



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DA/01096/2012

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 20<sup>th</sup> May 2013**

**Determination**

**Promulgated**

**On 3<sup>rd</sup> June 2013**

**Before**

**UPPER TRIBUNAL JUDGE GOLDSTEIN  
UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**LATEYI OLADIPO LAWSON**

Respondent

**Representation:**

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer

For the Respondent: Mr S Jaisri, Counsel instructed by Messrs Freemans  
Solicitors

**DETERMINATION AND REASONS**

1. The Appellant in this appeal is the Secretary of State. However, for convenience, we shall refer to the parties as they were before the First-tier Tribunal. Further, although the First-tier Tribunal in their determination recorded that no order for anonymity was made and there were no representations to the contrary at the hearing before us, we have decided for the purposes of our determination, that it would not be appropriate to identify the Appellant's children by name.
2. This is an appeal by the Secretary of State from the decision of the First-tier Tribunal promulgated on 17 January 2013, allowing the appeal of the Appellant, who is of dual Togolese and Nigerian nationality and born on 2

July 1957, on human rights (Article 8 of the ECHR) grounds, against the decision of the Secretary of State dated 15 November 2012 to make a Deportation Order against him, he being a foreign criminal as defined by S.32(5) of the UK Borders Act 2007 and in accordance with the provisions of S.3(5)(a) of the Immigration Act 1971.

3. The immigration history of the Appellant as set out in form ICD.3237 of the Tribunal bundle, shows that the Appellant married his spouse in Nigeria on 2 July 1994 and applied for Entry Clearance to the United Kingdom on 30 September 1998. This was granted until 20 April 2000. The Appellant then entered the UK on 26 February 2000, aged 42 as his wife's spouse, and was granted Indefinite Leave to Enter. An application for naturalisation was received on 17 January 2002. The Appellant's wife was granted a Right of Abode in the UK on 12 August 2002. On 14 September 2004 the Appellant's application for nationality was refused as he had applied too early and did not qualify.
4. On 3 January 2003 for "attempt/obtaining property by deception" the Appellant was convicted and sentenced to a term of eight months' imprisonment. On 6 November 2003 for "possessing a controlled Class B drug" he was fined £100. On 28 July 2006 following a plea of guilty to conspiring to steal, the Appellant was sentenced to a term of two years' imprisonment and he was considered for deportation by the UK Border Agency.
5. On 26 July 2007 a Notice of a Decision to make a Deportation Order and Reasons for Deportation Letter was served.
6. Following the completion of the Appellant's custodial sentence the Appellant was detained by the UKBA on 28 July 2007.
7. An appeal against deportation was lodged on 9 August 2007 and this was allowed on 3 October 2007 due to the UKBA having incorrectly served deportation paperwork relating to the wrong conviction.
8. A new Notice of a Decision to make a Deportation Order was made on 10 October 2007, but the prison did not convey this to the Appellant until 21 December 2007. On 25 January 2008 the Deportation Order was signed and served on the Appellant as he failed to lodge a further appeal. However he submitted an out of time appeal on 1 February 2008.
9. On 4 February 2008 the Appellant was convicted of one count of rape and three counts of sexual assault and sentenced to eight years' imprisonment and three terms of twelve months' imprisonment respectively, each to run concurrently. He was also required to sign the Sex Offenders' Register for life. The Appellant lodged an appeal against this conviction but this was refused by the Court of Appeal on 17 July 2008.

10. On 25 February 2008 the Appellant submitted an application to return to Nigeria under the Voluntary Assisted Return Scheme. This was refused on 26 February 2008 due to a Deportation Order having been signed against him.
11. The appeal against the UKBA's decision to deport the Appellant took place on 30 May 2008 and was allowed on 4 June 2008. At this point the Immigration Judge did not appear to have been aware of the convictions for rape and sexual assault.
12. On 6 April 2009 the Appellant was therefore served with a Notice of Liability for Automatic Deportation questionnaire and the completed questionnaire and supporting representations were received by the Secretary of State on 16 April 2009.
13. On 30 June 2011 a supplementary letter was issued to the Appellant's wife and to his representatives seeking her views on how the Appellant's deportation would affect her and their children.
14. On 14 December 2011 the Appellant's expired Togolese passport was sent to the National Document Fraud Unit who confirmed on 27 December 2011 that the passport was genuine. As such it was accepted that the Appellant held dual Nigerian and Togolese nationality.
15. The Appellant lodged an appeal against his conviction in 2012 although the exact date of when the appeal was submitted is not known. This was however refused by the Court of Appeal on 19 July 2012.
16. A Deportation Order was signed on 15 November 2012 and served on the Appellant together with a Reasons for Deportation Letter on 20 November 2012.
17. On 22 November 2012 the prison provided a copy of a letter from the Criminal Cases Review Commission addressed to the Appellant confirming that the appeal against the conviction was under review. On 22 November 2012 the UKBA requested the Criminal Cases Review Commission to expedite their enquiries.
18. When the Appellant's appeal came before a First-tier Tribunal panel at Nottingham Magistrates' Court on 10 January 2013, it was noted that he claimed that the decision to deport him from the United Kingdom would result in a breach of his Article 8 ECHR rights and those of his wife and children.
19. The panel recorded that the Presenting Officer did not seek to argue that the Appellant had not established a family and private life with his wife and children in the United Kingdom and that the issue was therefore one of proportionality.

