Neutral Citation Number: [2022] EWCA Civ 779

Case No: CA-2021-000109

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE SHERIDAN
Appeal No. RP/00001/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09 June 2022

Before:

LORD JUSTICE BAKER
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

- -

Between:

ARJAN GOSTURANI	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Barnabas Lams (instructed by **Oak Solicitors**) for the **Appellant**
Colin Thomann (instructed by **the Government Legal Department**) for the **Respondent**

Hearing date: 12 May 2022

- -

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on 9 June 2022.

Lord Justice Lewis:

INTRODUCTION

1. This appeal concerns the proper approach to determining whether the deportation of a person who has been convicted of crimes outside the United Kingdom would involve a disproportionate interference with the right to respect for family and private life guaranteed by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention").

2. In brief, the appellant, Arjan Gosturani, came to the United Kingdom in 1997. He used a false name and claimed to be a national of Kosovo when he was in fact an Albanian national. He applied for and was granted asylum on that false basis. He maintained that deception for the next 20 years. In addition, he was convicted of a serious criminal offence in Italy for which he was sentenced to six years and six months' imprisonment. The respondent decided that his deportation would be conducive to the public good. An appeal against that decision was dismissed by the Upper Tribunal.

3. The appellant contends that the Upper Tribunal erred because it considered that the public interest in deporting foreign nationals who had been convicted of criminal offences abroad was the same as the public interest in deporting foreign nationals who had been convicted of offences in the United Kingdom. He contends that the statutory regime enacted by Parliament gives added weight to the public interest in deporting foreign nationals who have been convicted of offences in the United Kingdom. On that basis, he contends that the Upper Tribunal erred by giving the same weight to the public interest in deportation in his case as it would if he had been convicted of an offence in the United Kingdom.

4. The respondent contends that the Upper Tribunal rightly considered the factors favouring deportation, including the fact that the appellant had lied to obtain refugee status and had committed a serious offence abroad. The Upper Tribunal was entitled to consider that there was a public interest in not allowing persons who have committed serious offences abroad to remain in the United Kingdom. That had to be weighed against other factors, including the effect on the appellant and his family members' rights under Article 8 of the Convention and the best interests of the child. That is what the Upper Tribunal did in this case.

THE LEGAL FRAMEWORK

5. Section 3(5) of the Immigration Act 1971 ("the 1971 Act") provides that:

> "(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. Section 5 of the 1971 Act provides that the Secretary of State may make a deportation order in respect of a person who is liable to deportation under section 3(5) of the 1971 Act.

7. Section 32 of the UK Borders Act 2007 ("the 2007 Act") makes specific provision in respect of persons who are foreign criminals as defined in that section, that is they are not British citizens and they have been convicted in the United Kingdom of an offence and sentenced to a period of at least 12 months' imprisonment (or have committed a specified offence and been sentenced to imprisonment). In such cases, the Secretary of State must make a deportation order unless certain exceptions apply including where deportation would breach a person's Convention rights. The appellant is not a foreign criminal within the meaning of that section. While he is not a British citizen, he has not been convicted in the United Kingdom of an offence for which he was sentenced to a period of at least 12 months' imprisonment. Rather, he was convicted in Italy of an offence committed in that country. The Secretary of State was therefore not required by section 32 to deport him but could choose to do so if she considered his deportation would be conducive to the public good.

8. There may be questions as to whether a person's deportation is compatible with Article 8 of the Convention. Article 8(1) provides that everyone has the right to respect for his private and family life. Article 8(2) provides that an interference with that right may be justified if it is in accordance with law and is necessary in the interests of "national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

9. Part 5A of the Nationality, Immigration and Asylum Act ("the 2002 Act") makes provision about claims that deportation would be a breach of Article 8 of the Convention. Section 117A provides that:

> "(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), *"the public interest question"* means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

10. Section 117B deals with persons who are liable to deportation and persons who are to be removed from the United Kingdom for other immigration reasons. It provides as follows:

> "**117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
>
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
>
> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom.

11. Section 117C of the 2002 Act sets out additional considerations to which a court or tribunal must have regard when considering cases involving foreign criminals. "Foreign

criminals" is given a broader meaning than that given in section 32 of the 2007 Act. It means a person who is not a British citizen and who has been convicted in the United Kingdom of an offence and (a) he has been sentenced to period of at least 12 months' imprisonment or (b) the offence has caused serious harm or (3) he is a persistent offender: see section 117D(2) of the 2002 Act. Section 117C provides that:

> "117C Article 8: additional considerations in cases involving foreign criminals"
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

12. As appears from section 117C(1) and (2), the more serious the offence the greater the public interest in deportation. Further, if a person is convicted in the United Kingdom of an offence and sentenced to between 12 months and four years' imprisonment,

deportation is in the public interest unless one of two exceptions apply. In cases of persons convicted in the United Kingdom of an offence and sentenced to at least four years' imprisonment, deportation will be in the public interest unless there are very compelling circumstances over and above those referred to in the two exceptions.

