Case No: C5/2015/2634

Neutral Citation Number: [2018] EWCA Civ 532

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)

IA083132012

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 21/03/2018

Before:

LORD JUSTICE LEWISON

and

LORD JUSTICE SALES

- -

Between:

Sherif El Gazzaz	**Appellan**
- and -	
The Secretary of State for the Home Department	**Responde**

- -

- -

Galina Ward (instructed by **Sutovic & Hartigan Solicitors**) for the **Appellant**

John-Paul Waite (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date: 15 March 2017

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Judgment

Lord Justice Sales:

1.
This is an appeal in an immigration case concerning the proposed deportation of the appellant, a national of Egypt, who falls within the definition of a foreign criminal for the purposes of the immigration regime. The appellant appeals to this court against the decision of the Upper Tribunal promulgated on 10 March 2015 by which it dismissed his appeal against a decision of the Secretary of State dated 25 March 2010 to maintain a deportation order in place in respect of him.

2.
In about 2009 the appellant has developed a mental illness in the form of schizoaffective disorder, psychosis and pronounced anxiety, in relation to which he has recently been conditionally discharged from a medium secure mental health unit and for which he receives appropriate treatment, including drugs. He maintains that if removed to Egypt he would be deprived of essential support from his family and by reason of his ill-health would face very significant obstacles to integrating in Egypt to

such a degree that his deportation would be disproportionate and in violation of his rights under Article 8 of the European Convention on Human Rights.

3.
It should be noted that, as Ms Ward for the appellant emphasised in her submissions, this case is not one in which the individual says that he is receiving medical treatment in the United Kingdom which would not be available in the country to which he would be removed, so as to give rise to a violation of his rights for that reason under Article 3 or Article 8 of the Convention: cf GS (India) v Secretary of State for the Home Department [2015] EWCA Civ 40; [2015] 1 WLR 3312. In relation to its decision, the Upper Tribunal had before it evidence about the mental health services available in Egypt on the basis of which the Secretary of State submitted that it "It had not been shown that the drugs and/or the other treatment [sc. required to manage his condition] were not accessible if he were returned to Egypt" ([22]); and the tribunal found that although the level of support in Egypt would be less than in the United Kingdom, "the necessary medication would be available to him" ([38], set out below).

Factual background and grounds of appeal

4.
The appellant was born in 1986 and came to the United Kingdom as a child aged 12 with his family in 1999. The family were granted indefinite leave to remain in 2003. In August 2004, when aged 17, the appellant committed an offence of violent disorder by participating in an incident in which someone was killed, for which offence he was convicted in August 2005. In September 2005 he was sentenced to three and a half years imprisonment in a young offenders' institution for that offence.

5.
In March 2006 the custodial element of the appellant's detention came to an end and he was transferred into immigration detention with a view to his deportation. The Secretary of State notified her intention to make a deportation order and the appellant's appeal against that notification was dismissed in June 2006. The Secretary of State proceeded to make a deportation order in relation to the appellant on 21 November 2006.

6.
In November 2006, during his licence period, the appellant committed an offence of criminal damage during riots at the Harmondsworth detention centre. He was sentenced to two months imprisonment for that offence in January 2008.

7.
The appellant became mentally unwell after this. In October 2009 a registered mental health nurse assessed the appellant as having a probable diagnosis of schizoaffective disorder, with possible symptoms of psychosis. In December 2009 a psychiatrist, Professor Freeman, saw the appellant and reported that it was difficult to make an assessment. He could neither confirm nor rule out a diagnosis of schizophrenia.

8.
In January 2010 the Secretary of State was invited to revoke her deportation order on grounds of the appellant's mental ill-health, but by her decision letter of 25 March 2010 under challenge in these proceedings she indicated that the deportation order would remain in place. She also issued a certificate that the appellant's human rights claim was clearly unfounded, but in due course that certificate was quashed by consent and the appellant appealed to the First-tier Tribunal against the decision to maintain the deportation order in his case.