20. The Appellant gave oral evidence before the First-tier Tribunal in which at the outset he adopted his witness statements of 5 January and 7 January 2013. He pointed out that his children (then aged 16 and 9 years' respectively) suffered from Sickle Cell Anaemia maintaining that prior to his imprisonment he used to assist his wife in looking after the children on a day to day basis, but that during his imprisonment it had of course been very difficult for his wife to care for the children on her own.
21. Before coming to the United Kingdom, he had worked in his uncle's office and was also employed as a business manager. His elderly mother remained in Nigeria and he had half-brothers and a sister in Nigeria. He had never visited Nigeria since his arrival in the UK on 26 February 2000. His wife and children had been to Nigeria on two occasions whilst the Appellant was in prison. His wife had half-brothers and a sister in Nigeria.
22. The Appellant confirmed in his evidence that he still maintained his innocence and that he was wrongly convicted of rape and sexual assault.
23. The Appellant's wife also gave evidence before the First-tier Tribunal panel adopting her witness statement of 6 January 2013. She confirmed that she was aware of the nature of the offences which had resulted in her husband's imprisonment but that she continued to support him and believed him to be innocent of the offences of which he was convicted.
24. In her evidence the Appellant's wife confirmed that it would be her intention to remain in the United Kingdom with her children if her husband were to be deported. It would not be possible for them to relocate to Nigeria. They would have no means of support and nowhere to live and additionally the boys' medical needs would not be provided for. The Appellant's wife confirmed that she had three brothers living in Nigeria and sent money every month for the benefit of her husband's elderly mother.
25. The panel took account of handwritten letters of support which had been written by the Appellant's sons and they recorded that they also took account of other character references and letters of support which had been included in the appeal bundle. They took note in particular of a letter from the Appellant and his family's Parish Priest and character references from officers at the Appellant's prison.
26. At paragraphs 24 and 25 of their determination the panel had this to say:  
  
"24. The Appellant is without doubt a serious offender. We have noted from the NOMS1 Form that the risk of serious harm is assessed as high but the risk of reconviction is assessed as low. We have no reason to disagree with this assessment. The risk of harm would be to female children and young female adults with whom the Appellant is placed in the position of trust in the community. The nature of this risk relates to sexual assault, rape, grooming as well as actual, emotional and psychological harm.

25. We have noted the sentencing remarks of His Honour Judge Issard-Davies. The Judge referred to the Appellant's victim as someone whom he had taken into his house when she was orphaned and friendless in Nigeria. He then took advantage of her in breach of the trust which was placed in him to care properly and responsibly for her welfare. The consequences of the Appellant's offending to his victim are described as incalculable. They have already provoked her to attempt suicide more than once. Part of the sentence is the requirement for the Appellant to remain on the Sex Offenders' Register for life."
27. The panel expressed a concern that the Appellant was still protesting his innocence. They observed that because of the Appellant's continued denial of responsibility he had not become rehabilitated and he would thus not have been afforded the opportunity for counselling and treatment whilst in prison (paragraph 26).
28. The panel reminded themselves of the guidance given by the Upper Tribunal in Masih (Pakistan) [2012] UKUT 00046 (IAC) that in a case of automatic deportation full account had to be taken of the strong public interest in removing foreign citizens convicted of serious offences which lay not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place. Secondly the deportation of foreign criminals expressed society's condemnation of serious criminal activity and promoting public confidence in the treatment of foreign citizens who had committed them. The panel recorded that they had reminded themselves of this important guidance, when making their assessment of proportionality for the purposes of Article 8.
29. The panel recognised that this was not the first time the Appellant had found himself to be the subject of deportation proceedings. The Asylum and Immigration Tribunal (AIT) had allowed the Appellant's previous appeal against the decision to make a Deportation Order in 2007. On that occasion the offending related to serious dishonesty that the Tribunal balanced against the Appellant's family and private life and found that the Appellant and his wife were credible witnesses who enjoyed a loving relationship with their two children. The Appellant was described as a "hands-on father". It was however noted that the Tribunal on that occasion, were strangely unaware that only a few months previously the Appellant had been convicted of rape and sexual assaults for which he had been sentenced to eight years' imprisonment.
30. The panel took account of the guidance in Beoku-Betts [2008] UKHL 39 as it related to the need to take account of the Article 8 rights of all family members who were likely to be affected by the decision under appeal, and they further adopted the five stage approach advocated by Lord Bingham in Razgar [2004] UKHL 27. Reference was made to the guidance given by the European Court of Human Rights.

