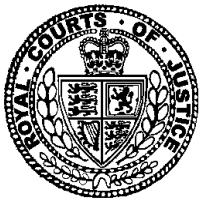

Neutral Citation Number: [2024] EWCA Civ 1410

Case No: CA-2024-000250

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Rintoul
UI-2023-000642

Date: 15/11/2024

Before :

LORD JUSTICE NEWEY
LORD JUSTICE SINGH
and
LADY JUSTICE WHIPPLE

- -

Between :

William Gadinala

Appellant

- and -

Secretary of State for the Home Department

Respondent

- -
- -

Rebecca Chapman (instructed by **Wilson Solicitors LLP**) for the Appellants
Tom Tabori (instructed by the **Treasury Solicitor**) for the Respondent

Hearing date: 30 October 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 15 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

Lady Justice Whipple:

Introduction

1. This is an appeal from the decision of Upper Tribunal Judge Rintoul dated 14 November 2023. UTJ Rintoul allowed the Secretary of State's appeal against the decision of First-tier Tribunal Judge Head dated 10 February 2023. FTTJ Head had allowed Mr Gadinala's appeal against the Secretary of State's decision refusing his article 8 claim to remain in the United Kingdom.

2. The consequence of the UT's decision is that Mr Gadinala, the appellant, must return to Zimbabwe, leaving his partner and two young children in the United Kingdom. Falk LJ granted the appellant permission to appeal to this Court, noting that a return to Zimbabwe would be exceptionally detrimental to the appellant.

3. In 2013, the appellant was sentenced to an extended term of detention in a young offenders' institution for offences committed when he was 18. The custodial element of his sentence was 8 years and the extension period was 4 years. He is therefore a "foreign criminal" for the purposes of the relevant legislation, contained in s 117C of the Nationality, Immigration and Asylum Act 2002. Relevant extracts from s 117C are set out at Appendix 1.

4. The focus in this appeal is on s 117C(6) which provides that 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*".

5. There is no longer any dispute that the appellant comes within Exception 2, which is explained in s 117C(5): he has a genuine and subsisting relationship with his partner and his child such that deportation to Zimbabwe would be unduly harsh.

6. The issue in this appeal is whether there are very compelling circumstances above and beyond that. The FTT held that there were very compelling circumstances. The UT overturned the FTT and held that there were no very compelling circumstances. The appellant seeks to restore the FTT's decision on this point which would mean that he could remain here with his family, alternatively he argues that the matter should be remitted to the UT for the decision to be retaken.

Anonymity

7. By an application dated 21 May 2024, the appellant sought anonymity in order to protect the identities of his partner and his two young children. We refused that application at the hearing. I now give reasons for that decision.

8. It is well-established that hearings should take place in public with the parties named unless there are cogent reasons why the court thinks it right to depart from that position: *Pink Floyd Music Ltd v EMI Records Ltd* [2010] EWCA Civ 1429; [2011] 1 WLR 770. This is the default position. The Civil Procedure Rules contain provision for mandatory anonymisation in certain circumstances, see CPR 39.2(4). General guidance on

anonymising parties or witnesses is given at CPR 39.2.13, and guidance specific to the Court of Appeal is given at CPR 52.23.4. In addition, Practice Guidance dated 22 March 2022 explains the approach to anonymisation of parties to asylum and immigration cases in the Court of Appeal; it provides that the identity of a party is to be withheld only if the court considers it necessary to secure the proper administration of justice and in order to protect the interests of that party (reproduced in the White Book 2024 at CPR 52PG.2, see paragraph 3 in particular). All these rules and sources of guidance emphasise the default position. Determining the answer to an application for anonymity requires the weighing of competing interests of a party or their family members against the need for open justice.

9. This appeal started out as an asylum claim. In line with standard practice in asylum claims, the appellant's name was anonymised in the FTT. However, UTJ Rintoul discharged the anonymity order because by the time the case came on appeal to the UT there was no longer any issue about international protection or asylum; the case was concerned only with the appellant's article 8 claim. By that stage the request for anonymity was advanced on the basis that it was in the interests of the appellant's partner and children. On the issue of anonymity, UTJ Rintoul ruled:

> "2. … I have discharged the anonymity order made as this is no longer a protection case, and I am not satisfied that the need to maintain open justice is outweighed by any other factors in favour maintaining anonymity. In doing so, I note the submission by Ms Chapman to the contrary, and that anonymity is necessary to protect family members. I am not satisfied that this is so, given that there is no need to name them, or to refer to any sensitive information about them as the facts are not in dispute."

