EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 16
XA40/20

Lord Woolman
Lord Pentland
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the Appeal

under Sections 13 and 14 of the Tribunals, Courts and Enforcement Act 2007

by

ZG (AP)

Appellant

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant: JM Scott QC, Caskie, Drummond Miller LLP
Respondent: McIlvride QC, Graham Middleton; Office of the Advocate General

2 March 2021

Introduction

[1] The appellant is a Chinese national who has lived in the UK since 1999 (when he was 16). He entered the UK clandestinely without a passport. He claimed to be an unaccompanied minor and applied for asylum. That claim was refused in February 2001, and an appeal was dismissed in May 2001. On 6 November 2009 he applied for Indefinite Leave to Remain ("ILR") under the Legacy Casework Programme. He was granted ILR on

1 February 2011. On 12 July 2012 he applied for a No Time Limit Visa. That application was refused on 5 March 2014.

[2] The appellant has a partner, L, who is also a Chinese national. Their relationship was established when both of them were in the United Kingdom unlawfully. L has Discretionary Leave to Remain. The appellant and L have a child, N, who was born in the UK in March 2009. N is a British citizen.

[3] On 28 September 2016 the appellant was convicted of assault to severe injury, and on 10 October 2016 he was sentenced to 12 months imprisonment. On 28 December 2016 he was served by the respondent with notice that, because he was a foreign criminal who had been sentenced to a period of imprisonment of at least 12 months in respect of whom deportation was conducive to the public good, section 32(5) of the UK Borders Act 2007 required that he be deported unless he could demonstrate that he fell within any of the specified exceptions set out in section 33. On 24 January 2017 the appellant submitted a human rights claim in terms of section 33(2)(a), maintaining that his deportation would be in breach of his right to family life and L and N's right to family life under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). As a result, it was said, the respondent was not obliged to deport him (section 32(5)). The appellant contended that the public interest did not require his deportation because he fell within Exception 2 in section 117C(5) of the Nationality, Immigration and Asylum Act 2002 and that paragraph 399 of the Immigration Rules applied. He maintained, inter alia, that it would be unduly harsh for N to live in China, and that it would be unduly harsh for her to remain in the UK without him. The respondent refused the human rights claim on 20 October 2017. The appellant appealed to the First-tier Tribunal ("the FtT"). On 13 April 2018 the FtT refused the appeal. On 9 May 2018 it granted

permission to appeal to the Upper Tribunal ("the UT"). On 26 September 2018 the UT refused the appeal. On 7 November 2018 the UT refused permission to appeal to the Court of Session, but on 9 June 2020 the court granted permission to appeal.

The relevant statutory provisions and guidance

[4] Section 3(5)(a) of the Immigration Act 1971 provides:

> "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;
>
> …"

The UK Borders Act 2007 ("the 2007 Act") provides:

> "**32 Automatic deportation**
>
> (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.
>
> …
>
> (4) For the purpose of Section 3(5)(a) of the Immigration Act 1971 (c.77), 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).
>
> …

33 Exceptions

(1) Section 32(4) and (5)—

(a) do not apply where an exception in this Section applies (subject to subsection (7) below)

…

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's Convention rights …

(7) The application of an exception—

(a) does not prevent the making of a deportation order;

(b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;

but Section 32(4) applies despite the application of Exception 1 …

…"

Sections 82, 84, 85, 86 and 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") provide:

"82 Right of appeal to the Tribunal

(1) A person ("P") may appeal to the Tribunal where—

(b) the Secretary of State has decided to refuse a human rights claim made by P…

84 Grounds of appeal

(2) An appeal under Section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under Section 6 of the Human Rights Act 1998.

85 Matters to be considered

(4) On an appeal under Section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

86 Determination of appeal

(1) This Section applies on an appeal under Section 82(1).

(2) The Tribunal must determine—

(a) any matter raised as a ground of appeal…

…

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.

…

(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.