9.
On 26 February 2010 the appellant was released from immigration detention on bail for a short period, but in March 2010 he was detained again. On 1 April 2011 he was transferred from detention to a secure hospital. On 1 August 2011 he was released from hospital on bail. In July 2012 he was arrested on suspicion of possession of cannabis and a search of his bedroom at the family home revealed a firearm and live ammunition concealed there. The appellant was detained again with a view to being tried for possession of the firearm and ammunition.

10.
In the meantime, another psychiatrist, Dr Mehotra, examined the appellant and produced reports in May and June 2012 giving details of the appellant's mental ill-health and stating his opinion that the appellant was not fit to give evidence in the tribunal proceedings.

11.
By a decision dated 17 December 2012, the First-tier Tribunal allowed the appellant's appeal against the Secretary of State's deportation decision of 25 March 2010. However, on 25 April 2013 the Upper Tribunal set aside the tribunal's decision for error of law. In due course the Upper Tribunal proceeded to re-hear the appellant's appeal and to re-make the decision itself.

12.
On 18 July 2013, a Home Office psychiatrist gave his view that the appellant was not fit to plead in the criminal proceedings against him for possession of the firearm and ammunition. However, the case proceeded to trial to determine whether the appellant was guilty of the actus reus of having the firearm and ammunition in his possession and whether a hospital order should be made against him pursuant to sections 37 and 41 of the Mental Health Act 1983. It seems that the appellant denied all knowledge of the firearm and ammunition and suggested that it had been put in his room without his knowledge by friends who visited him. However, on 7 November 2013 the Crown Court found the appellant guilty of committing the offence charged, although he was not fit to plead.

13.
Dr Mehotra produced a further report dated 30 November 2013 to assist the Crown Court in making an appropriate order in relation to the appellant. Pursuant to section 38 of the 1983 Act the appellant was transferred to a medium secure mental health unit.

14.
Dr Mehotra produced a supplementary report dated 4 July 2014, considered by the Upper Tribunal at [12]. In this report, Dr Mehotra gave his view that the appellant was suffering from schizoaffective disorder with psychotic features; the illness had a relapsing nature and the appellant's co-morbid use of cannabis in the community together with sporadic compliance with his medication regime had complicated his prognosis; there had been some improvement in the preceding months in the hospital unit; although there were signs of recovery, his mental health remained relatively fragile and at risk of relapse in the community or in prison; so the recommended course would be to order detention for treatment under the Mental Health Act 1983, the index offence being serious enough to justify consideration of an order under section 41 of that Act. It appears from this report that Dr Mehotra's view was that the anti-psychotic drugs prescribed for the appellant were effective in treating his mental illness, if the appellant properly complied with the medication regime. On 18 July 2014, the Crown Court made a hospital order in relation to the appellant pursuant to sections 37 and 41 of the 1983 Act.

15.

For the hearing in the Upper Tribunal, the appellant adduced these reports in evidence together with a further psychiatric report dated 1 February 2015 from a Dr Arya. Dr Arya referred to family support for the appellant in the hospital, in particular from his mother. There were indications from his interview with Dr Arya that his condition improved somewhat when he complied with his medication regime. Dr Arya observed that he managed the routine of life on the ward with little prompting, but that it was difficult for her to comment on how he would manage with daily living outside that environment. She noted that the appellant's mental state had deteriorated in relation to the immigration proceedings so that he required additional medication, support and reassurances and that he had shown good initial response to antipsychotic medication since admission. Her view was that it was necessary for the health and safety of the appellant and the protection of others that he should continue to receive medication and therapy at the hospital.

16.
At the hearing in the Upper Tribunal on 9 February 2015, Dr Mehotra gave oral evidence and was cross-examined by counsel for the Secretary of State. We do not have a transcript of the hearing, but the Upper Tribunal noted Dr Mehotra's evidence with some care at [13]-[19]. Dr Mehotra again referred to the history of relapses in the appellant's ill-health, but emphasised the significance for him of the medication he was taking. Dr Mehotra seems to have regarded the medication as an appropriate and effective way to manage the appellant's mental illness, although that was not the only way to manage the risk he posed to himself and others: [19]. Neither Dr Arya nor Dr Mehotra gave evidence that the appellant would be incapable of adapting to life in Egypt, especially in the context of his having access to appropriate medication there. Nor did either of them suggest that care he might receive in Egypt for his mental ill-health would be inappropriate or ineffective.

