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*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE UPPER TRIBUNAL

Makhlouf's (Zouhair Ben Belacum) Application [2014] NICA 86

IN THE MATTER OF AN APPLICATION BY ZOUHAIR BEN BELACUM MAKHLOUF

Before: Morgan LCJ, Coghlin LJ and Gillen LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal and an application for leave to appeal against a determination by the Upper Tribunal on 10 September 2013 whereby it dismissed an appeal from the First Tier Tribunal dismissing the appellant's appeal against the decision of the Secretary of State to order his deportation. The appellant appeals on the following points of law:

(1) Did the Secretary of State err in deciding to deport the appellant under the mandatory power conferred by s.32 of the UK Borders Act 2007 ("the 2007 Act")?

(2) Did the Upper Tribunal err in law in failing to find that the Secretary of State and First Tier Tribunal had erred in law and in refusing to set aside the decision of the First Tier Tribunal?

(3) Did the Upper Tribunal err contrary to s.6 of the Human Rights Act in failing to set aside the decision to deport in the absence of any tangible evidence for any Article 8(2) justification of the encroachment of the Article 8 rights of the appellant's children in circumstances where the Tribunal had not been specifically asked to address this point by the parties?

Leave to appeal on questions (1) and (2) was granted by the Court of Appeal on 31 March 2014. The Court made no order in relation to question (3) pending its decision in relation to the first two questions. We have received the submissions of the appellant on that issue and will deal with it in the course of judgment. Miss Higgins QC and Mr McGowan appeared for the appellant and Mr Sands for the respondent. We are grateful to all counsel for their helpful oral and written submissions.

Statutory Background

[2] *(i) Immigration Act 1971*

Section 3 of the Immigration Act 1971 ("the 1971 Act") provides, inter alia:

> "(5) A person who is not a British citizen is liable to deportation from the United Kingdom if—
>
> (a) the Secretary of State deems his deportation to be conducive to the public good; or
>
> (b) another person to whose family he belongs is or has been ordered to be deported.
>
> (6) Without prejudice to the operation of subsection (5) above, a person who is not a British citizen shall also be liable to deportation from the United Kingdom if, after he has attained the age of seventeen, he is convicted of an offence for which he is punishable with imprisonment and on his conviction is recommended for deportation by a court empowered by this Act to do so."

Section 5 goes on to provide:

> "(1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force."

[3] *(ii) UK Borders Act 2007*

Section 32 of the 2007 Act makes provision for the automatic deportation of certain non-UK nationals:

> "(1) In this section "foreign criminal" means a person—
>
> (a) who is not a British citizen,
>
> (b) who is convicted in the United Kingdom of an offence, and
> (c) to whom Condition 1 or 2 applies.
>
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
>
> (3) Condition 2 is that—
>
> (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (serious criminal), and
>
> (b) the person is sentenced to a period of imprisonment.
>
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good.
>
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).
>
> (6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless—
>
> (a) he thinks that an exception under section 33 applies,
>
> (b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or

(c) section 34(4) applies.

(7) Subsection (5) does not create a private right of action in respect of consequences of non-compliance by the Secretary of State."

Section 33 of the 2007 Act goes on to provide exceptions to the general rule of automatic deportation under section 32 including, inter alia, where deportation would breach the person's ECHR rights.

[4] *(iii) The Immigration Rules*

Part 13 of the Immigration Rules provides, inter alia:

"396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

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 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 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 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, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

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 not be reasonable to expect the child to leave the UK; and
(b) there is no other family member who is able to care for the child in the UK; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date

of the immigration decision (discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK."