…"

Section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") provides:

"**55 Duty regarding 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;

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

…"

Paragraphs A398, 398 and 399 of the Immigration Rules provide:

"**Deportation and Article 8**

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;

…

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

…

(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;

…

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) … 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; …

…"

Guidance issued under section 55(3)

[5] In November 2009 the respondent issued guidance under section 55(3) of the 2009 Act, *Every Child Matters, Change for Children*. Most of the guidance is of a relatively high-level nature. At paragraph 2. 7 it contains a series of "principles". In *Re JO (Section 55 Duty: Nigeria)* [2014] UKUT 517 (IAC) McCloskey J (as he then was) observed at paragraph 12:

"… Three of these principles are worthy of particular note:

(a) Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.

(b) Children should be consulted and the wishes and feelings of children taken into account whenever practicable when decisions affecting them are made.

(c) Children should have their applications dealt with in a timely way which minimises uncertainty.

…"

Article 8

[6] Article 8 of the Convention states:

> "1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. "

The decision letter of 20 October 2017

[7] The decision letter stated:

> "…
>
> You have been convicted of a serious violent crime. You planned the crime in advance and used weapons, it was pre-meditated. You caused severe injury to your victim. You have not displayed any evidence of insight into your behaviour. It is considered that you pose a high risk of harm to the public.
>
> …
>
> The Home Office's duty to safeguard the welfare of children as set out in Section 55 of the Borders, Citizenship and Immigration Act 2009 has been taken into account and the best interests of your children (*sic*) have been a primary consideration in making this decision. However, the best interests of the child are not the only or paramount consideration, and must be balanced against other relevant factors, including the public interest in deporting foreign criminals, to determine whether your deportation is proportionate. Paragraphs 398 and 399 of the Immigration Rules take into account that a child's best interests are capable of outweighing the public interest and set out in what circumstances that will be the case. The consideration of your child's best interests has been based on all information and evidence currently available to the Home Office. You have provided a birth certificate and copy of a passport for your daughter, [N] along with various educational records and certificates. Consideration has been given below to the effect deporting you will have on your child and to whether the best interests of your child outweigh the public interest in deporting you.
>
> The requirements of the exception to deportation on the basis of family life with a child are set out at paragraph 399(a) of the Immigration Rules. "

The respondent accepted that N was the appellant's child; that she had been born in the UK; that she had lived there for at least 7 years immediately prior to the date of the decision; and that the appellant had a genuine and subsisting parental relationship with her. The letter continued:

> "It is not accepted that it would be unduly harsh for your child to live in China. Both you and your partner are Chinese nationals, all 3 of you speak Mandarin as your first language. Despite being born in the UK your child struggles with the English language, as evidenced by the Transition record from nursery childcare from 2014. Speaking the language will enable your child to better integrate to life in China. Your child does not have any extended family members living in the UK, or any strong ties that would be severed if they accompanied you to China when you are deported. Your child is under 12 years old. Children often emigrate with parents who move abroad for work. That your child speaks Mandarin, even to a basic level, gives them an advantage over many children who are taken to a new country with no local language skills whatsoever.
>
> …
>
> It is not accepted that it would be unduly harsh for your child to remain in the UK even though you are to be deported. Your child was born in the UK and speaks some English. She has been schooled here and has some understanding of culture and society here. Your child was cared for by her mother whilst you were incarcerated and it is considered that this could continue if you were deported. It is clear that you had no regard to how your violent actions could affect your daughter and her future when you undertook the assault for which you were sentenced. Therefore, having considered all available information, it is not accepted that you meet the requirements of the exception to deportation on the basis of family life with a child. This decision does not prescribe any particular outcome for your child. The result of this decision means that you and your partner are required to make a decision about whether your child accompanies you to China or remains in the UK.
>
> …"

The respondent accepted that the appellant had a genuine and subsisting relationship with L, but that that relationship had been formed when the appellant was in the UK unlawfully and his immigration status was precarious. It was not accepted that it would be unduly harsh for L to live in China if she chose to do so; or that it would be unduly harsh for L to

remain in the UK if the appellant was deported. That aspect of the decision is not now a live issue.

The hearing before the FtT

[8] At the appeal the FtT had the original Home Office bundle and two additional bundles lodged by the appellant. The appellant's bundles included statements by the appellant and by L, and a report dated 16 March 2018 by Dr Alia Ul-Hassan, a clinical psychologist. The appellant and one other witness gave oral evidence (the identity of the second witness is not specified in the decision letter).