17.
On that point, the main submission for the appellant, as noted at [26], was that there was evidence from a mental health social worker from June 2012 that his functioning at that time had been very poor: he had been unable to walk 50 metres down the road without needing calming; so, it was submitted, it was fanciful that he would be able to return to Egypt and fend for himself and access treatment there. However, it is clear that the Upper Tribunal focused on the more recent evidence of Dr Arya and Dr Mehotra, expert psychiatrists, as it was plainly entitled to do.

18.
The Upper Tribunal had evidence before it regarding the availability of medical treatment in Egypt in cases of mental ill-health, both by relevant medication and through provision of therapy in hospital settings.

19.
Despite the contention of the appellant that the support of his family in the United Kingdom was an important consideration, although family members had put in witness statements none of them came to the hearing to give evidence on his behalf.

20.
The Upper Tribunal's decision was promulgated on 10 March 2015. It applied the law as it stood at the time of its decision, including in particular the regime contained in sections 117A and 117C of the 2002 Act and the associated Immigration Rules in force at that time. It is agreed that it was correct to do so. The Upper Tribunal dismissed the appellant's appeal against the decision of the Secretary of State to maintain her deportation order in his case.

21.

The appellant appeals to this court on three grounds: (1) the Upper Tribunal erred in law in its approach to application of the relevant "very compelling circumstances" test in section 117C and reached a perverse conclusion that there were no very compelling circumstances to prevent deportation of the appellant to Egypt under section 117C and Article 8; (2) the Upper Tribunal failed properly to apply the guidance given by the European Court of Human Rights in Maslov v Austria [2009] INLR 47 regarding deportation of a foreign criminal who has lawfully been in the host country since childhood in its consideration of section 117C, in line with the approach set out by this court in AJ (Angola) v Secretary of State for the Home Department [2014] EWCA Civ 1636 at [45]-[46]; and (3) the Upper Tribunal erred in law in treating the appellant as someone to whom the presumption in favour of automatic deportation in section 32 of the UK Borders Act 2007 applied.

Legal framework

22.
Section 3(5)(a) of the Immigration Act 1971 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".

23.
Sections 117A and 117C in Part 5A of the 2002 Act are the central provisions for the purposes of this appeal. They provide:

"**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).

…

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."

24.
As this court held in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662, [24]-[27], section 117C(3) must be read as providing that, in relation to medium offenders (i.e. foreign criminals sentenced to more than one year's but less than four years' imprisonment), "the public interest requires C's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances over and above those described in Exceptions 1 and 2". In considering whether "very compelling circumstances" exist apart from Exceptions 1 and 2, it is relevant to have regard, amongst other things, to any features of the case falling within the matters described in Exceptions 1 and 2 which might be said to make an individual's claim based on Article 8 especially strong: see NA (Pakistan), [29]-[33].

25.
The statutory provisions in Part 5A of the 2002 Act mirror the Immigration Rules in relation to foreign criminals which were brought into effect at the same time as Part 5A: see paras. 398 to 399A of the Immigration Rules as made in July 2014. Paragraph 398 provides, inter alia, that in relation to a medium offender whose deportation is conducive to the public good and in the public interest because of their conviction for an offence, where that offender claims that his deportation would contravene Article 8 the Secretary of State will consider whether para. 399 (equivalent to Exception 2 in section 117C) or para. 399A (equivalent to Exception 1 in section 117C) 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." Therefore, although section 117A(1) only says that Part 5A applies "where a court or tribunal is required to determine" whether a decision made under the Immigration Acts breaches a person's rights under Article 8, the Immigration Rules impose equivalent obligations on the Secretary of State herself. In any event, since the lawfulness of a decision by the Secretary of State by reference to Article 8 will be determined by the tribunal on an appeal according to the statutory provisions in Part 5A, it is plainly permissible (if, indeed, it is not a requirement in public law) for her to make her decisions by having regard to those provisions as well.