10. The grounds for seeking anonymity in this Court repeat two points raised in the UT: that by identifying the appellant, the identity of his partner and children will become known; and that sensitive information about the appellant's partner should not be made public. We do not set out the grounds in any greater detail because that would risk the very intrusion which the appellant seeks to avoid.

11. We accept that by naming the appellant, the identity of the appellant's partner and children may become known: his two children bear his surname, and he is in a long-term relationship with his partner conducted openly and known to others. Further, we accept that there is a risk that publicity arising out of this case might lead to the appellant and his family attracting some unwanted attention or comment, alternatively might cause them embarrassment because details of the appellant's criminal past will come out. But these are not sufficient reasons to depart from the default position. That risk of unwanted attention, comment or embarrassment is a predictable and accepted consequence of the open justice principle at work.

12. We further accept that there is sensitive personal information relating to the appellant's partner contained within the case papers and that there is good reason to protect that information from publication. However, there is no need for that information to be set out or explained in this judgment. It forms part of the background facts and the detail is not material to the analysis of the issues raised on appeal. In those circumstances, anonymity is not necessary to protect that sensitive personal information.

13. Anonymity cannot be justified because it would amount to a disproportionate interference with the principle of open justice.

Background Facts

14. The appellant is a national of Zimbabwe. He was born on 21 January 1994 and is now 30 years old. He came to the UK when he was 13 and has been in this country ever since. His mother died when he was young. His father and subsequent partners took care of the appellant at times, but he was street homeless and abandoned for parts of his early years in Zimbabwe. He came to the UK to be with his aunt who provided accommodation and support for him. His sister was by then already in the UK, and she remains here and is in close contact with the appellant.

15. On 24 September 2013, the appellant was sentenced to an extended sentence of 12 years, comprising a custodial element of 8 years and an extension period of 4 years. That sentence was for three offences of aggravated burglary committed in February 2012, when the appellant was 18. The appellant had pleaded guilty at the earliest opportunity to the charges and was accorded the maximum one third credit for his guilty plea. He had been detained on remand from some point in 2012 pending his sentencing hearing.

16. The appellant served around 4 years of his sentence in a young offenders' institution, before being transferred to immigration detention for a further period of around 18 months. He was released from detention in 2017. He has not offended since his release.

17. In October 2019, the appellant met his current partner. Their first child was born in April 2021. Their second child was born in late 2023 (after the FTT hearing). UTJ Rintoul wrongly recorded this as the couple's third child at para [53] of his decision.

Immigration History

18. The appellant was granted indefinite leave to remain on 21 December 2007 although the exact date of his arrival in the UK is unknown. On 5 December 2014, while the appellant was detained following his sentence, he was served with a decision to deport letter. On 18 February 2015 he was served with a signed Deportation Order and a reasons for deportation letter.

19. The appellant had signed a disclaimer stating that he wished to leave the UK, but he subsequently disputed that waiver. On 3 June 2016 the appellant wrote to the Home Office stating that he was not willing to return to Zimbabwe.

20. On 17 September 2016, the appellant issued a claim for asylum and international protection. He attended asylum interviews on 22 October 2016 and 12 September 2017. On 23 November 2018, the Secretary of State refused his asylum and international protection claim. On 8 February 2022, the Secretary of State issued a supplementary decision refusing the appellant's claim based on article 8.

First-tier Tribunal

21. The appellant appealed to the FTT against the Secretary of State's asylum and article 8 decisions. His case was that he had a well-founded fear of persecution in Zimbabwe,

that he would be destitute on return, and that it would be unduly harsh on his partner and daughter for them to go to Zimbabwe, or for him to be deported there without them, his partner being very vulnerable and the appellant having an exceptionally close relationship with his daughter such that there were very compelling reasons which outweighed the public interest in deportation.

22. Before the FTT, the Secretary of State relied on the presumption in s 72(2) of the Nationality, Immigration and Asylum Act 2002, which provides that a person is presumed to have been convicted of a particularly serious crime and to be a danger to the community of the United Kingdom if he is convicted in the United Kingdom of an offence and sentenced to a period of imprisonment of at least two years; this is subject to s 72(6) which provides that the presumption under subsection (2) may be rebutted by the person to whom it applies. The effect of the presumption, if not rebutted, is that the FTT must dismiss the appeal on asylum grounds. The Secretary of State also resisted the claims for protection on substantive grounds, and argued that return to Zimbabwe would not be unduly harsh so that there was no basis for allowing the article 8 (human rights) claim.