31. At paragraphs 28 and 29, the panel turned their attention “to the Appellant’s children and their best interests and wellbeing”. They continued:

“28. We are of course aware of the requirements of Section 55 of Borders, Citizenship and Immigration Act 2009 which requires the Respondent and the Tribunal to consider the best interests of the Appellant’s two children as a primary consideration. The guidance given in ZH (Tanzania) emphasises the importance of British citizenship and the rights which are attached to it.”

“29. .. that despite the Appellant’s very serious offending and the nature of it, he still enjoys the support of his wife and they are in a close relationship. We are satisfied that family life exists between the Appellant, his wife and their two sons. Deporting the Appellant to Nigeria or Togo would constitute a serious interference with the children’s right to respect for family life with their father”.

32. The panel noted that the Appellant’s children were at school and had lived in the United Kingdom all their lives. Although they had visited Nigeria whilst the Appellant had been in prison on two occasions, the panel were satisfied that it would not be reasonable to expect either of them to relocate to that country. Both boys suffered from Sickle Cell Anaemia for which they were receiving treatment and the medical evidence had been noted.

33. At paragraph 31 of their determination the panel had this to say:

“31. The best interests of children is not a factor of limitless importance in the sense it will prevail over all other considerations. It is, however, a factor which must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. What is determined to be in a child’s interest should customarily dictate the outcome of cases such as that which was before the court in ZH (Tanzania).”

34. Whilst, if the Appellant were to be removed, it might be possible for him to maintain contact with his children from a distance, the lack of physical and emotional contact for many years would have “a *potentially serious, adverse affect*” upon them.

35. The panel at paragraph 33, further recorded that they had noted the guidance given in EB (Kosovo) where Lord Bingham had stated it would rarely be proportionate to uphold an order for removal of a spouse, if there was a close and genuine bond with the other spouse, and where the spouse could not reasonably be expected to follow the removal of a spouse to the country of removal, and where it would sever a genuine and subsisting relationship between parent and child. The panel considered that they were not satisfied that it would be impossible or unreasonable for the Appellant’s wife to follow her husband to Nigeria but that it would be unreasonable to expect their two sons to relocate.

36. The panel reminded themselves of the guidance in MK (best interests of child) India [2011] UKUT 00475 (IAC). They observed that in ZH (Tanzania) and whilst considering the best interests of the child as an integral part of the Article 8 balancing exercise, their Lordships were clear that it was a matter which had to be addressed first, as a distinct enquiry.
37. The panel took account of the importance of considering the interests of children who were British nationals and referred to Sanade (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC) where the Tribunal held that there was no justification for saying it would only be in exceptional circumstances that removal would violate the family’s protected Article 8 rights or that the claim itself must be exceptional. Where the child or the remaining spouse was a British citizen and therefore a citizen of the European Union, as a matter of EU law it was not possible to require the family as a unit to relocate outside the European Union or for the Secretary of State to submit that it would be reasonable for them to do so.
38. At paragraph 35 the panel concluded:

“35. We find this to be a difficult and finely balanced case but we have concluded that the best interests of the Appellant’s two children tips the balance in the Appellant’s favour so far as proportionality is concerned. We find that it would be in the best interests of the Appellant’s children for them to remain in the United Kingdom with both parents and having considered all the evidence in the round, we conclude that the Appellant’s deportation would constitute a disproportionate interference with the children’s right to respect for family life. It is for that reason only that we conclude that the appeal should be allowed”.
39. The Secretary of State made a successful application for permission to appeal that decision to the Upper Tribunal and their grounds in support were as follows:
  - “1. The Tribunal’s finding on Article 8 are set out from paragraph 24 of the determination. However it is respectfully submitted that these findings are irredeemably flawed because they fail to have regard to the Immigration Rules in making its Article 8 assessment. In doing so it is respectfully submitted that the Tribunal misdirected itself in law. In making a decision on an application it is necessary for the decision-maker to consider all the legislation relevant to that decision and to give reasons for the way that it applies that legislation to the facts of the case. In this instance the Tribunal had no regard at all to the relevant Sections of the Immigration Rules. It is submitted that there simply cannot be an appropriate way for a sustainable decision to be made.
  2. The Immigration Rules are a detailed expression of government policy on controlling immigration and protecting the public. The Article 8 Sections of the Immigration Rules reflect the Secretary of State’s views to where the balance lies between the individual’s rights and the public interest. They reflect the broad principles set out in Strasbourg and

domestic jurisprudence. Therefore, when a Tribunal considers an individual appeal he should consider proportionality in the light of this clear expression of public policy; and the Secretary of State would expect the Courts to defer to her view, endorsed by Parliament on how, broadly, public policy considerations are weighed against individual family and private life rights, when assessing Article 8 in any individual case. Failure to do so means that the decision the Tribunal made on Article 8 is incomplete and that it is also unsustainable as it failed to consider a key element in the of this case.