[9] Dr Ul-Hassan had interviewed the appellant, L, and N. She also interviewed S, the deputy head teacher at N's primary school. At paragraph 4.2 of her report she noted the appellant saying that aside from his time in prison he had had no periods of significant separation from N. At paragraph 4.4 she noted the appellant's view that N was a well-integrated young girl who sees her home as being Scotland rather than China. L told Dr Ul-Hassan that N was well integrated into life in Glasgow. When L was asked why she would not consider moving to China with N she stated that she did not want to disrupt N's education, especially when she was well settled and making good progress educationally and socially. N told Dr Ul-Hassan that she wanted to live with both her parents. She would feel very sad if she had to live in China because she likes her school and all her friends live here. Dr Ul-Hassan's impression was that N had a close relationship with each of her parents. S considered N to be well settled at school and making good progress with English. She expressed concern there would be a significant negative impact on N's emotional and educational wellbeing if the appellant was removed from the UK. Dr Ul-Hassan opined that N had no significant mental health problems, but that she would be vulnerable to

developing psychological difficulties if she were to be separated from the appellant and/or had to leave her life in Glasgow and live in China. It would be in her best interests to continue to live in the UK with both of her parents.

[10] It seems that the evidence before the FtT in relation to L's position was that she would not return to China. She and N were settled in the UK. It emerged during cross-examination that L and N had spent 6 months in China living with L's parents. N had attended an American school where she had been taught English, Maths and Chinese. She had got on without any particular difficulty, and had made a friend or two from her class. However, L was of the view that this could not be repeated because her parents could not afford the school in the long term. The FtT was critical of the fact that no mention of this period was made in the statements of the appellant or L, and that Dr Ul-Hassan appeared not to have been informed about it:

> "47. It is a pity that this matter was not explained to the expert, who could have given her assessment on the whole situation. As it is, the expert has not been given a full and frank account of relevant circumstances upon which to base her opinion. That is not the fault of the expert but of the appellant and his family in not being fully open about their circumstances. "

[11] The FtT dismissed the appeal. In its view paragraph 399(a) of the Immigration Rules did not apply. It concluded:

> "45 … The fact is that [N] has been to school in China for 6 months. It is feasible. She has grandparents there with whom she can reside. Her mother might say that she has a job in a Chinese restaurant in the UK. However, she has transferable skills and presumably she has learned some English while in the UK which would be of some benefit to her in China.
>
> 46. It is very clear that in this particular case the appellant, his partner and daughter can all move without difficulty as a family unit to China and live there with his partner's family … To move to China as a family unit would satisfy the concerns in Section 55. It would not be unduly harsh for [N] to go to China in all the circumstances. It would be in her best interests to remain with both parents. "

The FtT held that deportation would not breach N's Article 8 rights.

[12] The appellant did not contend to the FtT that the respondent had been in breach of section 55(1) or section 55(3) of the 2009 Act.

The UT

[13] A number of grounds of appeal were advanced to the UT, but for present purposes it is only necessary to mention two of them. The first was that the FtT had failed to recognise that if N moved to China she would have to become a Chinese citizen in order to access state health care and education. It was contended that, since China did not allow dual nationality, N would have to renounce her British citizenship. The UT held that although the FtT had failed to deal with this aspect of the appellant's case, it was not a material failure. The only submission before the FtT on the issue had been that China did not accept dual nationality for a Chinese national. There had been no evidence of what the Chinese authorities might demand of N, or of how that might affect her status in the law of the UK. The UT concluded:

> "8. What the Appellant had to show in terms of rule 399(a)(ii)(a) was that it would be unduly harsh for the child to live in China. I do not see that any case was before the FtT by which it might have so found based on non-recognition, or some formal renunciation, of her British citizenship, particularly when there was no evidence that she would cease to be regarded as such in the law of the UK.
>
> 9. Further, the ground overlooks that it would have to be shown also … in terms of rule 399(a)(ii)(b) that it would be unduly harsh for the child to remain in the UK without the appellant. "

The second ground was that the FtT had erroneously referred to the trigger sentence under section 32 of the 2007 Act as being 6 months when in fact it was 12 months. The UT concluded this was simply a slip.