13. The provisions of section 117C of the 2002 Act are reflected in paragraphs 398 to 399A of the Immigration Rules which apply to "a foreign criminal liable to deportation".

14. For completeness, I note the provisions of the Immigration Rules dealing with the grant of entry clearance to a person seeking to come to the United Kingdom. Section S-EC.1.4 of Appendix FM to the Immigration Rules provides that the exclusion of an applicant from the United Kingdom is conducive to the public good where he has been convicted of an offence for which he has been sentenced to a period of imprisonment (a) of at least four years, or (b) of at least 12 months but less than four years and 10 years have passed since the end of the sentence, or (c) of less than 12 months and five years have passed since the end of the sentence. Those provisions apply when a person has been convicted of an offence outside the United Kingdom. There is an exception where there are exceptional circumstances which would render the refusal of entry clearance a breach of Article 8 of the Convention "because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member": see paragraph GEN 3.2.(2) of Appendix FM to the Immigration Rules.

THE FACTS

15. The appellant, Arjan Gosturani, is a national of Albania born on 31 December 1970. He entered the United Kingdom in 1997 and was granted refugee status and indefinite leave to remain in 1999. He used deception to obtain that status, falsely claiming to be Arjan Ahmetaj born in Kosovo on 31 December 1972.

16. The appellant has a wife and five children all of whom are British citizens. The children were born in 1994, 2003, 2005, 2008 and 2015. He lives with his wife and four of his children. His eldest child lives separately with her own family but sees the appellant and her mother and siblings regularly. The appellant has two grandchildren.

17. The appellant has been convicted of seven offences in the United Kingdom all committed before 2008. One was an offence of common assault committed in 2001 for which he was sentenced to six weeks imprisonment. In August 2001 he was convicted of an offence of driving while disqualified and sentenced to a community penalty and disqualified from driving. He committed four more such offences, in 2000, in 2003, in 2004 and in 2006. He was sentenced to two months' imprisonment, four months' imprisonment, a community rehabilitation order and four months' imprisonment respectively. He was convicted of being drunk and disorderly in 2007 and fined £250.

18. On 8 June 2006 the appellant was convicted in Italy, in his absence, of the crime of living off the earnings of female prostitution and attempted blackmail. The offence was committed in 2000 and 2001 respectively. He was sentenced to six years and six months' imprisonment. He was extradited in December 2012 to Italy to serve his sentence.

19. He returned at some stage to the United Kingdom. He came to the attention of Home Office enforcement officers on 18 December 2015. Concerns were raised as to his identity. Investigations revealed that the appellant was in fact Arjan Gosturani and that he had been born in Tropoje in Albania (and not in Kosovo). The appellant made submissions to the respondent in October 2017 again falsely maintaining that he was a national of Kosovo not Albania. The appellant now accepts that he is an Albanian national and that he misled the respondent as to his identity and nationality. His refugee status has been revoked.

20. By notice dated 2 October 2017, the respondent informed the appellant that she had decided that his deportation was conducive to the public good and that he was liable to deportation. The appellant appealed to the First-tier Tribunal on the basis that deportation would be a breach of Article 8 of the Convention.

The First-tier Tribunal Decision

21. The First-tier Tribunal accepted that section 117C of the 2002 Act did not apply to the appellant as he was not a foreign criminal within the meaning of the 2002 Act. It considered, however, that paragraphs 399 and 399A of the Immigration Rules applied to the appellant as he was a foreign criminal within the meaning of those rules. The appellant was not a British national and had been convicted in Italy and so was "foreign" and a "criminal" for the purposes of those rules. Applying the rules, the First-tier Tribunal found that deportation would not be a disproportionate interference with the rights guaranteed by Article 8 of the Convention.

The Decision of the Upper Tribunal

22. The appellant was ultimately granted permission to appeal to the Upper Tribunal. The appellant submitted that the First-tier Tribunal had erred in a number of ways.