[5] *(iv) Nationality, Immigration and Asylum Act 2002*

Section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") makes provision for a person to appeal against the making of a deportation order to the First Tier Tribunal. Section 86 of the 2002 Act goes on to provide, inter alia:

> "(3) The Tribunal must allow the appeal in so far as it thinks that-
>
> (a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or
>
> (b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.
>
> (4) For the purposes of subsection (3) a decision that a person should be removed from the United Kingdom under a provision shall not be regarded as unlawful if it could have been lawfully made by reference to removal under another provision.
>
> (5) In so far as subsection (3) does not apply, the Tribunal shall dismiss the appeal.
>
> (6) Refusal to depart from or to authorise departure from immigration rules is not the exercise of a discretion for the purposes of subsection (3)(b)."

[6] *(v) Tribunals, Courts and Enforcement Act 2007*

Section 13 of the Tribunals, Courts and Enforcement Act 2007 creates a right of appeal from the Upper Tribunal to the Court of Appeal. Such an appeal requires the leave of the Upper Tribunal or the leave of the Court of Appeal. The Appeals from

the Upper Tribunal to the Court of Appeal Order 2008 (SI 2008 No. 2834), provides at Article 2:

> "Permission to appeal to the Court of Appeal in England and Wales or leave to appeal to the Court of Appeal in Northern Ireland shall not be granted unless the Upper Tribunal or, where the Upper Tribunal refuses permission, the relevant appellate court, considers that—
>
> (a) the proposed appeal would raise some important point of principle or practice; or
>
> (b) there is some other compelling reason for the relevant appellate court to hear the appeal."

(vi) Border Citizenship and Immigration Act 2009

Section 55 of this Act deals with the need to safeguard and promote the welfare of children:

> "(1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c) any general customs function of the Secretary of State;

(d) any customs function conferred on a designated customs official."

Factual background

[7] The appellant is a Tunisian national born in July 1971. He married a UK national in 1996 in Tunisia and in 1997 the couple had a daughter. In 1997 the appellant entered the UK as a spouse of a UK national and in 1999 he was granted indefinite leave to remain in the UK. In the same year, however, his wife informed the UK Border Agency ("UKBA") that the pair had separated. The appellant remained in the UK and, in 2006, his then partner gave birth to their son.

[8] While in the UK the appellant has been convicted of the following criminal offences:

(i) In April 2005 he was convicted at Belfast Crown Court of two counts of assault causing grievous bodily harm contrary to section 20 of the Offences Against the Person Act 1861 and one count of possession of an offensive weapon. He was sentenced to a total of 3 years 3 months imprisonment.

(ii) In November 2008 he was convicted of breaching a non-molestation order and sentenced by Enniskillen Magistrates' Court to six months imprisonment suspended for two years.

(iii) In March 2009 he was convicted of disorderly behaviour and fined £350 by Enniskillen Magistrates' Court.

(iv) In February 2010 he was convicted of three counts of breaching a non-molestation order, one count of assaulting police and one count of resisting police. He was sentenced by Enniskillen Magistrates' Court to three months imprisonment for one of the counts of breaching the non-molestation order; six months imprisonment suspended for two years on the remaining counts.

(v) In August 2011 he was convicted of disorderly behaviour, attempted criminal damage and resisting police; he was sentenced by Enniskillen Magistrates' Court to a total of five months imprisonment.

[9] The appellant has not seen his daughter since 2003. An application under the Children (NI) Order 1995 ("the 1995 Order") for contact was dismissed in October 2008 with the court imposing a further order under Article 179(14) of the 1995 Order

prohibiting the appellant from making any further applications without the leave of the court. In July 2012 he was refused legal aid to bring a fresh application for contact. In relation to his son, the appellant had contact with him from his birth in 2006 until 2010. He subsequently made an application for contact but this was dismissed in May 2011. A further application for contact was lodged in November 2012 but withdrawn in February 2013 on counsel's advice that the appellant should seek counselling. The appellant has been unable to work since 2006/2007 following a serious assault and currently suffers from depression.