[14] The appellant did not contend to the UT that the respondent had been in breach of section 55(1) or section 55(3) of the 2009 Act.

Permission to appeal to the Court of Session

[15] The proposed grounds of appeal introduced for the first time the contentions that the respondent had not complied with her statutory duty under section 55(1) of the 2009 Act and that her official had not complied with the section 55(3) duty; and that the FtT and UT had erred in law in failing to recognise those failures and their import. On 9 June 2020 the court granted permission to appeal.

The grounds of appeal

[16] After the grounds of appeal were lodged the respondent objected that they went materially beyond the scope of the proposed grounds in respect of which permission had been granted. The court fixed a procedural hearing where the objection could be considered. In advance of that hearing the appellant tendered four proposed amended grounds of appeal in substitution for the grounds lodged. After hearing argument the court allowed three of the amended grounds to proceed but sustained the respondent's objection to the remaining ground. The amended grounds of appeal which the court allowed to be substituted in place of the existing grounds were:

> "***Ground 1***
>
> (a) The FtT proceeded on the basis of a material error in law, in paragraph 31 of its reasons, by referring to Section 32 of the UK Borders Act 2007 as applying to the appellant as having been sentenced to imprisonment 'for a period of at least six months', in the context that it was conducive to the public good to deport him and that no exceptions under Section 33 applied in his case. The relevant period under Section 32 is twelve months. Exception 1 in Section 33(2) applies where removal would breach the Convention rights of a person such as the appellant's daughter, involving a proportionality exercise under Article 8, which would be affected by consideration of a period of imprisonment of twice the prescribed period.

(b) The Upper Tribunal erred in recognising there was an error but dismissing it as a 'mis-statement'.

Ground 2

(a) The FtT failed to consider whether the respondent's decision-maker had carried out the duties required by Section 55(1) and (3) of the Borders, Citizenship and Immigration Act 2009, having regard to the statutory guidance *Every Child Matters, Change for Children* issued in November 2009, in the manner indicated by the Court of Appeal in Northern Ireland in *JG* v *The Upper Tribunal* [2009] NICA 27, this being relevant for the purposes of sections 32 and 33 of the UK Borders Act 2007.

(b) The Upper Tribunal failed to address whether the FtT had erred as to whether the respondent had conducted an assessment of the child's best interests and had regard to the need to safeguard and promote those interests as required by Section 55 and related guidance.

Ground 3

(a) The FtT were not entitled to find that the effect of the appellant's deportation would not be 'unduly harsh' for his child, in circumstances where it has not considered the respondent's compliance with the duties in Section 55(1) and (3) of the Borders, Citizenship and Immigration Act 2009.

(b) The Upper Tribunal, having failed to deal with the FtT failure to address matters arising under Section 55, erred in law in sustaining the decision of the FtT in relation to whether the respondent's decision was 'unduly harsh'."

The revised notes of argument

[17] In advance of the appeal hearing the parties lodged revised notes of argument. The respondent lodged a written objection to parts of the appellant's note which she maintained sought to raise matters outwith the scope of the amended grounds of appeal.

The appeal hearing

[18] At the outset of the hearing senior counsel for the respondent, Mr McIlvride QC, insisted on the objection. Senior counsel for the appellant, Mrs Scott QC, indicated that she did not propose to stray beyond the three grounds of appeal. The court adjourned to

consider the objection. When the court resumed it advised the parties that its preliminary view was that there was substance to the objection. It noted Mrs Scott's stated intention, and it indicated that at the end of the day what would be likely to be determinative was whether or not one or more of the grounds of appeal was established.

Submissions for the appellant

Ground of appeal 1

[19] In paragraph 31 of its decision the FtT had wrongly identified that the minimum period of imprisonment for the purposes of section 32 of the 2002 Act was 6 months rather than 12 months. That had been a material error. The UT had erred in law in treating it as an immaterial slip.