23. The first ground of appeal was that the First-tier Tribunal erred in treating the appellant as a foreign criminal for the purposes of paragraphs 398 to 399A because those paragraphs of the Rules applied to foreign criminals as defined in the 2002 Act. The Upper Tribunal accepted that submission and held that the appellant's conviction in Italy did not make him a "foreign criminal" for the purposes of the Immigration Rules. The consequence was that the First-tier Tribunal had erroneously applied a framework for assessing the public interest in, and the proportionality of, the appellant's deportation which was not applicable. The First-tier Tribunal had therefore erred in law.

24. The second ground of appeal was that the First-tier Tribunal had erred because it had failed to reflect in the appellant's favour, when considering proportionality, that extra-territorial convictions are explicitly excluded from the 2002 Act and carried less weight. The Upper Tribunal dealt with that ground at paragraphs 24 to 29 of its decision. It recorded Mr Lams' submission that successive legislative interventions, including section 117C(1) and (2), had made it clear that there is a significant public interest in deporting foreign nationals who have been convicted in the United Kingdom of a serious offence. The Upper Tribunal referred to the authorities upon which Mr Lams relied as supporting that submission. The Upper Tribunal then dealt with the issue in the following way:

"26. Mr Lams argued that as the legislation on the public interest in deporting foreign criminals excludes from its scope nationals convicted outside the UK, it follows that those convictions do not carry as much weight as a conviction in the UK when assessing the public interest in deportation.

27. I disagree. Although the UK Borders Act 2007 and the 2002 Act define the term "foreign criminal" in such a way that it only incudes convictions in the UK, it does not follow from this that there is a reduced public interest in removing a person convicted of a crime outside the UK. This issue was recently considered in *SC*, where it was noted that the Immigration Rules concerning Entry Clearance provide for the exclusion of applicants who have been convicted of offences outside the UK because it is "conducive to the public good". EC.1.4 of Appendix FM. There is, therefore, plainly a public interest in excluding (either by removing them or preventing their entry) foreign nationals convicted of serious crimes, wherever that crime took place. The public interest is not reduced because the crime is abroad because the framework for assessing proportionality in the 2002 Act (and in the Rules) does not apply in the case of foreign nationals convicted outside the UK.

28. That said, there is an important distinction between convictions in the UK and convictions abroad. Where a person has been convicted in the UK the length of prison sentence is a reliable indicator of the severity of the crime. In contrast, where a person has been convicted outside the UK it is difficult to draw an inference as to the severity of the crime from the length of the sentence. This point was made in *Entry Clearance Officer – United States of America v MW (United States of America & Ors* [2016] EWCA Civ 1273, where it was stated at paragraph 39:

> However, we accept that there may be important distinctions in the application of the policy, as Ms Revill has argued. In a deportation case, the UK conviction and sentence arise within a familiar legal system, and can be taken to be reliable indicators of the severity of the criminality, and thus the degree of public interest in deportation. In cases of application for entry, the same does not apply in all cases. The illustration arose in argument that, in a number of countries, homosexual acts lawful here are regarded as criminal and can be visited with imprisonment for four years or longer. Such circumstances might well be relevant to a Convention or asylum claim.

29. In the light of what is said in *MW*, it would, in my view, have been an error of law if the judge had inferred that the appellant's crime in Italy was serious solely on account of the length of the sentence. However, the judge did not fall into this error. At paragraph 37 the judge quoted from the European arrest warrant,

> which described the appellant's offence as inducing three women into prostitution, reducing them into conditions similar to slavery, and threatening death and bodily injury. Given this evidence as to the nature of the offence – and the absence of any other evidence to indicate the conviction was for something less serious – it plainly was open to the judge to describe the appellant's crime as being "of a very serious nature indeed". Given this characterisation of the crime, the judge did not err by not reducing in the article 9 proportionality assessment the weight attached to it merely because it occurred outside the UK."

25. The Upper Tribunal therefore concluded that the First-tier Tribunal had not erred in the way alleged in ground 2. There was a third ground but that is not material to this appeal. As ground 1 had succeeded, and the First-tier Tribunal had erred in law, its decision was set aside. The Upper Tribunal then proceeded to re-make the decision. The Upper Tribunal found that deportation would not breach Article 8 of the Convention and dismissed the appeal. Its reasoning is as follows:

> "33. The question for me to determine is whether it is proportionate under Article 8 ECHR for the appellant to be deported. As explained above, despite his conviction in Italy, the appellant is not "a foreign criminal" for the purposes of paragraphs A398 to 399D of the Immigration Rules or section 117C of the 2002 Act. The framework provided in those provisions for assessing the deportation of foreign criminals is not therefore applicable. Mr Lams submitted that this case requires what he characterised as a "freestanding and unvarnished" article 9 proportionality assessment. I agree, and proceed by adopting the "balance sheet" approach referred to by Lord Thomas in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60.
>
> 34. There are three factors which weigh on the respondent's side of the proportionality balance in the article 8(2) assessment.
>
> a. First, the appellant lied in order to obtain refugee status and maintained the lie for approximately 20 years. This is a serious and flagrant abuse, which has significant repercussions including the undermining of public confidence in the respondent's system of immigration controls. The public interest in the maintenance of effective immigration controls weighs heavily against the appellant.
>
> b. Second, the appellant was convicted of a very serious crime in Italy. There is a public interest in not allowing foreign nationals who are serious criminals to either enter, or remain in, the UK. The severity of the crime is such that even though it happened a long time ago and the appellant has not been convicted of any crimes for many years it is nonetheless a factor that weighs heavily against

him in the proportionality assessment. I note that the appellant's position is similar to that described in paragraph 94 of *SC*, where it is stated:

> "Because the appellant has been convicted and sentenced to imprisonment of at least four years, if he were seeking entry to the United Kingdom, S-EC.14 would make his exclusion conducive to the public good, regardless of the length of time that has passed. In view of what we have said about the appellant only being in the United Kingdom because he has unlawfully entered it, we reiterate that the approach taken in entry clearance cases ought to guide the assessment of the public interest in the appellant's removal by means of deportation. This means that the appellant must show "unjustifiably harsh consequences" for him, his wife and/or children (both minor and adult) in order to defeat deportation."

c. Third, the appellant was convicted of several offences between 2001 and 2007 in the UK. Each if the offences, considered individually, was relatively minor, but when considered together the pattern of offending indicates a flagrant disregard for the law. They are, however, even when considered cumulatively, far removed in terms of severity to the serious offence committed in Italy. Given the time that has elapsed without any further offending I attach only little weight to these offences in the balancing exercise under article 8 ECHR.

35. It is a requirement under the 2002 Act (sections 117B(2) and (3)) to take into consideration the public interest in the appellant speaking English and being financially independent. These factors do not weigh against the appellant because the evidence shows that he is financially independent and speaks English.

36. There are several factors that weigh in favour of the appellant.

a. First, it is in the best interests of the appellant's children, four of whom are minors, for the appellant to remain to the UK. The appellant is a devoted and supportive father, who provides both financial and emotional support to his children. The consequence of his deportation is that his children's lives will be diminished in a significant way, by losing meaningful contact with their father. It will also be to their detriment that their mother will have to cope on her own and may also suffer emotionally. There is no evidence to indicate that any of the appellant's children suffer from a serious physical or mental health problems. Nor is this a situation where the children will be left without a loving and caring parent: their mother will continue, to be there

for them. However, I accept the opinion of Mr Horricks that, for several of the children, the appellant's deportation will significantly impact both their education and behaviour. It is therefore firmly in the best interests of the appellant's children that he remains in the UK. I give this factor substantial weight and treat it as a primary consideration in the article 8 balancing exercise.

b. Second, the appellant has established a private life in the UK. He runs his own business and has employees. He is also involved with his family and has connections in the wider community. This weighs in the appellant's favour, but only to a small extent because his private life was established when he had no lawful basis to be in the UK, having been granted asylum because he lied about his nationality: section 117B(4) of the 2002 Act.

c. Third, the appellant has a genuine and subsisting relationship with his wife, who is a British citizen. This weighs in the appellant's favour. But I attach only little weight to it in the proportionality assessment given the appellant's immigration status when it was established: section 117B94).

37. This is a case in which there are factors weighing heavily on both side of the scales in the proportionality assessment. In particular, the best interests of the appellant's children (which is that the appellant remains in the UK) is a primary, and very weighty, consideration. However, even taking Mr Horricks' opinion about the negative effect of the appellant's deportation on his wife and children at its very highest, I am satisfied that the very substantial public interest in the appellant's deportation outweigh the factors weighing in his favour. The consequences of the appellant's deportation will be harsh for his family, but not, when all material factors are taken into consideration, unjustifiably so. The appeal is therefore dismissed."

GROUNDS OF APPEAL AND SUBMISSIONS

26. There is one ground of appeal which is that the Upper Tribunal erred at paragraphs 26 to 27 and 29 of its decision in holding that the public interest in deporting persons who had been convicted of criminal offences abroad was the same as the public interest in deporting foreign criminals as defined in Part 5A of the 2002 Act and paragraphs 398-399D of the Immigration Rules and the Upper Tribunal therefore erred in applying an equally onerous test when deciding whether the deportation of the appellant was a disproportionate interference with the rights guaranteed by Article 8 of the Convention.