[10] The appellant was notified in October 2010 of his liability to deportation from the UK. He made submissions to the Secretary of State that deportation would infringe his family life in the UK. On 5 October 2012 the Secretary of State issued her decision rejecting the appellant's arguments and ordering the appellant's deportation. The appellant's Notice of Appeal to the First Tier Tribunal is dated 19 October 2012. This First Tier Tribunal dismissed the appeal by a written decision on 8 January 2013. Leave to appeal to the Upper Tribunal against the First Tier Tribunal's decision, however, was subsequently granted on 29 January 2013. The Upper Tribunal heard the appeal in July 2013. By written decision dated 10 September 2013 the Upper Tribunal dismissed the appeal.

[11] An application to the Upper Tribunal for leave to apply to the Court of Appeal was refused on 21 October 2013. The appellant's present application to the Court of Appeal for leave to appeal from the Upper Tribunal is dated 11 November 2013. The Court of Appeal heard the application for leave to appeal on 31 March 2014 and granted leave on questions (1) and (2) on the Notice of Appeal but made no order in relation to question (3).

The history of the decisions

The Secretary of State's Decision

[12] A Notice of Decision, dated 5 October 2012, from the UKBA states:

> "On 18 April 2005 at Belfast Crown Court, you were convicted of grievous bodily harm. In view of this conviction, the Secretary of State deems it to be conducive to the public good to make a deportation order against you. The Secretary of State has therefore decided to make an order by virtue of section 3(5)(a) of the Immigration Act 1971.
>
> You have claimed that your deportation from the United Kingdom would be in breach of your human rights under Article 8 of the Human Rights Act 1998 on the grounds that you have established a family

> and/or private life in the United Kingdom. This claim does not meet the criteria as laid out in paragraph(s) 399/399A of the immigration rules and for the reasons given in the attached reasons for decision letter your claim is hereby refused."

[13] In a letter also dated 5 October 2012 the UKBA set out the reasons for the Secretary of State's decision having considered the representations made to her by the appellant. The letter summarised the chronology of the appellant's family life and criminal behaviour before looking at the 2005 offence in more detail. It said the Secretary of State regarded as particularly serious offences of violence; that the seriousness of the offence was reflected in the sentence imposed; and that she had regard to the impact of this type of crime on the wider community. It said that the type of offence and its seriousness, together with the need to protect the public from serious crime and its effects were important factors when considering whether deportation is in the public interest. The letter then set out a lengthy quotation from the trial judge's sentencing remarks as to the facts, circumstances and seriousness of the offence. The letter stated that specific regard was had to the presumption in paragraph 396 of the Immigration Rules; that in considering whether the presumption is outweighed in any particular case all relevant factors are taken into account, including the UK's obligations under the ECHR. It said that the appellant's representations had been taken into account but had been considered insufficient.

[14] Whilst it was accepted that removal to Tunisia would give rise to an interference with the appellant's Article 8 rights and may not be in the claimed best interests of his children, the interference was in accordance with the permissible aim of preventing disorder, crime and the protection of the rights and freedoms of others. In determining whether the removal would result in a breach of the appellant's Article 8 rights, the letter said:

> "… the starting point for considering such a claim is the Immigration Rules. Paragraph 396 establishes that where a person is liable for deportation, the public interest requires it. Where the Secretary of State must make a deportation order in accordance with Article 32 of the UK Borders Act 2007, it is also in the public interest to deport."

The letter then set out paragraph 398 of the Immigration Rules and, noting that the appellant was sentenced to 39 months imprisonment, said the Secretary of State was, therefore, required to consider whether paragraph 399 or 399A of the Rules applied to the appellant's case. Paragraph 399 subparagraph (a) specifies the criteria which must be satisfied in order for a parental relationship with a child to outweigh the public interest in deportation; subparagraph (b) specified the criteria in relation to a subsisting relationship with a spouse/partner. In relation to the appellant's son, the

Secretary of State noted that the appellant was not named on the birth certificate; that the appellant had stated in various correspondence that he had no relationship with his son; that he had not provided any evidence of contact despite requests to do so; and that his son could continue to be cared for by his mother upon the appellant's return to Tunisia. In relation to the appellant's daughter, the Secretary of State noted that the appellant had stated in correspondence that he had no relationship with his daughter; that he had not provided any evidence of contact despite requests to do so; and that his daughter could continue to be cared for by her mother upon the appellant's return to Tunisia.