Grounds of appeal 2 and 3

[20] Grounds of appeal 2 and 3 were essentially the same complaint, namely that the obligations in section 55(1) and section 55(3) had not been complied with. Where, as here, the person to be deported had family life with other family members in the UK, the interference with each family member's Article 8 rights required to be justified in terms of Article 8.2 (*Beoku-Betts* v *Secretary of State for the Home Department* [2009] 1 AC 115; *ZH (Tanzania)* v *Secretary of State for the Home Department* [2011] 2 AC 166). So far as the Article 8 rights of children are concerned, section 55(3) obliges the respondent's decision-maker to have regard to the criteria in the guidance *Every Child Matters: Change for Children*. That was designed to ensure that the best interests of children were properly considered, and that the procedural aspects of their Article 8 rights to family life were respected (cf *Principal Reporter* v *K* 2011 SC (UKSC) 91, joint judgment of Lord Hope of Craighead DPSC and Baroness Hale

of Richmond JSC at paragraphs 41-43). The relevant obligations in the present case had been (i) to give N an opportunity to express her views and to take those views into account; (ii) to endeavour to be fully informed as to all of the relevant factors bearing upon N's welfare. However, it was clear from the decision letter that the decision-maker had not done either of those things. There had been no attempt to ascertain N's views by any means. Nor had the information relating to N's circumstances and welfare been sufficiently comprehensive or up-to-date to permit her best interests to be properly assessed.

[21] The appeal to the FtT was under section 82(1)(b) and section 84(2) of the 2002 Act on the basis that deportation would breach N's Article 8 right to family life, in contravention of section 6 of the of the Human Rights Act 1998 ("HRA 1998"), The issue for the FtT was whether the decision-maker had acted contrary to section 6. While it was recognised that whether there had been a breach of Article 8 depended upon the particular facts of each case, often where a decision-maker had failed to comply with section 55(3) a consequence would be that the respondent was in breach of s 55(1). That had been the position here. In general, where the respondent was in breach of section 55 it would not be practicable on appeal for the FtT to reach a decision which was Article 8 compliant because it was likely that the necessary material relating to the child's welfare would not be before it (*JG* v *Upper Tribunal* [2020] NI 699, [2019] NICA 27, McCloskey J at paragraph 35; *JM4 for leave to apply for judicial review* [2019] NIQB 61, McCloskey J at paragraph 7). That was the position here. As a result of the breaches of section 55(1) and section 55(3) the respondent's decision to refuse the appellant's human rights claim had not been "in accordance with the law" in terms of Article 8.2. A consequence of the breaches was that neither the FtT nor the UT had been sufficiently informed to assess N's best interests and take them into account when determining if the interference with N's Article 8 right to family life was justified; and, in

particular, to take those interests into account when deciding whether it would be unduly harsh (a) for N to live in China with one or both of her parents, or (b) for N to remain in the UK without her father. The appeal should be remitted to the FtT to be heard by a different judge, with directions that the FtT consider whether the respondent's decision-maker (i) conducted an assessment of the best interests of N; and (ii) had regard to the need to safeguard and promote those interests in terms of section 55(1) and section 55(3).

Submissions for the respondent

[22] Mr McIlvride submitted that the appeal should be refused.

Ground of appeal 1

[23] The UT had been right to treat the reference to 6 months in paragraph 31 of the FtT's decision as a slip. Reading the decision fairly and as a whole, it was clear that the FtT was well aware that the relevant period was 12 months. With the singular exception of the misstatement, the FtT consistently referred to the relevant period as being at least 12 months (paragraphs 9, 10 and 32 of the decision). The FtT is an expert tribunal. The court should be slow to find that it misdirected itself in law unless it is clear that it did so (*AH (Sudan)* v *Secretary of State for the Home Department* [2008] 1 AC 678, per Baroness Hale of Richmond JSC at paragraph 30).

Grounds of appeal 2 and 3

[24] It was noteworthy that the appellant had not contended to the FtT or the UT that the respondent had breached her obligations under section 55(1) or section 55(3). The argument was now advanced for the first time. Mr McIlvride took no issue with that, indicating that

in a statutory appeal such as this it was competent for the court to entertain a ground of appeal that had not been argued before the FtT or the UT, although it should be slow to do so in any case where additional findings of fact were required, and it should not do so if unfairness would result (*Advocate General for Scotland* v *Murray Group Holdings Ltd* 2016 SC 201, Opinion of the Court delivered by Lord Drummond Young at paragraph 39). He did not suggest that either of those circumstances applied here.

