Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00679/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 February 2015	**On 10 March 2015**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

HM
(Anonymity Direction Made)

Respondent

Representation:
For the Appellant: Mr T Melvin a Senior Home Office Presenting Officer
For the Respondent: Ms C Hulse of counsel instructed by Virgo Solicitors

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department. ("the Secretary of State"). The respondent is a citizen of Uganda who was born on 22 October 1979 ("the claimant"). The Secretary of State was given permission to appeal the determination of First-Tier Tribunal Judge Eban ("the FTTJ") who had allowed the

claimant's appeal against the Secretary of State's decision of 27 March 2014 to refuse to revoke a deportation order made against him.

2. The Secretary of State's appeal came before me and Lord Boyd on 2 October 2014. We concluded that there was a material error of law in the decision of the FTTJ. We allowed the Secretary of State's appeal, set aside the decision and ordered that it be re-determined before the Upper Tribunal. The claimant was given permission to adduce further evidence. Our Decision and Reasons, prepared by Lord Boyd, is set out in the Appendix.

3. It is in these circumstances that the appeal comes back before me, sitting as a single judge. The additional evidence now submitted is a confidential report from an Independent Social Worker (Peter Horrocks) and an Amended Statement of Special Educational Needs prepared for Croydon Council (with attachments) both of which relate to the claimant's stepson K.

4. I have a skeleton argument from Ms Hulse and, from Mr Melvin, the skeleton argument submitted by his colleague which was before us at the last hearing. Mr Melvin submitted LC (China) v Secretary of State for the Home Department [2014] EWCA Civ 1310. I asked the representatives whether they could provide me with a copy of the sentencing remarks made by the judge when the claimant was sentenced for murder at the Central Criminal Court on 13 March 1998. These were not amongst my papers. Mr Melvin was able to provide a copy.

5. There were no further witness statements and no application to call oral evidence.

6. Mr Melvin relied on his skeleton argument which set out the relevant law. The appeal fell to be considered under the provisions of the Immigration Act 2014 ("the 2014 Act") and the amended Immigration Rules ("the Rules") which came into effect on 28 July 2014. The claimant's sentence excluded him from the provisions of paragraph 399 and 399A of the Rules. He came within section 117 and in particular 117C of the 2014 Act. It was necessary to balance his private and family life against the public interest. The Rules constituted a complete code and provided strong emphasis for the weight to be given to the public interest in deporting foreign criminals. Very exceptional circumstances were needed to outweigh the public interest.

7. LC (China) made it clear that "exceptional circumstances" were a high-level test. The claimant started his relationship with his partner when he faced deportation. He was served with notice of intention to deport whilst he was in prison. All his private and family life was gained whilst his status was precarious. Little weight should be given to a relationship formed at such a time. Mr Melvin said that he had considered the Independent Social Worker's report and accepted that it would be of benefit to the children if the claimant remained in this country. However, after taking this into account, there were still no exceptional circumstances. Any delay on the part of the Secretary of State should not be placed in the scales and

weighed against her. He said that the claimant's brother had been removed to Uganda last year, although it was accepted that he did not have family or children here. Neither the Independent Social Worker's report nor the Croydon Council report were challenged by the Secretary of State.

8. Ms Hulse submitted that this was a curious case. The claimant's conviction was as long ago as February 2008. It was not correct to say that the Secretary of State always intended to deport the claimant. There was no indication in the sentencing remarks that a recommendation for deportation had been made. All the facts had to be taken into account in considering whether there were exceptional circumstances. The claimant's stepson (K) had severe learning difficulties. It was clearly in his best interests that the claimant should be allowed to remain to help look after him. This would benefit the family and the public purse. If he had to leave the country the family could no longer afford to live in their present accommodation and there was a real risk of substantially increased costs for educating and treating K. I was asked to follow the conclusions set out in paragraph 18 of our earlier decision.

9. Ms Hulse said that the claimant's relationship with his partner started before he was told that he was at risk of deportation. She relied on her skeleton argument.

10. In reply Mr Melvin reiterated that the new Rules were a complete code. The circumstances of this case were not exceptional and did not outweigh the public interest.