[15] Having considered each of the factors listed in paragraph 399 individually the Secretary of State concluded that it was not accepted that the appellant's family life outweighed the public interest in him being deported. As regards subparagraph (b) the appellant had not claimed a subsisting relationship and, therefore, this did not outweigh the public interest of his deportation. In relation to paragraph 399A, the Secretary of State did not consider the appellant had lived in the UK for more than 20 years; but did consider that he had relatives in Tunisia and knew the culture, customs and language. Therefore, the Secretary of State did not consider this as outweighing the public interest in deportation. The Secretary of State then considered the personal circumstances of the appellant, as well as those of the family members affected by deportation, but concluded that they raised no exceptional circumstances to outweigh the public interest. The letter finally concluded:

> "43. Full and careful consideration has been given to all the known facts in your case in accordance with paragraph 396 of the Immigration Rules (as amended). The presumption is that the public interest favours deportation. After careful consideration, it has been concluded that it would not be contrary to the United Kingdom's obligations under the European Convention on Human Rights to deport you.
>
> 44. All relevant factors have been taken into account in considering whether the presumption in favour of deportation is outweighed in your case. It is considered that there are no exceptional circumstances to outweigh the public interest presumption. It is therefore concluded that in your case it is appropriate to deport you to Tunisia."

Decision of the First Tier Tribunal

[16] The First Tier Tribunal asserted that the burden of proof rested on the appellant and that the standard of proof was the balance of probabilities. The

Tribunal rejected the appellant's submission that the Secretary of State had failed to prove his deportation was conducive to the public good. In doing so the Tribunal said Rule 396 of the Immigration Rules created an automatic presumption that deportation is in the public interest; that it was in the public interest to deport under section 32 of the 2007 Act where a person has been convicted of an offence in the UK and sentenced to imprisonment for 12 months or more, and that the appellant met those criteria. The Tribunal considered the Secretary of State's decision was in accordance with the Immigration Rules (most notably Rules 398 and 399A) and, therefore, turned their mind to addressing whether the decision was contrary to the appellant's Article 8 ECHR rights.

[17] The Tribunal noted the following facts:

- The appellant had not had contact with his daughter, who is now 15 years old, since at least 2008.
- He must obtain leave of the court before making any further contact application.
- There was no evidence that he had made an application for legal aid to make a further contact application.
- The appellant had failed to provide a birth certificate for his son to prove his existence.
- The appellant's evidence in relation to applications for contact with his son was "unclear".
- There was no evidence the appellant made an application in 2011 for contact with his son.
- The C1 Application, dated 13 November 2012, for contact with his son was not stamped as being lodged, did not have a copy of the order from the supposed 2011 proceedings attached, and did not have any explanation for the 18 month period since the supposed 2011 proceedings.

The Tribunal concluded the appellant's relationship with his daughter "does not weigh heavily in his favour in the proportionality assessment under Article 8"; and that they did not "have the full picture of how matters stand" in relation to proceedings for contact with his son given a marked paucity of evidence. Citing RS (Immigration and Family Court Proceedings) India [2012] UKUT 00218 the Tribunal said it was not persuaded he had produced credible evidence of contact proceedings for either child or input into their lives in any form and that there was a pattern to be discerned in the way in which both mothers had apparently responded to whatever contact he had made. The Tribunal further concluded that, given his appalling criminal record, there were compelling public interest reasons to exclude the appellant from the UK irrespective of the outcome of any Family Proceedings or the best interests of the children.