3. In addition, or in the alternative, it is respectfully submitted that the proportionality assessment is flawed in that it failed to take account of the full range of evidence before the Tribunal. The index offence was a serious crime (rape of a minor resulting in an eight year sentence) which the Appellant still denies. He has an appalling criminal history. He has been assessed as being at high risk of serious harm especially to female children and young female adults, with the nature of that risk being sexual assault, rape, grooming and emotional and psychological harm. With due respect to the Tribunal, these established findings had been noted but not considered in the proportionality assessment. This assessment concentrates almost exclusively on the best interests of the children. While it is questionable why it should be in the children's best interests to be exposed to a drug dealing rapist, the proportionality assessment makes no attempt to seek a clear balance between the competing interests. In particular, the Tribunal makes no findings on risk, deterrent or public revulsion. Although the Tribunal found that this was a finely balanced case (paragraph 35) there is no evidence that this was the case as there is a significant gap in the Tribunal's reasoning."
40. In granting permission, Designated Judge R C Campbell considered it arguable that the panel may have inter alia, erred in law as their determination did not show that the Secretary of State's case, or the public interest in the Appellant's deportation, featured in the proportionality assessment as relevant factors to be weighed in the balance.
41. Thus the appeal came before us on 20 May 2013 when our first task was to determine whether the determination of the First-tier Tribunal disclosed an error on a point of law.
42. We clarified with the parties' representatives and they confirmed, that were we to find that the determination of the First-tier Tribunal indeed contained an error or errors on a point of law, such that it required us to set their determination aside, there was sufficient evidence before us upon which we could proceed to make a fresh decision in terms of the Appellant's Article 8 ECHR appeal.
43. It is right to say that initially, Mr Jaisri sought to add a caveat having received an indication from the Appellant's wife that their eldest son might wish to give evidence on his father's behalf. However on reflection, Mr Jaisri agreed with our decision that it would not be appropriate to

adjourn the hearing of the appeal for this purpose. Indeed he confirmed that he had no direct instructions from the Appellant's elder son to that effect, or such instructions from his instructing solicitors. We were also of the view that it was unlikely that the Appellant's elder son would be seeking to persuade us that it would be appropriate for his father to be removed to Nigeria or Togo. In any event and as recorded by the First-tier Tribunal, there was within the Appellant's bundle, handwritten letters of support written by the Appellant's sons.

44. Having heard the parties' respective submissions we reserved our decision.

### **Assessment**

45. We have concluded that the determination of the First-tier Tribunal has been vitiated by errors on a point of law such that it cannot be allowed to stand and must be set aside.
46. In reaching that decision, we have taken account of Mr Jaisri's Rule 24 response upon which he relied within his submissions before us, contending that the Tribunal did not make a material error in their approach to the application of Article 8 and whilst it might be accepted that the Tribunal did not apply the provisions of Appendix FM in its consideration of Article 8, this did not affect their approach on the true application of Article 8 as articulated in ME (Article 8 – new rules) Nigeria [2012] UKUT 00393 and Nagre [2013] EWHC 720 (Admin).
47. It was submitted that whilst the Tribunal may not have expressly specifically considered the Immigration Rules in the context of how the assessment of proportionality should be approached mindful of the Immigration Rules, this again was not material as the Tribunal did consider within its deliberations (paragraph 24) the seriousness of the offence and (paragraph 26) society's revulsion of criminal activity.
48. Further that the panel's determination had to be read as a whole from which it was clear that they had made findings at paragraph 24 and had considered the judge's sentencing remarks that the Tribunal clearly had in mind as part of its reasoning process.
49. The Tribunal had gone on to consider the weight to be attached to this pursuant to the factors in Masih. It was not a case of the Tribunal simply reminding itself of the approach in that the Tribunal towards the end of paragraph 26 were clear, that they had reminded themselves of the importance of this guidance when making their proportionality assessment.
50. The Tribunal had acknowledged the public policy consideration of immigration control at paragraph 34.