23. As part of her review of the appellant's case, FTTJ Head referred to the sentence of 8 years' detention in a young offenders' institution, noting that the sentence followed the appellant's guilty plea and reflected offending less than a month after the appellant's 18th birthday (FTT decision, para [27]). She confirmed that she had considered all the documentary evidence in the case "in the round" and "holistically" (FTT decision, para [41]). She considered whether the appellant had rebutted the presumption under s 72(2) (in a passage starting at FTT decision, para [43]). She noted that the appellant's conviction for aggravated burglary had resulted in a sentence of 8 years' detention with an extension period of 4 years, and referred to the judge's sentencing remarks which were in the bundle for the appeal hearing in which the judge had assessed the appellant as posing a significant risk to the public of serious harm (FTT decision, para [46]). She referred to two more recent documents provided to her: the OASys report and the probation officer's covering letter dated 3 September 2022 which stated that there were no concerns about negative behaviour on the part of the appellant; she noted the probation officer's assessment of the low risk of reoffending at 2.6% (FTT decision, paras [48]-[50]). She accepted the appellant's evidence of rehabilitation; she noted that he had no further convictions in over five years since the appellant was released; she was satisfied this was a genuine change (FTT decision, para [53]). She referred to the "very serious crime" the appellant had committed over 10 years ago (FTT decision, para [54]) but assessed the appellant no longer to constitute a danger to society (FTT decision, para [56]). She held that he had rebutted the statutory presumption (FTT decision, para [57]).

24. She next considered his protection claim. She accepted that the appellant would be faced with significant adversity on return and there was a very real likelihood that he would be subject to homelessness and associated vulnerabilities; but he had not established that he was a refugee or that he was entitled to humanitarian protection or that removal to Zimbabwe would breach his article 3 rights. Accordingly, his protection claims (for asylum and humanitarian protection) failed (FTT decision, para [83]).

25. She turned to the appellant's human rights appeal, based on his private and family life under article 8. She posed the question whether it would be unduly harsh for the family to live together in Zimbabwe, and above that, whether there were very compelling

circumstances which outweighed the public interest in his removal (FTT decision, paras [85]-[91]). The appellant and his partner had given evidence that it would be unduly harsh for the family to relocate to Zimbabwe, a position supported by the report of Peter Horrocks, independent social worker dated 20 September 2022 (FTT decision, paras [95]-[96]). She concluded, contrary to the Secretary of State's view in the decision letter, that it would be unduly harsh for the family to live in Zimbabwe (FTT decision, para [102]). She went on to consider whether deportation would have an unduly harsh effect on the appellant's partner or child, and concluded that it would (FTT decision, para [121]). She noted that the appellant had not been lawfully resident in the UK for most of his life which meant that Exception 1 could not apply (FTT decision, para [123]). Nonetheless, she addressed the appellant's integration (one of the factors listed in s 117C(4) and relevant to Exception 1). She said that the appellant had only once come to adverse attention as a result of offending, and thought that his response to his crime, his early guilty plea, his remorse, his acceptance of his sentence and clear re-integration following sentence were clear evidence of his acceptance of the rule of law and wider integration in the UK notwithstanding his sentence (FTT decision, para [123]).

26. Given her conclusion that the appellant had a genuine and subsisting relationship with both his partner and his young child (FTT decision, para [93]), that it would be unduly harsh for the family to live together in Zimbabwe (FTT decision, para [102]) and that his deportation would be unduly harsh in its effect on his daughter and in turn his partner (FTT decision, para [121]), it followed that Exception 2 applied (see s 117C(5)). She considered whether there were very compelling circumstances over and above the two exceptions. She referred to *HA (Iraq) and others v Secretary of State for the Home Department* [2022] UKSC 22; [2022] 1 WLR 3784 and *Zulfiqar v Secretary of State for the Home Department* [2022] EWCA Civ 492; [2022] 1 WLR 3339, cases which I shall consider shortly. She noted that "the most significant factor is undoubtedly the very serious offence committed by the appellant for which he received a sentence of 8 years imprisonment" (FTT decision, para [127]). She referred to s 117C(2) which provides that the more serious the offence committed by the foreign criminal, the greater the public interest in their deportation and said this at FTT decision, para [129]:

> "Here the only indicator of seriousness of the appellant's offending is the sentence imposed and the only conclusion which can sensibly be reached from the sentence of eight years imprisonment is that this was serious offending."