[18] The Tribunal also considered the appellant's evidence in regard to his private life to be "sketchy": he had not worked since 2007; he was living on state benefits;

because of his depression he rarely left his house; and he claimed to be visited by a few old people. The appellant said his parents, brothers and sisters resided in Tunisia and some other relatives lived in Italy.

[19] Citing EB Kosovo, the Tribunal considered that there had been no prejudice to the appellant caused by the delay of five years since the relevant convictions; indeed, the appellant had failed to use this period of time to develop ties with his children. The Tribunal, therefore, concluded that the appellant's deportation was a proportionate measure and fair balance between his private life and the maintenance of a fair and effective immigration policy.

Decision of the Upper Tribunal

[20] In the proceedings before the Upper Tribunal the Secretary of State accepted that the First Tier Tribunal misdirected itself when it considered the case to fall within the automatic deportation provisions under section 32 of the 2007 Act. The Upper Tribunal considered that the First Tier Tribunal had made a clear error of law. However, the Upper Tribunal concluded that this error was not sufficient to set aside the First Tier Tribunal's decision because, even though it had considered the decision under section 32, it had gone on to make its own assessment as to whether the deportation was conducive to the public good, albeit expressing it in terms of the 'public interest'. Furthermore, the reversal of the burden of proof by the First Tier Tribunal, whilst in error, was also not sufficient to set aside the decision given the Tribunal's full assessment of the evidence and also the presumption in paragraph 396 of the Immigration Rules.

[21] The Upper Tribunal further considered that the Secretary of State had established in her reasons that the deportation was conducive to the public good and that, whilst she had not dealt distinctly and separately with the Article 8 issues within the Immigration Rules and Article 8 as a stand-alone issue, such a procedural matter did not render the decision unlawful.

[22] Further, the Upper Tribunal considered that there was no merit in the argument that the Secretary of State had erred by taking into account the trial judge's sentencing remarks given the delay since the imposition of the sentence; nor was there an error by the First Tier Tribunal which evidently identified delay as a relevant factor but concluded that it did not render disproportionate the decision to deport. Also, the First Tier Tribunal's conclusion that deportation was merited despite the outcome of any family proceedings or the best interests of children was not irrational because the history of the family proceedings showed that the best interests of the children were not served by his having contact with them. The Upper Tribunal did, however, criticise the First Tier Tribunal for comments made in relation to the offence of breach of a non-molestation order in the absence of factual evidence.

The submissions of the parties

[23] The appellant submitted that the test under section 3(5) of the 1971 Act has been altered significantly as a result of the coming into force of section 32 of the 2007 Act. Ms Higgins argued that section 3(5) of the 1971 Act originally involved a three stage test:

(i) was the deportation conducive to the public good (the burden of proving which rests on the Secretary of State);

(ii) if so, was deportation in the public interest such that the Secretary of State should exercise her discretion (although, by virtue of Rule 396 of the Immigration Rules, there is a presumption that deportation is in the public interest); and

(iii) if so, was there anything (e.g. the person's human rights) which outweighs the public interest in the Secretary of State exercising her discretion (with the burden of proving proportionality falling on the Secretary of State).

[24] This, the appellant argued, must be compared to the test to be applied in those cases affected by section 32 of the 2007 Act:

(i) does the person fall within the definition of "foreign criminal" within section 32; and

(ii) if so, the Secretary of State must order deportation unless a section 33 exception applies (there is no consideration of whether 'conducive to the public good' or 'in the public interest').

[25] The deportation decision in this case was made on foot of the 2005 conviction and sentence for assault causing grievous bodily harm. That sentence pre-dated the coming into force of the 2007 Act which did not apply to it. The appellant contended that in the present case the Secretary of State mistakenly adopted the section 32 test and, therefore, failed to give proper consideration to the 'the public good' and 'the public interest' including the trial judge's sentencing remarks (Masih (Deportation – basic principles) Pakistan [2012] UKUT 00046) and the delay since the offence (Omar v SSHD [2009] 1 WLR 2265). The First Tier Tribunal erred in applying section 32 of the 2007 Act, conflating the 'public good' test and the 'public interest test' which involved very different considerations (e.g. there is no Rule 396 presumption in the 'public good' test) and, moreover, erred in not placing the burden of proof on the Secretary of State in respect of the 'public good' test and the proportionality test. The Upper Tribunal, thus, erred in law in not setting aside the First Tier Tribunal's determination.