27. Mr Lams, for the appellant, submitted that Parliament had adopted a comprehensive code in Part 5A of the 2002 Act. That legislative scheme gave added weight to the public interest in deporting foreign criminals. If Parliament had intended the same weight to be attached to the public interest in cases of persons who committed crimes

abroad, it would have said so. Consequently, Parliament could not have intended that the same added weight should be attached to any public interest in deporting persons convicted of offences abroad. He submitted that the Upper Tribunal had, in effect, assessed the public interest in deporting the appellant by giving it the same preponderant weight that applied to the public interest in deporting foreign criminals. If it had not done so, it might have concluded that other factors outweighed the lesser weight to be accorded to the public interest in the deportation of foreign nationals such as the appellant who were convicted of offences abroad. Mr Lams relied, in particular upon the decisions in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, [2017] 1 WLR 207, *CI (Nigeria) v Secretary of State for the Home Department* [2019] EWCA Civ 2027, *NE-A (Nigeria) v Secretary of State for the Department* [2017] EWCA Civ 239, and decisions of the European Court of Human Rights ("the European Court"), notably the decision in *Unane v United Kingdom* (2021) 72 EHRR 24 which summarises the earlier case law of the European Court.

28. Further, Mr Lams submitted that that error in approach appeared from the reference at paragraph 27 and 34(b) of the Upper Tribunal's decision to the decision in *SC* as that case considered matters by reference to whether the effect of deportation on the person's children would be unduly harsh which was the language used in section 117C(5) of the 2002 Act.

29. Mr Lams submitted that the Upper Tribunal should have applied, but did not, what he described as an unvarnished approach assessing the weight to be given to the public interest in deporting a person who had committed an offence abroad, and all other factors, in determining whether deportation would be a disproportionate interference with the rights guaranteed by Article 8 of the Convention.

30. Mr Thomann, for the respondent, submitted that the question was whether deportation was a proportionate interference with the rights conferred by Article 8 of the Convention, balancing the strength of the public interest in deportation against the impact on family and private life. In this case, no structure was provided by the 2002 Act and there was no express provision in the Immigration Rules governing the assessment of that issue. A useful starting point was the factors considered by the European Court in cases such as *Unane* and *Boultif v Switzerland* (2001) 33 EHRR 50. Mr Thomann submitted that it was also appropriate to give weight to the views of Parliament and the executive as to what was in the public interest. A helpful way of assessing the question of proportionality was to set out a balancing exercise as outlined by Lord Thomas CJ in *Ali v Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799 at paragraph 82. That would enable a court or tribunal to bring to bear the factors identified by the European Court in cases such as *Boultif*, any relevant factors identified in section 117B of the 2002 Act, and then to determine whether family and private life outweighed the interest in deportation.

DISCUSSION

The Correct Approach to Cases Involving Persons Convicted of Crimes Abroad

31. There are two separate issues. The first is whether the fact that a person has been convicted of a criminal offence in another country is capable of giving rise to a public interest in the deportation of that person from the United Kingdom. The second is how

that public interest is to be assessed and balanced against other factors such as the impact of deportation on family and private life.

32. On the first issue, the fact that a person has been convicted of a serious crime can give rise to a public interest in deporting that person. The fact that such a crime was committed outside the territory of the deporting state does not, of itself, indicate that a different, and lesser, weight is to be given to the legitimate public interest recognised in Article 8(2) of preventing crime and disorder (which is generally the basis upon which the deportation of a person who has committed a criminal offence constitutes a legitimate aim: see *Ali* at paragraph 25, and the decisions of the European Court in *AA v United Kingdom* [2012] Imm. A.R 107). In the present case, for example, the offence of which the appellant was convicted in Italy involved living off the earnings of female prostitution and attempted blackmail. The European Arrest Warrant described the offence as inducing three women into prostitution, appropriating their earnings, reducing them into conditions similar to slavery, and threatening them with death and bodily injury. As a matter of logic, there is nothing to indicate that the seriousness of the offence differs because it was committed in Italy rather than England. Nor is there anything to suggest that the seriousness of that offence gives rise to a less significant public interest in preventing crime and disorder because it was committed abroad rather than in the United Kingdom.