27. There was, she said, a "very strong public interest in the appellant's removal as a result of his serious offending which must be given significant weight" (FTT decision, para [130]). She then set out the various family and private life factors (FTT decision, paras [131]-[136]), namely:

i) the strong family life that the appellant enjoyed with his partner and child;

ii) that Zimbabwe was a country with which the appellant has no connection and where he had previously lived in destitution as a child, where he has no friends or family, and in relation to which he has no insight into local cultural customs as an adult;

iii) removal to Zimbabwe would have a hugely significant adverse impact on the appellant and a detrimental effect on his rehabilitation. He is ill-placed to establish himself in Zimbabwe and the impact on him of having to do so would be exceptionally detrimental;

iv) the strength of his relationships with his partner, daughter and sister, such that separation would have a great adverse effect on him and the other members of the family;

v) whilst the appellant's offending history would suggest a failure to integrate, there was clear evidence of integration since then: he was working hard to progress his career in the field of music, he was the primary carer for his daughter, he was fluent in English, and he would be financially independent;

vi) he was a markedly different person to the person he was in 2012. He was successfully rehabilitated, having lived in the community without incident for well over 5 years.

28. FTTJ Head found very compelling circumstances in the appellant's case, and held that this was "one of the rare cases" where the appellant's circumstances were sufficiently compelling to outweigh the public interest in removal (FTT decision, para [138]). Her conclusion was that the Secretary of State's decision to remove the appellant was a disproportionate interference with the appellant's article 8 rights and on that basis she allowed the appeal (FTT decision, para [139]).

Upper Tribunal

29. The Secretary of State appealed to the UT with permission granted by FTTJ Khurram. The Secretary of State advanced two grounds. The first challenged the FTT's conclusion that the s 72 presumption was rebutted. The second asserted that FTTJ Head had materially misdirected herself in concluding that there were "very compelling circumstances" present in this case and in particular that she had wrongly "focused exclusively on factors in favour of the appellant without weighing against him the severity of his offending and matters in favour of deportation" (para [7] of the Secretary of State's application for permission to appeal dated 16 February 2023).

30. UTJ Rintoul heard the appeal on 25 May 2023. His written determination following that hearing is dated 31 May 2023. He rejected ground 1 (and thereby upheld the FTT's conclusion that the s 72 presumption was rebutted). He acceded to ground 2, identifying an error of law by FTTJ Head, in that she had misdirected herself at para [129] of her decision by confining her consideration of the seriousness of the offending to the length of sentence "only". He held that the misdirection was capable of affecting the outcome because the wider circumstances of the offending were sufficiently serious that they could have affected the outcome (UT decision, paras [39] and [41]). He set aside the FTT's decision and directed a further hearing to determine how the decision should be remade, preserving the FTT's findings of fact; that meant that the scope of the further hearing would be confined to weighing the factors identified by the FTT with the addition of a wider consideration of the seriousness of the appellant's offending (UT decision, para [43]).

31. That further hearing took place on 15 September 2023. UTJ Rintoul's comprehensive written decision is dated 14 November 2023. UTJ Rintoul accepted the various points in the appellant's favour as they were recorded by FTTJ Head. He agreed that the appellant "clearly meets exception 2 by a significant margin, and while not having spent half of his life here lawfully, is now integrated" (UT decision, para [59]). UTJ Rintoul then considered the public interest factors to be weighed against him, noting that the more serious the offence, the greater the public interest in deportation (UT decision, para [61]). He set out extracts from the sentencing remarks, including references to the pre-sentence report before the judge. He noted that the judge had passed a sentence for the protection of the public of 8 years in prison, which would have been 12 years' imprisonment had the appellant not pleaded guilty (para [64]).[1] He held that the "circumstances of this appellant's offending were … such as to make them significantly more serious than was reflected simply in the length of the sentence which had been reduced due to a guilty plea" (UT decision, para [65]). He concluded that removal would be proportionate and allowed the Secretary of State's appeal, for these concluding reasons:

> "66. There are three elements to the public interest: in this case, the maintenance of confidence in the system and the deterrence of foreign nationals is perhaps greater than the other factor. But, the truly appalling nature of the appellant's serious crimes, and the harm they caused, increase the public interest significantly.
>
> 67. Given the nature of the public interest in its multiple facets, I am satisfied that on the particular facts of this case, that although there are significant compelling circumstances in terms of the effect that the appellant's deportation will have both on him and his family, and that close family bonds between husband and wife, and between father and young children, that the seriousness of his offending is such that the harm caused is proportionate to the public interest.
>
> 68. Accordingly, I am not satisfied that on the particular facts of this case, the public interest in deportation is outweighed that deportation would not be a disproportionate interference with article 8 rights. I therefore remake the appeal by dismissing it on all grounds."

Grounds of Appeal

32. By grounds of appeal drafted by Ms Chapman who has represented the appellant throughout, the appellant advances two grounds of challenge: first, that UTJ Rintoul erred in law in concluding that FTTJ Head had misdirected herself on the law; and secondly and alternatively, that UTJ Rintoul erred in his evaluation of the relevant factors when he remade the proportionality decision.