[26] Ms Higgins submitted that even if the section 32 argument failed the respondent would not have lawfully been entitled to conclude that deportation was conducive to the public good. She submitted that this required consideration of the public interest. In relation to the appellant's offending the public interest issues were essentially the risk of reoffending, the need for deterrence and the need to express society's revulsion that the offence was committed. Relying on R v Kluxen [2011] 1 WLR 218 she submitted that it would rarely be appropriate to recommend the deportation of an offender who was not a British citizen. She further submitted that the respondent had failed to have regard to that portion of the sentencing remarks where the trial judge determined that the appellant should not serve the appropriate sentence of 3 1/2 years for the 2005 offence but rather imposed a sentence of three years and three months in order to ensure that he became time served on the date of sentence. The subsequent convictions were not relied upon by the Secretary of State and the case for deportation was undermined by the fact that there was a delay of over seven years between the deportation decision and his 2005 conviction.

[27] Even if the public good test was satisfied Ms Higgins submitted that a full enquiry under Article 8 of the Convention was required rather than the circumscribed exercise suggested by Immigration Rules 398-399A. She developed this further in her submission in relation to the leave application arguing that the Article 8 rights of the appellant's children were not respected because there was an absence of any justification for the interference with those rights caused by the deportation. It was specifically submitted that section 55 of the Border Citizenship and Immigration Act 2009 imposed a duty upon the respondent when considering questions of immigration, asylum or nationality to have regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. Ms Higgins relied upon paragraph 24 Baroness Hale's judgment in ZH (Tanzania) v SSHD [2011] 2 AC 166 where she said that if the Secretary of State does not have regard to the need to safeguard and promote the welfare of children that decision will not be "in accordance with law" for the purposes of Article 8. She further relied upon paragraph 25 of that judgment to support the proposition that the best interests of the child should be a primary consideration. In this case it was further submitted that the opportunity for contact between the appellant and his children and the need for them to understand their cultural background were critical factors. In any event it was submitted that the Secretary of State had not carried out sufficient enquiries to advise herself of the views of the children or recognise the positive obligation on the state to take measures to maintain or restore contact. None of these matters were considered by the First Tier Tribunal and no proper proportionality assessment was conducted.

[28] Mr Sands accepted that the automatic deportation provisions set out in sections 32-38 of the 2007 Act do not apply to persons convicted before the passing of the Act. He submitted that it was clear from the Deportation Order dated 5 October 2012 that the Secretary Of State had decided to make the order by virtue of section 3 (5) (a) of the 1971 Act and that the decision was on the basis that in light of

the conviction deportation was deemed to be conducive to the public good. The argument in respect of the 2007 Act was misconceived as it did not form the basis of the respondent's decision.

[29] It was submitted that the appellant's reliance on R v Kluxen was unfounded. That decision was concerned with a number of cases to which section 32 of the 2007 Act applied and also considered cases not falling within the 2007 Act because the individual periods of imprisonment imposed were less than 12 months. Although the respondent accepted that delay may indicate that there was no pressing need to protect the public, in this case the evidence indicated that the appellant had committed further offences, albeit less serious, after the subject offences.

[30] Mr Sands argued that the respondent had taken all appropriate steps to gather information in relation to the Article 8 issues. On 14 October 2010 an initial questionnaire was sent to the appellant seeking details about his relationships and children. Further specific information in relation to the children was sought by letter dated 4 February 2011 dealing in particular with contact arrangements and evidence of support. The respondent sought updated information in relation to these matters by letter dated 28 June 2011 and again on 12 April 2012 in response to which the solicitors provided information in relation to proposed proceedings for contact. It was submitted that the respondent had obtained all necessary information in relation to the position of children and that the respondent and the Upper Tribunal took all relevant factors in relation to Article 8 into account.