[25] Section 55(1) and section 55(3) impose statutory obligations upon the respondent and those exercising her authority. In the present case the respondent had complied with her duties under both subsections. She had had regard to the best interests of N as a primary consideration. There had been no need to record and deal with every piece of evidence in her decision letter (*Zoumbas* v *Secretary of State for the Home Department* 2014 SC (UKSC) 75, Lord Hodge JSC at paragraph 23). It had not been necessary for her to make specific reference in the letter to the guidance which had been issued under section 55(3). The issue was one of substance and not form (*MK (Section 55 –Tribunal Options) Sierra Leone* [2015] UKUT 223 (IAC), [2015] INLR 563, McCloskey J at paragraph 19).

[26] Section 55 imposes obligations on the respondent and those acting on her behalf. It does not impose obligations upon the FtT, or the UT, or the court. When carrying out an assessment of proportionality under Article 8 in a case where a child is involved, the FtT, the UT, and the court must have regard to the best interests of the child as a primary consideration. The source of that obligation is section 6(1) of the HRA 1988 not section 55 of the 2009 Act.

[27] Where the respondent has decided to refuse a person's human rights claim, that person may appeal to the FtT on the ground that the respondent's decision is unlawful under section 6 of the HRA 1998 (section 82(1)(b) and section 84(2) of the 2002 Act). It is

settled law that, in hearing such an appeal, the FtT's jurisdiction is not a judicial review jurisdiction. Nor is it merely an appellate jurisdiction which is limited to considering the evidence which was before the decision-maker. Typically the evidence before the FtT is more extensive than the material which the respondent had. Usually the FtT will have the benefit of written witness statements and oral evidence, as well as additional documents. The FtT requires to consider all of the evidence put before it and to come to its own decision on the merits (*Huang* v *Secretary of State for the Home Department* [2007] 2 AC 167, Lord Bingham at paragraph 11; *Singh* v *Secretary of State for the Home Department* [2017] 1 WLR 4340, Ryder LJ at paragraphs 28 to 34). If, as counsel for the appellant seemed to suggest, *JG* v *Upper Tribunal, supra*, indicated that whenever the respondent has breached section 55 the FtT must allow the appeal,that was not correct. In *JG* the court seems to have been heavily influenced by judicial review cases. It was important to remember that the FtT's jurisdiction was wider than that.

[28] Even if the respondent had breached one or both of her section 55 duties,that would not have the consequences which the appellant suggested. At the end of the day any such breach would not have been material because the FtT had been able to assess the best interests of N properly and it had treated those interests as a primary consideration. It had the benefit of all of the evidence before it relating to N, including statements from the appellant and L, oral evidence from the appellant, and Dr Ul-Hassan's report. It conducted a careful analysis of N's circumstances. The grounds of appeal do not contend that the FtT had insufficient material before it to assess N's best interests and to determine for itself whether or not deportation of the appellant would breach her Article 8 right to family life. The position was clearly distinguishable from that in *JG*, where the court found (i) that the evidence before the FtT was not materially different from the information before the

respondent, and (ii) that the FtT had substantially adopted the respondent's decision and reasoning. The FtT had not erred in law in determining that it would not be unduly harsh for N to live in China, and that deportation of the appellant was a justified interference with N's Article 8 right to family life.

Decision and reasons

Ground of appeal 1

[29] We can deal briefly with the FtT's reference at paragraph 31 of its decision to 6 months' imprisonment rather than 12 months. In our opinion the UT did not err in law in treating the reference as a slip. The FtT is an expert tribunal. We are not persuaded that it misdirected itself. Reading its decision fairly and as a whole, in our view it is clear (i) that the FtT was well aware that the relevant period was 12 months; and (ii) that that was in fact the basis upon which it proceeded. Apart from the misstatement, it consistently referred to the relevant period as being at least 12 months (see paragraphs 9, 10 and 32 of the decision).

Grounds of appeal 2 and 3

[30] We accept that a new ground ought to be admitted where the interests of justice require it. In view of the position adopted by the respondent we are content to accept that the interests of justice do require that grounds 2 and 3 be considered, even though they were not raised before the tribunals.

[31] Both parties approached grounds of appeal 2 and 3 on the basis that they raise essentially the same point. In our opinion they were right to do so.