11. I reserved my determination.

12. Paragraphs A362, 390, 390A, 398, 399 and 399A of the current Immigration Rules provide that;

> "Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.
>
> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
> (i) the grounds on which the order was made;
> (ii) any representations made in support of revocation;
> (iii) the interests of the community, including the maintenance of an effective immigration control;
> (iv) the interests of the applicant, including any compassionate circumstances.
>
> 390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in

exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

A398. These rules apply where:
(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
(b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –
(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
(i) the child is a British Citizen; or
(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –
(a) the person has been lawfully resident in the UK for most of his life; and
(b) he is socially and culturally integrated in the UK; and 8
(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

13. The provisions of the Immigration Act 2014 set out where the public interest lies in paragraphs 117A, 117B, 117C and 117D as follows;

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;
"qualifying child" means a person who is under the age of 18 and who—
(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;
"qualifying partner" means a partner who—

(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).
(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.
(3) For the purposes of subsection (2)(b), a person subject to an order under—
(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),
has not been convicted of an offence.
(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—
(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that 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; and
(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.
(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

14. The claimant has raised Article 8 grounds in the context of deportation under Part 13 of the Rules with the consequence that his claim under Article 8 can only succeed where the requirements of the Rules as at 28 July 2014 are met even though the deportation order was served on him before then. The Rules on deportation represent a complete code on Article 8 (MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192) and must now be read in the light of the provisions of the 2014 Act.

15. Because of Paragraph 398(a) the deportation of the claimant is conducive to the public good and in the public interest because he has been convicted of an offence for which he has been sentenced to a period of at least four years imprisonment. Paragraphs 399 and 399A do not apply with the result that it will only be in exceptional circumstances that the public interest in maintaining the deportation

order will be outweighed by other factors.

16. Under paragraph 117B of the 2014 Act this is a case where the claimant is a foreign criminal who has been sentenced to a period of imprisonment of at least four years. As a result the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

17. Applying Devaseelan principles, the FTTJ took as her starting point the determination of Upper Tribunal Judge Lane promulgated on 5 January 2009. These are set out in paragraph 23 of the FTTJ's determination, which I adopt. I note that Upper Tribunal Judge Lane was dealing with the appeals of both the claimant and his brother.

18. The FTTJ then went on to assess the evidence since the hearing before Upper Tribunal Judge Lane. I adopt her record of the additional evidence and her findings of fact in paragraphs 25, 28 and 30.

19. It is not suggested that there has been any great change in the claimant's circumstances since the FTTJ heard the appeal in June 2014, although I now have the benefit of the Independent Social Worker's Report and the report to Croydon Council the contents of which are not disputed by the Secretary of State. Some further time has passed and the provisions of the new Rules and the 2014 Act have come into effect and must be considered.

20. I also adopt what we said in paragraphs 19 to 22 of our Decision and Reasons set out in the Appendix. Any delays by the Secretary of State in this case did not, as the FTTJ found, "significantly weaken(ed) the case for deportation". These periods are however relevant to the extent that the claimant's ties to the UK and his family life have deepened over time. This is not a case where it is suggested that the claimant has been the cause of any substantial delays for impermissible reasons. For example he has not tried to hide.

21. The claimant's crime was the most serious known to the criminal law. It must excite deep revulsion in society. There is a need for public confidence that such offenders will be properly punished and dealt with including by removing them from the country. Other potential foreign criminals need to be deterred. The judge's sentencing remarks do not shed much light on the circumstances of the offence, although I note that the claimant was one of five people convicted four of whom were the main participants in an armed attack on a young man in his own home. The sentencing remarks contain no recommendation for deportation. The claimant was sentenced to life imprisonment with a tariff of 10 years which was subsequently reduced to 9 years on appeal. He was released on licence on 6 March 2006. The public interest in deporting foreign criminal convicted of such a crime must be at or very close to the top of any scale.

22. Against this recognition of the strength of the public interest must be set the factors which favour the claimant. I have already adopted certain findings of the FTTJ and Upper Tribunal Judge Lane. In addition and in summary the claimant has turned his life around since leaving prison. He has become a hard-working and reliable member of the community who seeks to mentor young people who may have been in prison or risk ending up there. He is a caring family man who helps to support three children one of whom has challenging special educational needs (K). He has been diagnosed with Asperger's Syndrome and Attention Deficit Hyperactivity Disorder. The reports now before me show that there is likely to be a serious deterioration in his condition if the claimant is removed. The claimant is particularly good at helping him through problem periods and coping with his difficulties. The other two children, whilst they do not have their elder sibling's difficulties, are likely to suffer from the knock-on effect of the deterioration in their elder brother's sometimes violent behaviour which is likely to follow the breakup of the family by the removal of the claimant. It would be in the best interests of all three children for the claimant to remain in this country with his children. It is accepted that the family cannot leave the country with him. Without the joint incomes of the claimant and his partner it is likely that they will have to give up their home with the increased risk of damaging effects on K. The claimant, who was a teenager when convicted of murder, has had no other convictions and is at low risk of reoffending.