33. The Secretary of State, acting by Mr Tabori who did not appear in either tribunal below, resists both grounds, maintaining that UTJ Rintoul was right to set aside the decision

[1] The sentence was in fact pronounced, correctly, as one of detention in a Young Offender Institution, given the appellant was 19 years old at the time of sentence (see s 262(1) Sentencing Act 2020). The FTTJ and UTJ referred to "imprisonment" in place of "detention". Nothing turns on this.

of FTTJ Head and asserting that UTJ Rintoul's remade proportionality assessment is unimpeachable.

34. We are grateful to both advocates and their respective legal teams for the commendable focus of their arguments.

Law

35. I shall set out the main legal principles before considering the grounds of appeal. There was little to divide the parties on the law.

Seriousness of the offending

36. The appeal turns on s 117C(6) (set out in full in the appendix) which provides that 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. The UT confirmed the FTT's conclusion that Exception 2 applied here, so the issue in the appeal was whether there were "very compelling circumstances".

37. Section 117C(2) (also set out in full in the appendix) makes clear that the more serious the offence committed by a foreign criminal, the greater the public interest in deportation of the criminal. It was common ground that the seriousness of the offence was a matter which the court or tribunal had to take into account when carrying out a proportionality assessment for the purposes of the very compelling circumstances test (and see *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22; [2022] 1 WLR 3784 at para [60]).

38. In considering seriousness, the parties agreed that a discount for a guilty plea should be taken into account. However, there was some dispute about the extent to which facts and circumstances beyond the fact of a guilty plea could or should be taken into account, with Ms Chapman suggesting that the immigration tribunal should not go behind the conclusions of the sentencing judge on seriousness. We were shown two recent Supreme Court authorities where the approach to assessing seriousness of offending for the purposes of the "very compelling circumstances" test was discussed. In my view, those cases determine Ms Chapman's point against her.

39. The first case was *HA (Iraq)* where Lord Hamblen (with whom the other members of the Court agreed) rejected the view that the seriousness of the offending could be established simply by looking at the sentence imposed (which had been the Court of Appeal's view, see *HA and RA v Secretary of State for the Home Department* [2020] EWCA Civ 1176; [2021] 1 WLR 1327 per Underhill LJ at [94] and [148], cited at paras [64] and [65] of Lord Hamblen's judgment). He noted that a sentence imposed by a court may well reflect various considerations other than the seriousness of the offence; one example of such a consideration was a guilty plea which could have a significant impact on sentence but "has nothing to do with the seriousness of the offence" (para [66]). He acknowledged that in practice the immigration tribunal might only know the sentence and not have any other information, in which case the sentence would be the surest guide to assessing seriousness (para [67]). He went on to consider those cases where the immigration tribunal had the sentencing remarks available to it and held that in general it would only be appropriate to depart from the sentence as the "touchstone

of seriousness" if it was clear from those remarks that factors unrelated to the seriousness of the offence had influenced the sentence arrived at and how they have done so; credit for a guilty plea was an example of a factor unrelated to the seriousness of the offence and should be taken into account in assessing seriousness for the purposes of the very compelling circumstances test (paras [67] and [68]).

40. Referring to *Unuane v United Kingdom* (application no 80343/17) (2020) 72 EHRR 24, Lord Hamblen said that the nature and circumstances of the offending could be relevant to an assessment of seriousness too, but warning of the danger of double counting:

> "70. The other issue raised in relation to the seriousness of the offence is whether it is ever appropriate to place weight on the nature of the offending in addition to the sentence imposed. Whilst care must be taken to avoid double counting, as this may have been taken into account in arriving at sentence, in principle I consider that this can be a relevant consideration. This is supported by the Strasbourg jurisprudence which refers to the nature and seriousness of the offence as a relevant factor. As stated in *Unuane* 72 EHRR 24 at para 87:
>
> > "The court has tended to consider the seriousness of a crime in the context of the balancing exercises under article 8 of the Convention not merely by reference to the nature and circumstances of the particular criminal offence or offences committed by the applicant in question and their impact on society as a whole. In that context, the court has consistently treated crimes of violence and drug-related offences as being at the most serious end of the criminal spectrum." "

41. The second case is *Sanambar v Secretary of State for the Home Department* [2021] UKSC 30; [2021] 1 WLR 3847 (to which Lord Hamblen referred at para [71] of his judgment in *HA (Iraq*)). Sir Declan Morgan (with whom the other members of the Court agreed) summarised the circumstances of the offending: these were knifepoint robberies at night on victims aged between 15 and 18; the offences were pre-planned against vulnerable young victims who were likely to have goods of value; there was a background of previous offences of attempted robberies and possession of an offensive weapon. He noted that the sentence of three years' detention would have been much longer if the appellant had been an adult. He concluded, in agreement with the tribunal, that these were "plainly very serious, violent offences" (para [52]).