[32] The first question is whether the respondent complied with her section 55 obligations. The decision letter made reference to regard having been had to section 55.

There was no specific reference to section 55(3), but it was not essential that there should be. What was important was whether there was compliance with the substance of the section 55 duties. What such compliance requires in a particular case is intensely fact sensitive (cf *Re JO (Section 55 Duty: Nigeria), supra*, McCloskey J at paragraph 13). Sometimes there may be nothing in an applicant's representations which suggests a need for the respondent to obtain further information about a child, or that there is a need to ascertain a child's views independently of the child's parents. On one view, it might be said that that was the position here. N was aged 7. L was her primary carer. There was no suggestion that that would not remain the position if the appellant was deported, whether or not L and N went to China with him. What causes us to pause is that some of the information which the decision-maker had regard to in relation to N was far from up-to-date. Reliance was placed upon the nursery transition record from 2014 - three years before the respondent's decision - from which the conclusion was drawn that N "struggles with the English language". The decision letter indicates that "various educational records and certificates" relating to N had been submitted, but the contents are not further described. If those records indicated that N was still struggling with English, the decision letter does not say so (and the information which was available to the FtT tends to suggests that by the time S was interviewed by Dr Ul-Hassan N was not struggling). If the respondent considered N's proficiency in English to be a significant factor, and the current position was unclear from the available material, we are inclined to the view that she ought to have sought more recent information, and that failing to do so would have been a breach of section 55.

[33] What would be the consequences of that breach? If the FtT's jurisdiction had been a judicial review jurisdiction the issue would have been whether the breach was material and

ought to lead to the respondent's decision being set aside. However, as we discuss below, it was not a judicial review jurisdiction and that was not the issue.

[34] Where the respondent has refused an applicant's human rights claim against a deportation order, the applicant may appeal to the FtT in terms of section 82(1)(b) of the 2002 Act against the refusal. The only relevant ground of appeal (section 84(2) of the 2002 Act) is that the decision is unlawful under section 6 of the HRA 1998. It is important to bear that in mind. Until the amendment of sections 82, 84 and 86 by the Immigration Act 2014 (with effect from 20 October 2014) there were more extensive rights of appeal from a decision of the respondent, and the grounds upon which an appeal could be advanced were considerably wider. In particular, the former version of section 84 included a ground that the respondent's decision "is otherwise not in accordance with the law" (section 84(2)(e)), and in terms of the former section 86(3)(a) an appeal could be determined on the basis that the decision appealed against "was not in accordance with the law". That is no longer the position.

[35] In a section 82(1)(b) appeal the FtT's jurisdiction is not limited to a judicial review jurisdiction or an ordinary appellate jurisdiction (*Huang* v *Secretary of State for the Home Department*, *supra*, Lord Bingham at paragraphs 11, 13 and 15; *Ali* v *Secretary of State for the Home Department* [2016] 1 WLR 4799, Lord Reed JSC at paragraphs 8, 42, 43, and 50; *R (MM (Lebanon)* v *Secretary of State for the Home Department* [2017] 1 WLR 771, Baroness Hale of Richmond JSC at paragraph 64; *Singh* v *Secretary of State for the Home Department*, *supra*, Ryder LJ at paragraphs 28 to 34). The FtT is an extension of the decision-making process in human rights cases (cf *Singh* v *Secretary of State for the Home Department*, *supra*, Ryder LJ at paragraph 30). The FtT will accord respect to the respondent's decision and give weight to her policies (*Ali* v *Secretary of State for the Home Department*, *supra*, Lord Reed JSC at

paragraphs 44-50), but it is not restricted to considering the material which was before her. It is entitled to hear evidence (section 85(4) of the 2002 Act) and it usually does so. It has to decide for itself on the basis of the evidence before it whether the decision is unlawful under section 6 of the HRA 1998. Whatever the defects of the respondent's decision, it is the duty of the FtT to ensure that the ultimate disposal of the human rights claim is consistent with the Convention (*R (MM (Lebanon)*) v *Secretary of State for the Home Department*, *supra*, Baroness Hale of Richmond JSC at paragraph 59).