33. There is nothing in Part 5A of the 2002 Act which implies that a different, and lesser, weight is to be attached to offences simply because they were committed abroad. That conclusion follows in part from the language of sections 117A and 117B of the 2002 Act. Section 117A(2)(a) requires that a court must "(in particular) have regard" to the factors listed in section 117B. Section 117B deals with all cases where a court or tribunal has to determine if a decision under the Immigration Acts breaches Article 8 of the Convention. It applies to the removal of a person from the United Kingdom on general immigration grounds, as well as to those who are liable to be deported. It recognises that the maintenance of effective immigration control is in the public interest: see section 117B(1). It does not deal specifically with the weight to be given to the public interest in the removal of persons whose deportation is deemed conducive to the public good. It does not structure the assessment, or balancing, of the public interest in deporting such persons against other factors. It does provide that, in one specific set of circumstances, the public interest does not require the removal of a person who is not liable to deportation: see section 117B(6) of the 2002 Act. Section 117B does not therefore deal specifically with the assessment of the public interest in removing persons liable to deportation because they have been convicted of offences abroad.

34. Section 117C of the 2002 Act has a different function. Section 117A(2)(b) recognises that a court or tribunal must have regard to the considerations listed in section 117C in cases concerning foreign criminals. Section 117C then does specifically deal with the weight to be attached to the public interest in deporting foreign criminals as defined. The deportation of foreign criminals is recognised as being in the public interest, and the more serious the offence the greater the public interest in deportation: see sections 117C(1) and (2). Section 117C then prescribes a structure for conducting the balancing exercise to determine, whether deportation of a foreign criminal would be disproportionate. That structure depends in part on the length of the sentence imposed. The length of the sentence is, in the context of convictions before courts in the United

Kingdom, a reliable indicator of the severity of the offence and thus the degree of public interest in deportation.

35. Section 117C, therefore, reflects a statement of public policy by the legislature in relation to persons convicted in the United Kingdom of offences resulting in sentences of at least 12 months' imprisonment as recognised by this Court in *NA (Pakistan)* at paragraphs 11 to 13 and 22 of its judgment. That section may provide a complete code in relation to foreign criminals such that an assessment of the proportionality of deportation carried out in accordance with section 117C of the 2002 Act will produce a final result compatible with Article 8 of the Convention in all cases to which section 117C applies as recognised by Leggatt LJ (with whom Hickinbottom LJ and the Senior President of Tribunals agreed) in *CI (Nigeria)* at paragraph 20. But those cases were dealing with foreign criminals as defined in section 117D of the 2002 Act. They were not dealing with persons who were liable to deportation but were not foreign criminals. Similarly, in *NE-A,* a decision on which Mr Lams also relies, Sir Stephen Richards (with whom McFarlane and Flaux LJJ agreed) observed that Part 5A of the 2002 Act is primary legislation governing decision-making in relation to Article 8 claims in the context of appeals under the Immigration Acts and that sections 115A-117D were intended to provide for a structured approach to the application of Article 8 in all cases. The case, however, involved two appeals by foreign criminals and, as appears at paragraph 1 of the judgment, the issues "concern the construction or application of section 117C(6)" of the 2002 Act. Sir Stephen Richards set out the terms of section 117A and 117C at paragraph 5 of his judgment but not paragraph 117B. The observations he made at paragraph 14 of his judgment occur in a section headed "The correct approach towards section 117C(6)". He noted that sections 117A-D were intended to provide a structured approach to Article 8 of the Convention and, in particular, if the application leads to section 117C(6), the proper application of that subsection would, in turn, produce a result compatible with Article 8. There is nothing to suggest that those observations were intended to indicate that Part 5A was intended to ascribe a particular (and lesser) weight to the public interest in deporting persons liable to deportation but who were not foreign criminals or how that public interest was to be balanced against consideration of family and private life. For those reasons, I do not consider that Part 5A, or more specifically section 117C, impliedly limits or prescribes the weight to be attached to the public interest in deporting a person who has been convicted of a criminal offence abroad.

36. Furthermore, other statements of policy indicate that the fact that a person has been convicted of an offence in another country is relevant to whether that person ought to be permitted to enter the United Kingdom. The Immigration Rules contemplate that a person convicted of a serious offence ought not to be granted entry clearance to come to the United Kingdom unless refusal would have unjustifiably harsh consequences for the applicant or members of his family. There is a need to bear in mind that, where the conviction occurred abroad, the seriousness of an offence cannot necessarily be measured by the sentence imposed by the foreign courts. There may be instances where a foreign conviction is not based on conduct which would be criminal in the United Kingdom (such as offences involving homosexuality or proselytising) or where a severe sentence is imposed which would not be imposed here (such as a sentence imposed for a minor public order offence in a country with an authoritarian regime): see *MW (United States of America) and others v Entry Clearance Officer* [2016] EWCA Civ 1273, [2017] 1 WLR 1556 at paragraphs 39 to 41. Subject to that caveat, the fact that a person

has been convicted of a serious offence abroad is seen by the executive as relevant to whether a person should be allowed to enter the United Kingdom. By analogy, it is legitimate to have regard to the fact that a person has been convicted of a serious criminal offence abroad when deciding whether it is in the public interest to deport that individual.