42. Youth is related to the seriousness of the offending. *Sanambar* shows that youth can and should be taken into account when considering seriousness for the purposes of the very compelling circumstances test. *Sanambar* also provides an example of the court looking at the facts and circumstances of the offending – including youth but also the underlying facts and details of the offences - to reach a conclusion for itself on seriousness for the purposes of the very compelling circumstances test.

43. The following principles can be extracted from *HA (Iraq)* and *Sanambar*:

    i) if the tribunal has no information other than the length of sentence to hand, then it should treat the length of sentence as the surest guide to seriousness;

ii) if the tribunal has the judge's sentencing remarks to hand, the sentence will in general remain the touchstone of seriousness, except where it is clear that factors unrelated to the seriousness of the offence have influenced the sentence arrived at and how they have done so;

iii) an example of a factor unrelated to the seriousness of the offence is a guilty plea which has served to reduce a sentence. Assuming the amount of credit for a guilty plea is clear from the sentencing remarks, that plea can and should be taken into account by the immigration tribunal in assessing seriousness;

iv) the nature and circumstances of particular offences can also be taken into account as a relevant consideration. If the nature and circumstances are considered, it is important to avoid double counting of factors which may have been taken into account in arriving at the sentence;

v) one particular circumstance where it may be appropriate for an immigration tribunal to consider the nature and circumstances of a particular offence is where the offender was young and received a sentence which was less than an adult committing those offences would have received, in which case the immigration tribunal may have regard to the sentence which might have been imposed on an adult.

44. I therefore reject Ms Chapman's submission that it is impermissible for the immigration tribunal to look behind the sentencing remarks when assessing seriousness. *Sanambar* is an example of the immigration tribunal and then the appeal court doing precisely that. There can be no surprise in that, given that the immigration tribunal is conducting a public interest proportionality exercise pursuant to s 117C(6), which is different from the exercise conducted by the criminal court in sentencing the offender. There is undoubtedly overlap between the two exercises but the conclusions of the criminal judge are only a point of reference (referred to by Lord Hamblen as "the touchstone") for the immigration tribunal and not the end point of the immigration tribunal's assessment of seriousness.

Public interest in deporting foreign criminals

45. It is common ground that the various elements of the public interest in deporting foreign criminals can be summarised in the following way, drawing on *Zulfiqar v Secretary of State for the Home Department* [2022] EWCA Civ 492; [2022] 1 WLR 3339 (per Underhill LJ, paras [38]-[44] in particular):

i) to avert the risk of re-offending;

ii) to deter foreign criminals from committing serious crimes; and

iii) to maintain public confidence in the system.

Appeal Court's approach

46. Two principles underpinning the approach of this court to the appeal were advanced as common ground. First, an appeal court should be slow to infer that a particular point, not expressly mentioned by the tribunal, has not been taken into account; secondly, the

tribunal has special expertise and an appeal court should assume, unless it detects an express or implicit misdirection of law, that the specialist tribunal knows and has applied the relevant law. Both of these principles are confirmed in the following passage from *Yalcin v Secretary of State for the Home Department* [2024] EWCA Civ 74; [2024] 1 WLR 1626, per Underhill LJ at [50]-[51].

> " 50. … I should recapitulate the approach that should be taken in considering whether the FTT made an error of law. At para. 72 of his judgment in *HA (Iraq)* (but with reference to the appeal in *AA (Nigeria)*) Lord Hamblen said:
>
> > "It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:
> >
> > (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently – see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.
> >
> > (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account – see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.
> >
> > (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out – see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope."
>
> 51. Mr Malik relied on that passage but added some further points by way of amplification. The only one that I need mention is that in *AA (Nigeria)* in this Court Popplewell LJ said, at para. 34:
>
> > "Experienced judges in this specialised tribunal are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically, unless it is clear from their language that they have failed to do so." "