23. Like the FTTJ I find this difficult case with a difficult balancing exercise. Looking at all the evidence in the round and notwithstanding all that I have said about the weight to be given to the public interest I find that the claimant has established that there are exceptional circumstances which outweigh that interest.

24. The FTTJ made an anonymity direction. Whilst I have not been asked to make a similar direction I consider it appropriate to do so. I make an order under rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant or any member of his family.

25. Having set aside the decision of the FTTJ I remake that decision and allow the claimant's appeal on Article 8 human rights grounds.

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Signed Date 11 February 2015

Upper Tribunal Judge Moulden

APPENDIX

DECISION AND REASONS

1. By determination promulgated on 11 July 2014 the First-tier Tribunal comprising of Judge Eban allowed an appeal against a decision of the Secretary of State dated 27 March 2014 to refuse to revoke a deportation order in respect of the appellant. The Secretary of State now appeals against that decision.

2. We will refer to the appellant in these proceedings as the Secretary of State and the respondent as the appellant as he was in the proceedings before the FTT.

3. The appellant, HM, was born on 22 October 1979. He is a citizen of Uganda. He came to the UK as a boy with his mother and brother. On 17 February 1998 he was convicted at the Central Criminal Court of murder. He was sentenced to life imprisonment and given a tariff of 10 years reduced on appeal to 9 years. He was released from prison on life licence on 6 March 2006.

4. The immigration history is lengthy and set out in detail in the Secretary of State's decision letter. The important dates for these purposes are as follows. The appellant came to the UK on 29 November 1991. (The determination gives the date as October 1990. We do not think anything turns on this discrepancy; clearly he was a boy when he arrived in the UK.) He and his brother were added to their mother's pending asylum claim as dependents. The asylum claim was refused but the appellant was granted exceptional leave to remain as a dependent of his mother until 29 November 1992. On 28 September 1996 he was granted indefinite leave to remain (ILR). As noted above in 1998 he was convicted of murder. On 25 February 2006, shortly before his release on 6 March 2006, he was served with a liability for deportation notice. On 10 February 2008 he was detained under immigration powers and served with a notice of intention to deport. The appellant appealed against deportation. The appeal was allowed but that was overturned following a judicial review at the instance of the UK Border Agency. A further hearing before a tribunal dismissed the appellant's appeal on 5 January 2009. An application was made for permission to appeal to the Court of Appeal but this was refused. A further application was made and again refused. A deportation order was made on 23 April 2009. A further application to the Court of Appeal for an oral hearing was refused on 11 June 2009. On 18 June 2009 the appellant's solicitors made a human rights claim. This was refused on 28 July 2009 and was certified with an Out of Country appeal on the same date. According to the decision letter the appellant became appeal rights exhausted on 18 May 2010. On 15 May 2012 further representations were received on article 8 grounds and the appellant was served with a refusal to revoke a deportation order on 9 November 2012. A judicial review against that decision was refused in March 2013. On 14 October 2013 a supplementary decision letter was served on the appellant. On

15 November 2013 an amended grounds of claim was filed on the appellant's behalf. Further procedure resulted in the making of the decision to refuse to revoke a deportation order.

5. In determining the appeal the FTT had regard to the decision of UT Judge Lane in a decision promulgated on 5 January 2009 when he refused the appellant's appeal against the notice of intention to deport dated 11 February 2008.

Appellant's personal circumstances

6. As noted above the appellant came to the UK when he was aged 11 with his mother and brother. He has been in the UK since then. Shortly after his release from prison the appellant commenced a relationship with JR who is a British citizen. She has a child K from another relationship. That child is now 10 years old. He has been diagnosed with Asperger's Syndrome and ADHD. A letter from Maddie Woollcott, a CAMHS clinical specialist dated 13 January 2014 notes:

> "Due to his difficulties, K can be challenging to manage and requires a firm, consistent and predictable approach. Changes to the structure of his family can therefore have a severely detrimental impact upon his behaviour and wellbeing. We would therefore support the family's request to remain together".