37. The second issue concerns the approach to the assessment of the proportionality. The issue here can be described as whether the deportation of a person convicted of a criminal offence abroad in the public interest is a disproportionate interference with the right to respect for family and private life of that person and of members of his family. Neither the relevant statutory provisions nor the Immigration Rules provide a structure for that assessment in the case of a person who is liable to deportation because he has been convicted of an offence abroad. Consequently, a court or tribunal would need to adopt what was described in argument as an "unvarnished" approach to the assessment.

38. A useful starting point is the factors identified in the case law of the European Court such as *Unane* at paragraphs 72 to 74 and *Boultif* at paragraph 48. Factors such as the seriousness of the offence or the time since the offence was committed and the person's conduct since the commission of the offence, or, in the case of young offenders, the offender's age, go to the weight of the public interest in deportation. Some factors relate to the effect of deportation on the person to be deported such as the length of time he has spent in the country, the seriousness of any difficulties he would encounter in the country to which he is to be deported, and the strength of the social, cultural and family ties with the host country and the country to which he is to be deported. Other factors relate to the effect of deportation on the person and his family including, as a primary consideration, the best interests of any children. The list of factors is not exhaustive: see per Lord Reed JSC, with whom the other members of the Court agreed, in *Ali* at paragraph 25.

39. In addition, a court or tribunal must have regard to the factors referred to in section 117B of the 2002 Act. Furthermore, a court or tribunal should attach weight to any relevant policy of the Secretary of State based on a general assessment of proportionality: see *Ali* at paragraph 46.

40. One way in which a court or tribunal can structure its assessment is by identifying the factors in favour of, and against, deportation and setting out a reasoned conclusion as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of a person who has been convicted of a criminal offence abroad (see the approach suggested by Lord Thomas CJ at paragraph 83 of his judgment in *Ali* in respect of foreign criminals prior to the enactment of section 117C of the 2002 Act).

The Decision of the Upper Tribunal in the Present Case

41. Against that background, I turn to the decision of the Upper Tribunal. First, it was correct to conclude that the fact that the person was convicted of an offence outside the United Kingdom does not of itself mean that the public interest in deportation is reduced. Secondly, it was well aware that the framework for assessing the issue of proportionality in relation to those persons was different because the framework in section 117C and the related paragraphs of the Immigration Rules did not apply to persons convicted of an offence outside the United Kingdom. That appears clearly from

the last two sentences of paragraph 27 of the decision of the Upper Tribunal set out above. Furthermore, it was well aware that it would not be appropriate to infer that an offence was serious simply because of the length of the sentence imposed in the foreign jurisdiction for the reasons given in *MW*. None of that reasoning involves any error on the part of the Upper Tribunal.

42. Nor does the reference to the decision in *SC* in paragraphs 27 and 34(b) of its decision indicate any error on the part of the Upper Tribunal. In assessing proportionality, a tribunal is entitled to have regard, as one relevant factor, to the fact that the executive regards it as contrary to the public interest to admit persons who have been convicted of offences committed abroad. Mr Lams argued that *SC* approached the issue by applying the tests in section 117C, and in particular, the test in section 117C(3) of whether deportation would be unduly harsh because of the effect on a partner or child. Reading the decision in *SC* fairly and as a whole the Upper Tribunal did not do that. *SC* involved a person who had a conviction for murder in Albania. He was able to leave prison in Albania and entered the United Kingdom unlawfully. The respondent decided to deport him. At paragraph 73 of its decision, the Upper Tribunal pointed to the fact that the rules on entry clearance was supportive of the respondent's policy on the balance to be struck between family and private life and the public interest. It set out the relevant provisions of the Immigration Rules including the exception whereby refusal would be contrary to Article 8 of the Convention because it would result in "unjustifiably harsh consequences". At paragraph 94, it identified that the appropriate question was whether the appellant in that case had demonstrated that deportation would have "unjustifiably harsh consequences". It then considered the factors weighing in favour of, and against, deportation. At paragraph 114, it concluded that the outcome of the proportionality exercise was firmly in favour of deportation. It is correct that it said that the evidence failed, by a significant margin, to show that the effect of deportation would be unduly harsh on the children. The Upper Tribunal was not using that language because it was applying the provisions of section 117C. Rather it was using the phrase as a shorthand for unjustifiably harsh consequences, the test which it had identified as appropriate (and one that Mr Lams accepts is compatible with Article 8 of the Convention). In the present case, the Upper Tribunal did not therefore err by referring to *SC.* The reference does not indicate that the Upper Tribunal in the present case was inadvertently misled into applying an approach to the assessment of the public interest of the kind reflected in section 117C. Furthermore, the Upper Tribunal was careful in this case to use the language of whether the consequences for the appellant's family would be unjustifiably harsh as appears from paragraph 37 of its decision.