Consideration

[31] Section 3(5)(a) of the 1971 Act provides that a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good. Where a person is liable to deportation under section 3(5) the Secretary of State may make a deportation order against him by virtue of section 5 of the 1971 Act. Section 32 of the 2007 Act creates a presumption that the deportation of a foreign criminal as defined will be conducive to the public good. That provision does not, therefore, alter the statutory requirement that the Secretary of State deem the deportation to be conducive to the public good but simply provides a mechanism for satisfying that test where the statute applies.

[32] The issue, therefore, in this case is whether there is evidence to suggest that the Secretary of State impermissibly relied upon the 2007 Act. By letter dated 30 May 2012 the respondent advised the appellant that in light of the conviction on 18 April 2005 the Secretary of State took a very serious view of the offence and was considering the appellant's immigration status and his liability to deportation. The reasons letter accompanying the decision to make a deportation order referred to that letter and the representations received in response to it but indicated that it was concluded that deportation would be conducive to the public good.

[33] The reasons letter went on at paragraph 16 to state that the Secretary of State regarded as particularly serious those offences involving violence and indicated that the type of offence, its seriousness together with the need to protect the public from serious crime and its effects were important factors when considering whether deportation was in the public interest. The reasons letter included reference to a portion of the comments of the sentencing judge and noted that these were serious offences involving the use of a bladed weapon. Throughout this portion of the reasons letter there is no reference to the 2007 Act.

[34] The reasons letter then goes on to state that specific regard has been given to the presumption arising from paragraph 396 of the Immigration Rules that the public interest requires the deportation of a person who is liable to deportation. It then goes on to review the Article 8 issues arising in this case. At paragraph 23 of the reasons letter it is stated that the starting point for considering the Article 8 claim is the Immigration Rules. The next sentence refers to the presumption in Paragraph 396 and the following sentence notes that where the Secretary Of State must make a Deportation Order in accordance with Section 32 2007 Act it is also in the public interest to deport.

[35] That is the only reference to the 2007 Act. There was no statement that the respondent was required by virtue of the 2007 Act to conclude that it was in the public interest to deport. If the Secretary of State had acted in accordance with the 2007 Act Paragraph 396 of the Immigration Rules would not have come into play on the public interest issue. The letter explicitly makes it clear that specific regard was hard to that paragraph on that issue. It is, therefore, plain from the terms of the reasons letter that the 2007 Act played no part in the making of this decision.

[36] In developing the second ground of appeal there were really two aspects of the attack on the part of the appellant. First, it was contended that the Secretary of State was in error in concluding that in light of the conviction it was conducive to the public good to deport the appellant. The basis for the respondent's decision was primarily set out in paragraph 16 of the reasons letter as described in paragraph 33 above. The approach which should be taken to the judgment of the Secretary of State in this area was helpfully set out by Judge LJ at paragraph 83 of N (Kenya) v SSHD [2004] EWCA Civ 1094.

> "The 'public good' and the 'public interest' are wide-ranging but undefined concepts. In my judgment (whether expressly referred to in any decision letter or not) broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged. They include an element of deterrence, to

> non-British citizens who are already here, even if they are genuine refugees and to those minded to come, so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of serious crime may well be deportation. The Secretary of State has a primary responsibility for this system. His decisions have a public importance beyond the personal impact on the individual or individuals who would be directly affected by them."