7. The appellant has assumed parental responsibility for K who regards him as his father. The appellant and his partner have two children of their own now aged 7 and 4.

8. The appellant is currently employed as a gas engineer and has been for the last 8 years. There are very positive references from his employers, friends and probation officer. He is active in the church and in the community, in particular taking a mentoring role with troubled teenagers and those expelled from school.

Issues before the FTT

9. The issues for the FTT were (1) the applicability of section 72 of the Nationality, Immigration and Asylum Act 2002; (2) an asylum and article 3 claim; and (3) an article 8 claim. The FTT rejected the asylum and article 3 claim and that is not an issue for us.

Section 72

10. The Secretary of State issued a certificate under section 72 of the 2002 Act that the presumption that the appellant constituted a danger to the community of the UK applied. The FTT found that the appellant did not constitute such a danger. The

grounds of appeal include a challenge to that finding on the grounds that there were insufficient reasons. Mr Jarvis did not press that challenge. It is in any event not determinative of the matter since the asylum issue is no longer before us. Suffice to say that we consider that the reasons given at paragraphs 12 and 13 of the determination are full and carefully reasoned.

Article 8 claim

11. The FTT set out its consideration of this issue in paragraphs 21 to 32. The starting point was Upper Tribunal Judge Peter Lane's determination which found against the appellant on the article 8 issue. The FTT then notes the additional evidence since 2002 including the evidence relating to K. At paragraph 28 the FTT set out the factors that Judge Eban has taken into account in determining proportionality. She concluded at paragraph 29 that it is in the best interests of the appellant's children that they remain with him and the family unit continues as of now. Judge Eban then goes on to consider whether there are exceptional circumstances. She sets out a number of factors in addition to those in paragraph 28 which he took into account in considering this issue.

12. At paragraph 31 Judge Eban finds that the appellant has turned his life around completely. He is a hardworking and reliable member of the community who seeks to mentor young people who may have been in prison or risk ending up there. He is a caring family man looking after his children, one of whom has special educational needs. He is at a low risk of reoffending and it would be in the best interests of his children were he to remain with them. She concluded that on balance the level of the appellant's reintegration amounts to exceptional circumstances.

13. Judge Eban then sets what she finds to be exceptional circumstances against the weight to be given to all the public policy factors identified. She made particular reference to the need to deter foreign criminals from committing serious offences, the legitimate need to reflect society's public revulsion of such crimes and to ensure that the public will have confidence that offenders will be properly punished.

14. At paragraph 32 Judge Eban states that she has found this an extremely difficult balancing exercise and continues:

> "The State's delays in dealing with this appellant between March 2006 and February 2008 and again between July 2009 and May 2012 have in my view significantly weakened the case for deportation now. Weighing up all the public interest and the private interest and taking all relevant matters into account, I find that on the facts of this appeal the public interest does not outweigh the private interest. I find that the respondent's decision was not proportionate".

Submissions for Secretary of State

15. Mr Jarvis relied on the grounds of appeal and expanded upon them in written and oral submissions. He submitted that the FTT failed to give adequate reasons why the appellant's circumstances have changed significantly since his appeal was refused by UT Judge Lane's determination in 2009; failed to recognise that in order to demonstrate exceptional circumstances the appellant must show that they are something above and beyond that in IR 399(a) or (b) and failed to give adequate weight to the public interest in deportation. Mr Jarvis also submitted that the FTT were in error in placing weight on perceived delays both in respect of finding exceptional circumstances and in weakening the public interest in deportation. He referred us to *Onur* v *The United Kingdom* [2009] ECHR 289. In considering the issue of delay in a deportation case the European Court of Human Rights said:

> "Clearly there was a long delay between the letter notifying the applicant that the Secretary of State was considering deportation and the decision to deport him. In the present circumstances, however, the delay is only relevant to the question of whether deportation was necessary in a democratic society as it permitted the applicant to build closer ties to the United Kingdom".

16. On this point Mr Jarvis also referred us to the cases of *Patel & Ors* v *Secretary of State for the Home Department* 2013 UKSC 72 and *Hakemi & Ors* v *Secretary of State for the Home Department* [2012] EWHC 1967 (Admin) (19 July 2012).