43. As I have indicated, the Upper Tribunal went on to remake the decision and conduct the balancing exercise for itself. It is clear from the way in which it carried out that exercise that it did not regard itself as applying section 117C or paragraphs 398 and 399A of the Immigration Rules. It carried out the balancing exercise in a way which was consistent with the decision of the Supreme Court in *Ali* and the case law of the European Court.

44. First, it identified the public interest in deportation. There were two factors which demonstrated the very significant public interest in deportation. The appellant had entered the United Kingdom under a false identity and falsely claimed to be from Kosovo and obtained refugee status and indefinite leave to remain on a false basis. He then maintained that deception for over 20 years. As the Upper Tribunal correctly said

that "is a serious and flagrant abuse, which has significant repercussions including the undermining of public confidence in the respondent's system of immigration controls." The second factor was that the appellant had committed a very serious offence in Italy. The Upper Tribunal considered the time that had passed since the commission of the offence and the fact that the appellant had not been convicted of any criminal offence for a number of years. It considered, as it was entitled to do, that the commission of this serious crime did weigh heavily against him in the proportionality balance.

45. The Upper Tribunal was also aware that the appellant had committed seven offences in the United Kingdom between 2001 and 2007. Each offence considered individually was relatively minor but when considered together they indicated a flagrant disregard for the law. However, the Upper Tribunal considered that the offences, even considered cumulatively, were far less serious than the offence committed in Italy. Given the time that elapsed without any further offending, the Upper Tribunal attached only little weight to those offences in the balancing exercise.

46. The Tribunal correctly considered the factors referred to in sections 117B(2) of the 2002 Act, that is, that it was in the public interest for those seeking to remain to speak English and be financially independent so that they are not a burden on taxpayers. Those factors did not count against the appellant here as he does speak English and is financially independent.

47. The Upper Tribunal then considered carefully the factors weighing against deportation. In particular, it considered that it was in the best interests of the appellant's children to remain in the United Kingdom. The Upper Tribunal had evidence from a social worker on the effect that removal would have on the family. It set out the effect of deportation on the children. It noted that, while the children would still be cared for in the United Kingdom by their mother, who was a loving parent, the deportation of their father would have a significant impact on the children's education and behaviour. The fact that the appellant had established a private life in the United Kingdom, ran his own business and had employees, was involved in the community, and had a genuine and subsisting relationship with wife, who was a British citizen, were also factors in favour of the appellant.

48. The Upper Tribunal recognised that there were factors weighing heavily on both sides of the scales in the balancing exercise. In particular, the best interests of the children, which was that the appellant remained in the United Kingdom, was a primary and very weight consideration. However, even accepting the social worker's evidence about the effect of deportation on the children and the appellant's wife, the Upper Tribunal considered that the very substantial public interest outweighed the factors in favour of not deporting the appellant.

49. The Upper Tribunal did not err in its careful assessment of all the factors in deciding whether deportation would be a disproportionate interference with the appellant and his family members' right to family and private life. It reached a conclusion that it was entitled to reach in the present case. There was a substantial interest in deportation given the deception used by the appellant to enter and remain in the United Kingdom and the very serious offence of which he had been convicted in Italy involving reducing three women to prostitution, and attempted blackmail involving threats to kill and cause bodily injury. The Upper Tribunal was entitled to conclude that those factors far outweighed the impact on family and private life.

CONCLUSION

50. For those reasons, I would dismiss this appeal. The Upper Tribunal did not make any error in dealing with the appeal. It was entitled to conclude that the fact that the appellant had been convicted of a serious offence outside the United Kingdom did give rise to a public interest in deportation. It carefully assessed all the factors relevant to the public interest, and weighed those against the consequences of deportation on the appellant's family and private life. It reached a conclusion that it was entitled to reach on the evidence before it.

Lady Justice Elisabeth Laing

51. I agree.

Lord Justice Baker.

52. I also agree.