[36] Generally in a case where the Article 8 right to family life of a child is founded upon the critical question for the FtT will not be whether the respondent has breached one or both of her section 55 duties. Usually the crucial issues will be whether paragraph 399(a) of the Immigration Rules applies; and, if it does not, whether the interference with the Article 8 right is justified. In some cases, even though the respondent may have breached section 55, the evidence before the FtT enables it to identify and have proper regard to the best interests of the child as a primary consideration. In that connection we remind ourselves of the observations of McCloskey J in *MK (Section 55 – Tribunal Options: Sierra Leone)*, *supra* , at paragraph [9]:

> "9. Our survey of the relevant jurisprudence, governing principles and statutory framework yields the following conclusions:
>
> > (a) Where either the FtT or the Upper Tribunal decides that there has been a breach by the Secretary of State of either of the duties imposed by Section 55 of the 2009 Act, both Tribunals are empowered, in their final determination of the appeal, to assess the best interests of any affected child and determine the appeal accordingly. This exercise will be appropriate in cases where the evidence is sufficient to enable the Tribunal to conduct a properly informed assessment of the child's best interests.
> >
> > (b) However, there may be cases where the Tribunal forms the view that the assembled evidence is insufficient for this purpose. In such cases, two options arise. The first is to consider such further relevant evidence as the Appellant can muster and/or to exercise case management powers in an

> attempt to augment the available evidence. The second is to determine the appeal in a manner which requires the Secretary of State to make a fresh decision. While eschewing prescription, we observe that this course may well be appropriate in cases where it appears to the appellate tribunal that a thorough best interests assessment may require interview of an affected child or children in accordance with Part 2 of the Secretary of State's statutory guidance.
>
> (c) In choosing between the two options identified above, Judges will be guided by their assessment of the realities of the litigation in the particular case and the basis on which the Secretary of State has been found to have acted in breach of either or both of the Section 55 duties. It will also be appropriate to take into account the desirability of finality and the undesirability of undue delay. "

[37] We do not understand *JG* v *Upper Tribunal*, *supra*, to suggest that a different approach is required. In that case the court emphasised the importance of the section 55 obligations and the undesirability of undermining them. We respectfully agree. The court held that the respondent's decision-maker was in material breach of section 55(3). Crucially, it concluded that the evidence before the FtT had not provided it with a proper basis to identify the best interests of the elder of the applicant's two children and to treat those interests as a primary consideration when it determined whether the interference with that child's Article 8 right to family life was justified. A psychology report which the applicant had submitted to the FtT was dismissed by the court as not having addressed the material issues. The FtT had not had the benefit of materially different information from the information which had been before the respondent. It had merely "in substance endorsed the approach and reasoning of [the respondent]". In other words, in the court's view the scenario was that described in paragraph 39(b) of *MK (Section 55 – Tribunal Options: Sierra Leone), supra*, rather than the scenario described in paragraph 39(a). In those circumstances the court held that the FtT erred in law, and that the UT had fallen into the same error.

[38] We are not persuaded that a similar analysis is appropriate in the present case. Here the FtT had considerably more material relating to N than the respondent had at the time of her decision, and the material was up-to-date. We consider that N's views were adequately ascertained and ventilated before the FtT. We are satisfied that there was sufficient evidence to enable the FtT to properly assess N's best interests and to treat them as a primary consideration; and that it did both of those things when it considered whether paragraph 399(a) of the Immigration Rules applied, and when it considered whether deportation would breach N's Article 8 right to family life. We are not persuaded that the FtT required to do anything more. In our judgement the FtT's consideration and determination of the appeal was in accordance with the legal principles enunciated by Lord Hodge JSC in *Zoumbas* v *Secretary of State for the Home Department, supra*, at paragraph 10. Following a proper Article 8 proportionality assessment the FtT found that the interference with N's Article 8 rights was justified. In our view even if the respondent breached section 55, the breach was superseded by the FtT's full consideration of N's best interests, its treatment of them as a primary consideration, and its proportionality assessment. In our opinion it follows that the proposed interference with N's Article 8 right to family life is in accordance with the law and is proportionate.

[39] For the foregoing reasons we are not persuaded that the FtT or the UT erred in law in any material respect.

Disposal

[40] We shall refuse the appeal. We reserve meantime all questions of expenses.