51. We would observe that Nagre is a decision of the Administrative Court and therefore not binding on the Tribunal. We note that in any event, Sales J expressly approved the decision of the Tribunal in Izuazu (Article 8-new rules) [2013] UKUT 00045 (IAC), though he made what he described as "a slight modification" that where a person's human rights have been considered adequately under the immigration rules, there is no need to make a separate human rights decision. In our experience, there will only be a very few cases where this can properly be said and it is likely to be confined to those cases where the rules recognise that the removal would be contrary to a person's rights under Article 8. Save for those unlikely cases, an appellant's rights will have to be considered in accordance with the Human Rights Act and that will almost always involve a separate consideration.
52. It was notable that in his submissions before us, Mr Jaisri candidly accepted that the First-tier Tribunal would have had regard to Counsel's skeleton argument of the where at paragraph 8, reference was made to the new Immigration Rules, but it was contended that they failed to appropriately consider the depth of private and family life and failed to take into account the citizenship of the child of a potential deportee and the rights afforded by way of citizenship. In that context, Mr Jaisri accepted that the Tribunal may have therefore erred in failing to take this into account but he maintained that it did not affect their consideration of the issues in this appeal as articulated by them. Mr Jaisri submitted that the Tribunal had recognised that the case was "*finely balanced*".
53. Mr Avery placed reliance on the guidance of the Upper Tribunal in MF, in particular what was said at head note (viii) of that decision as follows:
- "viii. However, as a result of the introduction of the new Rules, consideration by judges of Article 8 outside the Rules must be informed by the greater specificity which they give to the importance the Secretary of State attaches to the public interest. For example, the new Rules set out thresholds of criminality by reference to terms of imprisonment so that Article 8 private life claims can only succeed if they not only have certain periods of residence but can also show their criminality has fallen below these thresholds".*
54. We have concluded that this is of course an important aspect of the decision in MF and one that with great respect to Mr Jaisri he has overlooked in his contention that the panel's failure to consider the new Immigration Rules within the context of their Article 8 considerations had no material affect on their conclusions. Not only was this aspect of the guidance in MF overlooked, but indeed the First-tier Tribunal failed entirely to take account of this guidance, notwithstanding that MF was promulgated well before their hearing of the present appeal. We are satisfied, that had they considered such guidance, not least head note (viii), but also paragraphs 42, 43 and 44 of MF under the heading "New Rules and the public interest", they would have doubtless appreciated the following:

- “42. There is, however, at least one important respect in which the new Rules affect the second-stage Article 8 assessment. Previously judges’ understanding of the weight the Secretary of State attaches to the public interest side of the Article 8 balancing exercise had largely to be gleaned from the submissions of the Secretary of State in leading cases. It has fallen very much to the judicial system to give it form and content. In deportation cases involving foreign criminals S.32 of the 2007 Act gave clear parliamentary expression to the particular importance the Secretary of State attached to their deportation: see MK (deportation - foreign criminal - public interest) Gambia [2010] UKUT 281 (IAC); AP (Trinidad and Tobago) [2011] EWCA Civ 551 per Carnwath LJ; Gurung v Secretary of State for the Home Department EWCA Civ 62. Now more generally greater specificity is given in the new Rules as to what circumstances are seen to attract the greatest weight in respect of the public interest; the Secretary of State has now herself told us what factors she considers relevant and what weight at the general level she attaches to them. In particular, in the context of deportation of foreign criminals, the new Rules set out thresholds of criminality (by reference to length of terms of imprisonment) so that Article 8 private life claims brought by foreign criminals can only succeed (unless there are exceptional circumstances) if they not only have certain periods of residence but can also show their criminality has fallen below these thresholds.
43. That must and should properly inform our Article 8 assessment made in compliance with our S.6 obligations under the HRA. Whereas previously it has been open to judges, within certain limits, to reach their own view of what the public interest is and the weight to be attached to it, the scope for doing so is now more limited.”
- “44. From the above it will be clear what we think is new about the Immigration Rules, but the degree to which these new Rules change our interpretation of the ‘public interest’ should not be exaggerated. Even under the old Rules it has never been legitimate to treat the public interest in a narrow and restrictive fashion: see N (Kenya) [2004] EWCA Civ 1094, OH (Serbia) [2008] EWCA Civ 694, UE (Nigeria) [2010] EWCA Civ 975.”
55. In that latter regard, we drew to the parties’ attention, the guidance of the Court of Appeal in AM [2012] EWCA Civ 1634 in which Lord Justices Elias and Ward, gave brief judgments in full concurrence with that of Pitchford LJ who gave the leading judgment. This was important guidance that again predated the hearing before the First-tier Tribunal but of which no account was taken by the panel.
56. In AM his Lordship at paragraph 29, referred to the opinion of the Court in N (Kenya) that the public interest in deterrence was a permanent feature of the legitimate aim being pursued, whether expressly relied on by the Secretary of State or not and was relevant to the appeal before their Lordships, notwithstanding that since 2007, the public interest was

expressed in a statutory obligation to deport. N (Keyna) had predated the automatic deportation of “foreign criminals” provisions in the 2007 Act.

57. Reference was made to RU (Bangladesh) [2011] EWCA Civ 65 where Aikens LJ had said inter alia at paragraph 36, that by statute, the deportation of “*foreign criminals*” was deemed to be conducive to the public good. Therefore, if a “*foreign criminal*” asserted that removal by a Deportation Order pursuant to Section 32(5) of the UKBA would be a disproportionate interference with his Article 8(1) rights, both the Secretary of State and any reviewing Tribunal must be obliged to take those public interest factors into account when performing the “*proportionality*” balancing exercise. In RU Aikens LJ continued:

“40. At all events on an appeal from the SSHD's decision that Section 32(5) applies in a case where the ‘foreign criminal’ has argued that removal pursuant an automatic Deportation Order would infringe his Article 8(1) rights and be disproportionate, the Tribunal or court concerned must recognise and give due weight to all the public policy factors identified in OH (Serbia). It must acknowledge that the SSHD is entitled, indeed obliged, to give due weight to them. The Tribunal or court must also acknowledge and give due weight to them when drawing the ‘proportionality balance’ under Article 8(2)”.