Submissions for appellant

17. Ms Beach submitted that there was no error of law. Much of the Secretary of State's complaints were with the weight that was attached to particular factors rather than the legality of the approach. It appeared that permission to appeal had been granted primarily on the basis of delay. The Secretary of State had not properly stated the chronology. In particular the appellant became appeal rights exhausted in July 2009 not in May 2010. The reason for the delay in taking action after July 2009 was not before the FTT and should not be considered. *Onur* could be distinguished; the issue was one of public interest. The basis of the immigration rules was the public interest. If the Secretary of State failed to enforce the rules it was demonstrative of her approach to the public interest.

Decision

18. This was an extremely difficult decision. On the one hand the appellant is a foreign criminal who has been convicted of the most serious crime of murder. It is difficult to overstate the public interest in deportation in such a case. In our opinion that is fully

recognised in Judge Eban's careful analysis. On the other hand Judge Eban was faced with a substantial amount of evidence supportive of the article 8 claims. Of particular significance are K's special needs. It is clear that the appellant's partner would not go with him to Uganda because of K's needs. That would split the family and inevitably impact on K. That factor is set against the background which includes the appellant's young age when he committed the offence, the low risk of reoffending, the length of time he has been in this country and his role in the family and wider community including his charitable work. It is difficult to imagine a more positive set of circumstances from someone convicted of such a serious offence.

19. However, having set out in some detail the circumstances on each side of the scales Judge Eban then went on to look at the issue of delay. It appears from paragraph 32 that it is this issue which finally swings the balance against the Secretary of State. It is necessary therefore to consider this point in more detail.

20. Two periods of delay are noted. The first is between March 2006 and February 2008. The second is between July 2009 and May 2012. The first period follows the appellant's release from prison until served with the notice of intention to deport. The second follows the refusal of the human rights claim in July 2009 until further representations were made on article 8 grounds in May 2012. According to the grounds of appeal the delay was caused through police investigations into possible death threats and investigations into the appellant's family life following the birth of his child in 2011. The Secretary of State maintains that the appellant became appeals right exhausted on 18 May 2010 but Ms Beach submitted that this date was wrong; it was July 2009. While the date in May 2010 comes from the Secretary of State's letter we cannot determine from the other dates how this is calculated. Accordingly we will assume for present purposes a date of July 2009. We also agree with Ms Beach that we cannot now consider explanations for the delay that were not before the FTT.

21. The issue then is whether or not the FTT were entitled to come to the view that "the State's delays" in dealing with the appellant during these periods "significantly weakened the case for deportation".

22. As we understood Ms Beach's submissions they were to the effect that the Secretary of State's delay showed that the State took a relaxed view of the public interest in deportation; if the State truly considered that there was a substantial and overwhelming case to remove the appellant they would have done so already. We cannot accept that submission. It is of course true that bureaucracies sometimes march slowly particularly when faced with those who are determined to use every legitimate, and sometimes illegitimate means to resist. That does not necessarily mean that the State has lost interest. Moreover the public interest should not be equated with those of the State. While the State may articulate and enforce the public interest it is an autonomous concept which goes beyond the interests of the

government of the day. While we cannot say that the State's delay in taking action will never be a factor, in our opinion the real question is whether or not during the period of any delay the appellant's ties to the UK and family life have deepened to the point where deportation is disproportionate.

23. In our view the FTT was wrong to conclude that the State's delays significantly weakened the case for deportation for the following reasons. First, at no point could the appellant have been in any doubt that the Secretary of State was minded to deport him. During the first period he was subject to the liability for deportation notice. During the second period he was subject to a deportation order. Secondly, much of the private life on which the appellant relies was established during the time that his stay in the UK was precarious because of his immigration status. That includes the establishment of his relationship and the birth of his children as well as his employment during the time he was subject to a deportation order. Thirdly, as the European Court of Human Rights pointed out in *Onur* the appellant could have had no legitimate expectation that a decision to deport him would take place within a particular time period.

24. Accordingly we have come to the view that there is an error of law in the FTT's reasoning. Given that it plainly swung the balance in the FTT's determination we conclude that the error is material and we will allow the appeal.

New decision

25. Mr Jarvis suggested that the case should be kept in the Upper Tribunal. Ms Beach argued that it should be sent back for a rehearing before the FTT. Given that it would fall to be considered under reference to the new rules the appellant would want to adduce more evidence in relation to K's condition.

26. While we can quite understand that the appellant may wish to adduce new evidence this can be done before the Upper Tribunal. We shall set the case down for a hearing before the Upper Tribunal.

27. We shall make a direction for an anonymity order.

LORD BOYD OF DUNCANSBY
Sitting as an Upper Tribunal Judge