim was undetermined and the threat of deportation had materialised. He fathered these children in circumstances where he was aware of his unlawful immigrant status and was pursuing an asylum claim which he later abandoned. We remind ourselves at once that this finding must not contaminate

our assessment of the three childrens' best interests. However, it informs our assessment of their best interests in the future.

32. The evidence relating to the Appellant's relationships with women and our findings in relation to the aforementioned births impel us to find that the Appellant is a person who charms and manipulates women. Relationships with women are a major part of his life. Properly analysed and in hindsight, it is clear that during a period of approximately four/five years, the Appellant's main adult relationship was with 'AA', punctuated by an "affair" with 'AN'. Thus, during a period of some 28 months, 'AN' gave birth to a child, 'AA' then did likewise and, finally, 'AA' gave birth to a second child. Throughout this period, the purportedly "stable" partnership was with 'AA', while the "affairs" were with Anisa. We consider that the Appellant, by this conduct, has shown himself to be a fickle, unreliable, irresponsible and highly self-interested person. We consider that these traits will, in due course, operate to the detriment of his children.

33. Moreover, the Appellant was convicted of assaulting 'AA' within weeks of his release from prison. We find that the account of the assault given by the Appellant to this Tribunal and elsewhere is not worthy of belief. We do not believe the Appellant's detailed evidence to this Tribunal concerning the precipitating incident. We find that it was contrived and did not withstand the scrutiny to which we subjected it by questioning. Furthermore, our questioning of the Appellant and the social worker established to our satisfaction that the Appellant sought to deceive the social worker by failing to disclose to him either of his previous convictions. This, coupled with our probing of the social worker's evidence, impels us to the freestanding finding that we can attribute no weight to the opinions or assessments expressed in his report.

34. Our findings above are bolstered by further considerations pertaining to the two ladies in question. Neither attended any of the succession of Tribunal hearings, beginning in August 2012, to testify on the Appellant's behalf. We find the explanations for this given by the Appellant to the FtT – in paragraphs 6 and 9 of its determination – and to this Tribunal wholly unworthy of belief. We further find specifically that neither of these women has testified on the Appellant's behalf for the simple reason that their evidence would be more likely to undermine and confound, than support and verify, the various claims and assertions which make up his case. The Appellant has claimed, inter alia, that he had a strong, close relationship with 'AA'. This is confounded by the sequence of events highlighted above and, further, the need for Court intervention, in the form of a contact order, dated 16th December 2010, in respect of the child 'J'.

35. We would highlight, in this discrete context, the paucity of evidence relating to the year 2010. Furthermore, we note in particular the letter dated 26th January 2011 from the Immigration Advisory Service, a Community Legal Service representing the Appellant, to UKBA. The contents of this letter reflect that the Appellant had given his representatives instructions that -

> "*My client's private and personal life has settled down since August 2009 … He has reconciled with his wife with whom he is now expecting a child … His private life is now stable. He is the father figure to his wife's two sons. He is expecting a new child later this year and he plays a major role in the care and upbringing of his new daughter.*"

[Emphasis supplied]

This letter airbrushes both the assault conviction and the Court contact proceedings. Strikingly, it was written just three days before 'AN' gave birth to R. It also coincides with a letter dated 15th January 2011 apparently signed by AA, describing herself as the Appellant's "*former partner*". This was followed by a letter dated 7th May 2011 written by 'AN', who had given birth to the Appellant's child just some three months previously. This letter discloses that some months beforehand the Appellant had involved this lady in an attempt to secure the status of civil partnership. We accept this assertion. It continues:

> "*I want to make it clear that I am no longer in a relationship with* [the Appellant] … *We are not together any more* [and I] *can tell you he is currently not providing me and my son's support.*"

This letter was written by the mother of the child, 'R', who had been born some three months previously. This is the lady with whom the Appellant had, per the instructions reflected in the aforementioned legal adviser's letter, no role and no existence. She was someone other than the lady with whom he allegedly had a "*stable*" relationship following a reconciliation and the mother of two sons in respect of whom the Appellant was allegedly "*the father figure*". Our analysis of this evidence readily yields the finding that the Appellant was liberally making untruthful representations in support of his case and was blithely enmeshing his female partners in an elaborate web of unmistakable deceit. We recall, at this juncture, the earlier Tribunal's finding of mendacity in its rejection of his asylum claim: see [5] supra.

36. Many of the findings and assessments rehearsed above do not involve or relate directly to any of the three children concerned, all of whom are blameless of the machinations and deception we have found. We must now identify and assess their best interests. We are satisfied that, at present, they are somewhat better off with the Appellant than without him. He is making some contribution to their lives. Their interests and welfare are enhanced and promoted in consequence. However, we believe that the benefit currently enjoyed by the children is fragile and likely to be short lived. We have assessed the Appellant as a strikingly self-interested person. This is reflected in, *inter alia*, the new relationship which he has developed with a woman some ten years younger than him. He clearly has a strong interest in this relationship. Our expectation is that he will invest much time, effort and energy in this relationship or, if it terminates, in some further adult liaison with

another woman. He and his current girlfriend have given unequivocal evidence that they are planning a long term relationship which will involve the birth of further children. If this relationship is to survive and develop, the Appellant is likely to spend significant periods of time in Northern Ireland, where his current girlfriend works. Our expectation is that this will become a priority for him, at the expense and to the disadvantage of his three children. Furthermore, if his current relationship develops and prospers in the manner planned by both partners, it will involve the birth of children, events which will inevitably divert the Appellant's time, interest and attention from his existing children to a major extent. In addition, our assessment of the Appellant as a fickle, unreliable self-interested and manipulative person means that one can have no confidence in his current relationship with his children being maintained come whatever.

37. Our various findings and assessments above impel to the firm conclusion that while the Appellant's departure from the lives of his three children would not be in their best interests, this will be a short term loss to them. In the medium and longer terms, he is unlikely to be a dedicated, devoted and responsible father. He will, rather, give precedence to other interests. Beyond the short term, therefore, the three children will unquestionably be better off without him. The undisputed evidence is that they have loving, devoted and responsible mothers. We find that, beyond the short term, their best interests will not be compromised by the Appellant's absence. They will be better off without him. They will not suffer the uncertainty, insecurity and confusion which his predictably shadow presence in their lives would engender. We remind ourselves that, as a matter of law, the potency of the public interest engaged is diluted somewhat by the length of the Appellant's sentence of imprisonment (ten months). We further take into account the lack of expedition in the various decision making processes. Having done so, on the grounds and for the reasons above, we give determinative weight to the public interest favouring the Appellant's deportation from the United Kingdom. We conclude that his deportation would not be disproportionate. Thus, there will be no breach of the rights of those laying claim to the protection of Article 8 ECHR.

DECISION

38. We remake the decision by dismissing the appeal, thereby affirming the determination of the FtT which, in turn, upheld the decision of the Secretary of State to deport the Appellant from the United Kingdom.

Signed:

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

Date: 20 March 2014