58. In AM reference was also made to the decision of the Court of Appeal in OH (Serbia) albeit under the pre-2007 Act Framework. Further their Lordships considered it:

“Inevitable that in measuring proportionality the public interest in deterrence is a material and necessary consideration. The public interest is an important component of the balancing exercise required to test proportionality (for the purpose of Section 33(2) (a)) whether or not the Secretary of State expressly says so in her decision letter or in the Presenting Officer's submissions to a Tribunal.”

Pitcford LJ continued inter alia:

“It is an indelible feature of the balancing exercise that the decision-maker weighs the consequences of deportation against the full import of the legitimate aim to be achieved. Mr Saeed with some skill, sought to persuade the court that we could infer from the express language used by the FTT that it had well in mind the public interest which the domestic cases identify. I accept that this court should not readily conclude that a specialist Tribunal erred in law but also ‘that it is for the Tribunal to demonstrate that it has applied the correct test when striking that balance’ (per Pill LJ in OH (Serbia) at paragraphs 27 and 32). With some regret I must conclude that no such inference is available. ... The emphasis in the FTT's self-direction of law is upon the harsh consequences of separating a family which may follow an immigration decision. It drew no distinction between the public interest considerations arising in immigration decisions (to which Lord Bingham was referring in Razgar and EB (Kosovo)) and in deportation decisions following the commission of serious crime. As Richards LJ held in JO (Uganda) different considerations apply when the balance is to be struck against a

separate and more powerful public interest. For this reason I am unable to conclude that the FTT did have in mind both the existence and the breadth of the legitimate aim which the Deportation Order was pursuing.”

59. Upon our consideration of the First-tier Tribunal panel’s deliberations on Article 8(2) proportionality in the present case, we come to the same conclusion for like reasons.

60. We are also mindful that in AM at paragraph 34, his Lordship considered the question as to whether the FTT in that case, made an error of law, either by omitting consideration of material evidence, or by reaching a decision that was perverse as to the low risk for reoffending presented by the Appellant. He continued:

“It may well be that the Appellant was anxious to minimise, even to deny, his criminality before the FTT and the UT, but the OASyS assessment had been made by a trained probation officer whose job it was to assess risk and in my view was not lightly to be dismissed ...”.

61. We would pause there, because the Tribunal in the present case at paragraph 24 of their determination were clear that the Appellant was *“without doubt a serious offender”*. They also noted the NOMS1 Form that the risk of serious harm was assessed as high but the risk of reconviction was assessed as low. They found that they had no reason to disagree with that assessment. It was acknowledged that the risk of harm would be to female children and young female adults with whom the Appellant was placed in the position of trust in the community. The nature of that risk related to sex and assault, rape, grooming as well as actual emotional and psychological harm.

62. In the course of our deliberations, we have taken a closer look at the NOMS1 Form that went significantly further than the observations made by the panel. It was also stated that the high risk of harm identified:

“.. remains high due to the offender’s continued denial of any wrongdoing and his wife’s collusion with him. He is assessed as presenting an ongoing risk of harm to the victim and her sister whom he has accused of making false allegations against him.

There is also a risk to the general public of financial loss from fraud (deception).”

63. These are matters surprisingly not identified by the panel in their determination.

64. Further, under the heading “Risk of Reconviction”, the OGRS predictor score was a risk of 24% in year one and 39% in year two. There is nothing in the panel’s determination to suggest that given the extreme nature of the potential consequence of further offending, there still remained a disturbing risk.

65. The Appellant had committed a very serious offence and although it was open to the panel to give credit to his good behaviour in prison, the evidence before them was that the Appellant remained a danger to female children and young female adults with whom he was placed in a position of trust in the community and as presenting an ongoing risk of harm to the victim and her sister, apart from the risk to the general public of financial loss from fraud/deception.
66. The report was clear that in consequence, the Appellant was subject to Safeguarding Children restrictions and was disqualified from working with children and required to sign on the Sex Offender' Register for life.
67. No reference was made by the panel to what was said in the NOMS1 report at Section 3(c) that on release it was:

“.. likely that Mr Lawson will initially be placed in an Approved Premises if he is not immediately detained by the UKBA. His plan to return to his family will require review by his Offender Manager in consultation with other agencies such as Social Services. He will need close monitoring and prohibitive licence conditions to ensure he does not have unsupervised access to children on release”.
68. We should add for the sake of completeness, that reference to “OGRS” stands for “*Offender Group Reconviction Scale*” that estimates the probability that offenders with a given history of offending will be reconvicted for any recordable offence within two years of sentence.
69. We find that the panel failed to ask themselves and consider in such circumstances, the nature of the harm that the Appellant might cause upon release. A risk assumed at 24% in year one and 39% in year two does not despite the banding category of “Low” seem particularly low not least when it is assessed that it could rise to 39% within two years.
70. We would add that in the same report, predicted percentage scores were given for OGP (OASyS General Reoffending Predictor) and OVP (OASyS Violence Predictor) that provided scored predictors of the likelihood of general reoffending and violent offending over one and two years from the beginning of supervision or release on licence. Those predictions in relation to this Appellant were in terms of OGP a 16% risk in the first year rising to 26% in two years and in terms of OVP, a risk of 5% rising to 10% in two years.
71. That no reference to these matters was made by the panel within their determination raises a serious concern as to whether these important factors were taken into account at all, within the panel's proportionality consideration and the balancing exercise that they were required to carefully conduct.
72. As was made clear by Elias LJ in AM it was:

“.. plain from the domestic jurisprudence that a mere reference by a Tribunal to the nature and seriousness of the offence will not suffice to satisfy an Appellate Court that proper consideration has been given to all aspects of the public interest. A Tribunal cannot, therefore, act on the premise that a conscientious application of the *Boultif* criteria (as further explained in *Uner* and *Maslov v Austria* [2008] ECHR 508)) will constitute a lawful application of the proportionality principle.”

73. Elias LJ also had this inter alia, to say:

“41. The central question in this appeal is whether the FTT erred in law in its approach to proportionality. **In particular did the FTT have in mind not only the risk that the applicant might commit future offences but also the need to deter foreign nationals from committing serious offences by making it plain that one of the consequences may well be deportation, as well as the legitimate need to reflect society's public revulsion of such crimes and to ensure that the public will have confidence that offenders will be properly punished.**

42. The decisions of this court in *N* (Kenya), *OH* and *RU* (Bangladesh) all emphasise the importance of a Tribunal giving full weight to these different aspects of the public interest in the proportionality assessment. **They emphasise that it is not a sufficient answer to the public interest concerns that the risk of future offending by the applicant himself is very low. Indeed, where a serious offence has been committed, then as Lord Justice Judge (as he was) pointed out in *N* (Kenya) (para 65), that will not even be the most important aspect of the public interest.**

43. **.. If a Tribunal fails expressly to refer to these factors, then in my view there will have to be very cogent evidence from which it can properly be inferred that the Tribunal must have had these considerations in mind. It is not enough to say that a specialist Tribunal must have been aware of these authorities and should be assumed to have given weight to these factors”.**  
(Emphasis added)

74. We have concluded for the above reasons, that the Tribunal failed to give sufficient to those considerations.

75. We would also observe that within their deliberations, the panel appeared at paragraph 33 of their determination, to have taken account of the guidance given in *EB* (Kosovo) but, as observed by their Lordships in *AM*, such reliance would be misconceived, in that the observations of Lord Bingham to which the panel referred (that it would be rare for removal to be proportionate if there was a close family bond and that it was unreasonable to expect the family to follow the family member being removed) was in the context of where the public interest related to the need to enforce immigration control. Lord Bingham did not intend that observation to apply in cases where a person, as here, was being deported for a serious criminal offence. The Tribunal were in our view, wrong in law

thus to refer to and rely upon such guidance within their proportionality deliberations.

76. We also note with some concern, that at paragraph 31 of their determination (see above) in a carefully constructed argument in stages, the panel attached increasing weight to the primary consideration in terms of the best interests of the children. Firstly they concluded that it was a factor which must rank higher than any other factor; then by increasing its significance further in stating that it was not merely one consideration that weighed in the balance. Finally by stating that customarily it should dictate the outcome of the case. We find that this was wrong. The best interests of children are a primary consideration which means it must be treated first but not that it has an intrinsic additional weight by reason of it being a primary consideration. As Lord Hope made clear in ZH (Tanzania), the best interests of the children was not to be treated as some sort of trump card.
77. We nonetheless recognise that in accordance with their clear statutory obligations, the First-tier Tribunal had regard to the best interests to the Appellant's children who would be adversely affected by his removal. They were right to do so, because disrupting the lives of children by removing their father is a very serious step on the part of the state.
78. However the Tribunal were required to conduct a balancing exercise in which the interests of the children and other factors had to be considered against the desirability of excluding from the UK, foreign criminals who committed serious offences.
79. This Appellant committed amongst other things, the offence of rape which is always a very serious offence and which in his case, attracted a sentence of eight years' imprisonment. Further, it is not a case where the evidence suggested that the Appellant faced up to his responsibilities and had reordered his life. Indeed he continued to deny his guilt.
80. The NOMS report referred to his being at high risk of harming young female children or female adults even though it also reported rather curiously that the risk of reconviction was low.
81. We acknowledge that the First-tier Tribunal considered very carefully the rights of the children, but in so doing we find that they lost sight of the fact that they were supposed to be conducting a balancing act and we are satisfied that their findings were not set against the public interest and therefore we find that they erred in law.
82. For the reasons to which we have above referred and without in any way detracting from the panel's findings about the best interests of the children, we find this is a case where the public interest required the Appellant's deportation from the United Kingdom.