47. I respectfully agree with those statements.

Ground 1: Misdirection

Preliminary point

48. First, I address a point made in Ms Chapman's skeleton argument, to the effect that the error of law identified by UTJ Rintoul, namely the misdirection by FTTJ Head contained at para [129] of the FTT decision, did not reflect any point pleaded by the Secretary of State in her grounds of appeal to the UT. I am not able to accept that. The Secretary of State's grounds of appeal clearly asserted a failure on the part of FTTJ Head to weigh the severity of the offending (see above at paragraph 29). In addressing that ground, UTJ Rintoul focused on para [129] of the FTT's decision where he found a misdirection in FTTJ Head's statement that the "only" indicator of the seriousness of the appellant's offending was the length of sentence. It may be that the Secretary of State had not put her challenge in quite that way in the grounds of appeal, but the misdirection meant that FTTJ Head had failed to assess the seriousness of the offending correctly; there was an obvious consequential risk that she had failed to accord sufficient weight to the offending in the overall balance. I am satisfied that UTJ Rintoul did not step outside the pleaded grounds of appeal.

Substantive complaint

49. I turn next to consider the substance of Ms Chapman's complaint. She submits, in essence, that there was nothing wrong with FTTJ Head's reasoning or approach, because FTTJ Head had all the circumstances of the appellant's offending well in mind, including the fact that he had entered a guilty plea as a consequence of which his sentence was discounted by a third, that the length of his sentence would have reflected his youth (he was just 18 when he committed these offences), and that this was an extended sentence with a custodial element as well as an extended licence period imposed because the judge had assessed the appellant as dangerous. She took the Court to the various passages in FTTJ Head's decision and in the various documents before the FTT, including the sentencing remarks, where these various aspects were set out. FTTJ Head had stated in terms that she had read everything and taken a holistic view; she did not have to set it all out again at para [129] of the FTT decision. Further and in any event, the FTT is a specialist tribunal whose conclusions should be respected.

50. Whether FTTJ Head made an error of law is a question to which there can only be one right answer and it is common ground that it is for this Court to reach its own conclusion on that question without deferring to the decision-maker below (see *Yalcin* at [52]).

51. *HA (Iraq)* and *Sanambar* pre-date the FTT decision in this case. I have summarised the approach which emerges from those two cases (see paragraph 43 above). The issue raised by ground 1 is whether FTTJ Head followed the approach laid down by those cases, taking account (at least) of the discount for guilty plea, or not. If she did not, then she erred in law.

52. I conclude that FTTJ Head did not follow the approach laid down in those cases; instead, she wrongly took account only of the length of sentence in assessing seriousness. I reach that conclusion for a number of reasons. First, the language FTTJ Head used is very clear; she said that "the only indicator of seriousness of the appellant's offending is the sentence imposed … of eight years imprisonment" (FTT decision, para [129]); there is no ambiguity in her words and no reason to doubt that

she meant what she said. Secondly, FTTJ Head's decision was carefully reasoned and impressive in many ways; it jars to characterise para [129] as an isolated instance of loose phrasing when that is not a feature seen elsewhere in this decision. Thirdly, para [129] is critical to FTTJ Head's process of reasoning, because it is the first stage in the proportionality balancing exercise which led to the appeal being allowed; she could be expected to express her views with accuracy and attention at this crucial point in the analysis. Fourthly, FTTJ Head could very easily have referred back to earlier parts of the decision where she had discussed the sentence, including the guilty plea, if she had wanted to demonstrate that she had other aspects of the sentence in mind; but she did not make any such reference. Fifthly, although FTTJ Head had just referred to *HA (Iraq)* (see para [126] of the FTT decision) she had pinpointed para [51] of Lord Hamblen's judgment which introduces the concept of seriousness of offending as well as other factors to take into account; FTTJ Head did not refer in her decision to paras [60]-[71] of *HA (Iraq)*, which are the paragraphs addressing the particular issues which arise on this appeal and which state clearly the need to take account of factors beyond the length of sentence where that information is available.

53. FTTJ Head misdirected herself on the law. As a result of that misdirection, FTTJ Head failed to take account of the guilty plea in this case (which had reduced the sentence substantially). She did not take account of other facts and matters which are particularly striking in this case and are in my judgment obviously relevant to the assessment of seriousness, namely: the fact that the sentence was also discounted for age (see *Salambar* as an example of that factor being taken into account) and the fact that the eight year custodial term was only part of a longer sentence which also included a four year extended licence period, making a total sentence length of 12 years, imposed because the appellant was assessed by the sentencing judge to be dangerous within the meaning of s 229 of the Criminal Justice Act 2003, now superseded by s 308 of the Sentencing Act 2020.

54. Whether FTTJ Head made an error of law is a question for this Court. No question of deference to the expert tribunal arises. In this case, the error is manifest and cannot be countered by any assumption that the expert tribunal must have known the law and applied it properly (see *Yalcin*, considered at paragraph 46 above). Ground 1 fails.