[37] In her submission on this issue Ms Higgins relied on the statement in R v Kluxen that it would rarely be appropriate to recommend the deportation of an offender whether or not he is a citizen of the European Union in cases to which the 2007 Act did not apply. It is clear, however, from that judgment that the category of offenders to which the statement applied was those who received either a non-custodial sentence or a custodial sentence of less than 12 months. The statement did not, therefore, apply to the circumstances of this case. The court then went on to accept that there was no distinction between a test for deportation based on whether the offender's continued presence in the United Kingdom was to its detriment and the test propounded by the ECJ in R v Bouchereau [1978] QB 732 which required consideration of whether the offenders conduct constituted a genuine insufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society. We consider that the Secretary of State was entitled to conclude that the public good test was satisfied as a result of her assessment of all the circumstances connected with the offence to which we have referred in paragraph 33 above.

[38] The second aspect of the respondent's decision about which the appellant complained concerned the approach to the Article 8 rights which were engaged in this decision. It is accepted that the First Tier Tribunal wrongly concluded that the burden of proof on this issue rested with the appellant. That was recognised by the Upper Tribunal. The First Tier Tribunal did, however, consider the Article 8 issues both as they affected the appellant and the children and the Upper Tribunal was satisfied that a full assessment of the Convention issues was undertaken.

[39] The appellant complained that the reasons letter did not make any reference to the passage in the trial judge's sentencing remarks where he concluded that instead of passing a sentence of three years and six months which would have required the appellant to be kept in custody for another few weeks he should pass the sentence of three years and three months to enable the appellant to be released. It is, of course, possible to deduce from this that the trial judge did not consider that the appellant constituted a serious risk of significant harm but that does not in any way diminish his culpability in relation to the commission of a serious offence which caused grievous bodily harm. The Secretary of State did not rely upon propensity.

[40] The second matter raised concerned the absence of any reference to the impact of delay in the reasons letter. It is, however, incorrect to conclude that there was no reference to delay. The letter set out the various offences committed by the appellant in the period after the commission of the index offence. It also set out the further information that was provided particularly in relation to the contact proceedings upon which the appellant relied to establish family life with his children. Delay can be a factor affecting the public interest in whether a person should be deported but in this case there is evidence of further offending and a significant breakdown in the relationship between the appellant and his children. In those circumstances the delay could not have been a significant factor in the appellant's favour.

[41] The position of the children necessarily engages both the second point of law on which leave has been given and the third point of law in respect of which leave has not been given. There is no doubt that the duty in section 55 of the Border Citizenship and Immigration Act 2009 was taken into account. The provision was specifically referred to in paragraph 27 of the reasons letter. The reasons letter also expressly referred to the decision of the Supreme Court in ZH (Tanzania). We accept that a substantial portion of the reasons letter concerns an analysis of Article 8 by reference to the terms of Paragraph 399A of the Immigration Rules and examines the Article 8 issues primarily from the perspective of the appellant. There is, however, consideration of the living arrangements for each child and the extent to which care can be provided for the child.

[42] Those matters would not, on their own, have been sufficient to constitute a proper analysis of the Article 8 issues in respect of each child but the evidence in this case indicated that the appellant had no relationship with either of the children. He had not seen the elder child since 2003. His application for contact with had been dismissed in 2008 and an order had been put in place preventing further applications.

[43] He had not seen the younger child since 2010 and his contact application had been dismissed in May 2011. No further application had been made by him for contact nor was there any indication in the evidence that such an application was being prepared. The position in the round, therefore, was that the circumstances of both children had been properly examined by the Family Court and the conclusion reached that the children's welfare was best served by them not having contact with her father.

[44] It was submitted that there was a duty of investigation upon the respondent to pursue those matters further. We do not agree. The lives of these children did not require the disruption of further investigation in circumstances where a court with appropriate jurisdiction had made important decisions in relation to their welfare. The respondent was entitled to proceed on the information available and to make the judgment at paragraph 41 of the reasons letter that the personal circumstances of

the appellant and family members affected by the decision did not outweigh the public interest in seeing him deported.

Conclusion

[45] For the reasons given we conclude that the appeal in respect of the first two points of law should be dismissed and that leave should be refused in relation to the third point.