83. We find that the Tribunal had simply not shown proper if any, regard to the public interest merely by identifying the need so to do.
84. The importance of giving proper regard for the public interest was fully considered in AM and mindful of that guidance, we cannot infer from the skimpy reasoning of the First-tier Tribunal, that they did in fact show the regard for the public interest that AM reminds us was needed. Simply to refer to aspects of case law guidance is not sufficient. The First-tier Tribunal may have reminded itself of the need to have regard to the public interest, but nowhere in their determination, did they demonstrate how they had filtered that consideration into the balancing exercise that they were required to conduct.
85. Quite apart from the NOMS report and in particular those important aspects of it to which the Tribunal made no reference at all, there was before the panel the report of the London Probation Trust dated 28 March 2012, where in common with the NOMS report, the view was expressed that the Appellant would be required to attend for a psychological assessment at the Bracton Clinic upon his release as directed by probation. He would be required to reside at an Approved Premises (AP-hostel) initially upon release for a period of at least six months.
86. Indeed the author of the report, Ms Sonia Calliard continued inter alia:

“I am not happy for him to be released to the family home immediately. In my view the fact that this wife has stood by him increases the possibility of collusion which will heighten the risk he poses to young women or girls in the family that he may come into contact with. The situation with the hostel accommodation would be continually monitored and re-assessed just before the six month period elapses. It cannot be assumed that Mr Lawson will go straight back into the family home after six months.”
87. Ms Calliard also pointed out, that as the Appellant was a Registered Sex Offender, he would be required to work with the protocols governing police management of the case. He would be subject to sex offender registration on release from custody. He would be required to report to the police within three days of release from custody. There would be Victim Specific licence conditions (exclusion zones and non-contact conditions) as appropriate. He would be forbidden from contacting or seeking to approach the victim of the offence. He would be forbidden to enter the area where the victim lived. He would be forbidden from undertaking work or other organised activity which would involve a person under the age of 18, either on a paid or unpaid basis without the prior approval of his supervising officer.
88. Ms Calliard continued that in any case the Appellant’s conviction precluded him from certain occupations including working with vulnerable people. She would seek to have a further condition included on his Licence which would mean he would not be allowed to have unsupervised contact with

children under the age of 18 without the prior approval of his supervising officer and Southwark Social Services Department.

89. This in itself raises within us a concern, that although the probation report was before the panel, no consideration would appear to have been given to it when they reasoned as to why it was in the Appellant's children's best interests, for the Appellant not to be removed to Nigeria or Togo.
90. This is a case where the Appellant's children have been without the presence of their father for approximately the last six and a half years. The children will continue to benefit from the treatment that they are receiving for their Sickle Cell Anaemia in the United Kingdom and to enjoy all of the benefits including that of education as is their right as British citizens. They will continue to live with their mother as before. They can as appropriate and in the future, visit their father in Nigeria as indeed they have visited members of the family in Nigeria on two occasions in the past.
91. The Appellant was sentenced to eight years' imprisonment for rape as well as other associated sexual offences. This was not his first criminal conviction and indeed his prior convictions are indicative of his behaviour whilst in the United Kingdom. We regret to say we have concluded that the First-tier Tribunal failed to properly take account of the other elements in the public interest and paid no more than lip service to the Appellant's current offence and the public reaction to it.
92. For the above reasons, we find that notwithstanding that perversity has a high threshold, that in the circumstances of this appeal, the Tribunal's reasoning was indeed, perverse.
93. We have therefore concluded that the First-tier Tribunal decision did involve the making of errors on a point of law such that their decision to allow the Appellant's appeal on Article 8 ECHR grounds must be set aside.
94. As we mentioned earlier in this determination, the parties agreed with us that in such circumstances there was no reason why we could not proceed on the evidence to proceed to make a fresh decision and whilst we have taken account of the statements of support from family and friends, and the family's Parish Priest and that of the prison officers at present dealing with the Appellant and whilst we have the deepest sympathy for the situation that the Appellant's wife and children (whose handwritten letters of support we have considered) will now find themselves, we have concluded upon the most careful consideration of the evidence in its totality, including the case law guidance to which we have made reference and which we have applied against the backdrop of the Appellant's particular circumstances, that in applying the principle of proportionality, we consider that deportation is justified in support of the legitimate aim of the prevention of crime and disorder and the protection of public health and morals.

## **Conclusions**

95. The making of the decision of the First-tier Tribunal did involve the making of an error on the point of law.
96. We set aside the decision.
97. We remake the decision in the appeal by dismissing it.

Signed

Date 30 May 2013

Upper Tribunal Judge Goldstein