Ground 2: Proportionality

55. Ms Chapman complains that UTJ Rintoul materially erred in remaking the decision in a number of respects. She contends, first, that he was not entitled to consider the facts and circumstances of the offending himself, to arrive at an assessment that "the circumstances of this appellant's offending were, in my view, such as to make them significantly more serious than was reflected simply in the length of the sentence which had been reduced due to a guilty plea" (UT decision, para [65]) and that "the truly appalling nature of the appellant's serious crimes, and the harm they caused, increase the public interest significantly" (see UT decision, para [66]). For the reasons set out above, Ms Chapman is not on solid ground here and this element of her complaint under ground 2 must be rejected. In making the proportionality assessment, it is necessary to have regard to the fact of a guilty plea reducing sentence, at least, and the tribunal is entitled to have regard to the facts and circumstances of the offending to assess seriousness: see *HA (Iraq)* and *Salambar*, discussed at paragraphs 43 and 44 above.

56. Secondly, she suggests that UTJ Rintoul failed to have proper regard to the three elements of the public interest (outlined in *Zulfaqar*, see paragraph 45 above), most notably to the need to avert the risk of re-offending. This is a difficult argument for Ms Chapman, given that UTJ Rintoul reminded himself in terms of the three elements at para [61] and discussed their application to this case at para [66] of the UT decision.

57. Her third and related argument was that UTJ Rintoul had preserved the FTT's findings but failed to engage with them in his re-making decision. One of those findings was that the appellant had been rehabilitated and no longer presented any danger to the public (see FTT decision, para [56], in the context of rebutting the s 72 presumption). Ms Chapman argued that this factor was highly relevant to the issue of risk to the public (one of the aspects of the public interest explained in *Zulfaqar*) yet UTJ Rintoul made no reference to it at all. Ms Chapman complained that other factors in the appellant's favour were not referred to by UTJ Rintoul, namely: his young age at the time of offending; the fact that the appellant had not committed any offences in the many years since he was sentenced; the interests of his children – specifically, UTJ Rintoul made no reference at all to s 55 of the Borders, Citizenship and Immigration Act 2009 which imposes on the Secretary of State a duty to make arrangements to safeguard the welfare of children; the very adverse impact that the appellant's removal would have on his children, noting that the FTT had accepted that his removal would have an unduly harsh effect on them; the significant vulnerability of the appellant, by virtue of his distressing experiences as a young child; and the significant vulnerability of the appellant's partner. She submitted that the lack of care in UTJ Rintoul's analysis was evident from his mistake in reciting the birth of a "third" child, when in fact it was the appellant's second child. In summary, while not challenging the rationality of UTJ Rintoul's conclusions, she challenged the process of his decision-making as defective, in that UTJ Rintoul had failed to engage in any meaningful balancing exercise, alternatively, he had given wholly inadequate reasons for reaching the conclusion that he did.

58. In answering the appellant's case on ground 2, Mr Tabori relies on *Yalcin* (see paragraph 46 above), to submit that this Court should be slow to infer that particular features of the case were not considered by the judge below just because they were not mentioned in terms. He submitted that UTJ Rintoul was obviously aware of the findings of fact that were preserved from the FTT decision and he took them into account and balanced them appropriately. Once the seriousness of the appellant's offending had been properly assessed, there could be no surprise in the conclusion that the public interest balance tipped in favour of deportation. UTJ Rintoul gave sufficient reasons for his conclusion, which in the end could be shortly stated: the seriousness of the appellant's offending outweighed the appellant's article 8 rights by a clear margin.

59. I agree with Mr Tabori that UTJ Rintoul was plainly aware of the various aspects of the appellant's private life and understood his obligation to weigh those factors in the balance. I am satisfied that UTJ Rintoul conducted the balancing exercise, even though he did not itemise the individual factors in his decision. His reasons were adequate and could in the end be shortly stated: the earlier offending was so serious that it outweighed the private life factors relied on by the appellant and reflected in the preserved facts. That was to conclude that there were no very compelling circumstances above and beyond the unduly harsh effects already identified as part of Exception 2, in which circumstances deportation is required.

60. I can see no basis for interfering with UTJ Rintoul's conclusion. Ground 2 fails.

Conclusion

61. I would dismiss this appeal.

Lord Justice Singh:

62. I agree.

Lord Justice Newey:

63. I also agree.

Appendix 1

Extracts from Part 5A of the Nationality, Immigration and Asylum Act 2002

117A Application of this Part

(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).

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.

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.

117D Interpretation of this Part

(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

…

(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

…

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

…

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time…"