26.

Section 32(5) of the 2007 Act provides that "The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33)." Section 33 provides for a number of exceptions to this general obligation, including where deportation would breach the person's Convention rights, i.e. including under Article 8 (Exception 1, set out in section 33(2)), and where a hospital order made under section 37 of the Mental Health Act 1983 has effect in relation to that person (Exception 5, set out in section 33(6)). Section 33(7) has the effect that the application of Exception 5 does not prevent the making of a deportation order, but "results in it being assumed neither that the deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good."

27.
In other words, if an exception applies within the regime set out in sections 32 and 33 of the 2007 Act, it is left to the Secretary of State's discretion and judgment whether to assess that deportation would be conducive to the public good and that a deportation order should be made, subject always to any other legal obligations to which she may be subject in that regard. For example, if the Secretary of State assesses that deportation would breach a person's Convention rights, Exception 1 in section 33(2) will apply thereby engaging section 33(7), but the Secretary of State will be prevented from making a deportation order by virtue of her general duty under section 6(1) of the Human Rights Act 1998 to act in a way which is compatible with that person's Convention rights. Similarly, if Exception 5 applies (section 33(6)), the Secretary of State has a discretion to assess that deportation of the person is conducive to the public good for the purposes of section 3(5)(a) of the 1971 Act and she may be obliged to make a deportation order if relevant provisions of the Immigration Rules and sections 117A and 117C of the 2002 Act require that.

Discussion

Ground (1): "very compelling circumstances"

28.
Since the appellant's right to be in the United Kingdom was truncated by the deportation order made in 2006, the Tribunal found that the appellant could not bring himself within Exception 1 in section 117C because he had not been lawfully resident in the United Kingdom for most of his life: [34]. There is no appeal in respect of this part of its reasoning. Exception 2 is not relevant in this case.

29.
The question for the Tribunal, therefore, was whether there were "very compelling circumstances" in the appellant's case to outweigh the strong public interest in deportation of a foreign criminal in the medium category. The Tribunal correctly identified this as the relevant issue which it should address: see the last sentence of [36] and also the first sentence of [37] and the penultimate sentence of [38], as set out below. This was so even though the Tribunal's decision pre-dated the decision of this court in NA (Pakistan) which made clear the proper interpretation of section 117C(3), no doubt because the Tribunal had in mind the way in which the relevant Immigration Rules identified this as the test.

30.
In addressing itself to that issue, the Tribunal noted the points made by Ms Ward on behalf of the appellant, in particular as summarised by it at [37] as follows:

"As regards the issue of whether there are very compelling circumstances in this case, these were essentially summarised by Ms Ward in her submissions referring to the age of the appellant when he came to the United Kingdom, his age when he committed the most serious offence, the amount of time he had been in the United Kingdom, the need for family support to enable him to benefit from the

treatment, the need for the treatment itself, his inability to fend for himself on return and the need to ensure he does not become a danger to himself or others and the likelihood of a relapse should he come under the influence of others."

The Tribunal did not dismiss any of these points as irrelevant to the balancing exercise it had to perform for the purposes of applying the "very compelling circumstances" test and Article 8. It is clear that the Tribunal did take these points into account as relevant factors.

31.
At [38] the Tribunal judge gave his assessment of the appellant's case on very compelling circumstances:

"I should say that in this regard that I accept in its entirety the evidence of Dr Mehotra and the other medical evidence that has been put in. I also note the background evidence concerning the difficulties the appellant would experience on return to Egypt in terms of such matters as his vulnerability, the need for support from his family in accessing and taking medication and lack of the same level of medical and other support that he would have there, albeit bearing in mind that it does appear that the necessary medication would be available to him. On the other side of the line is of course the very serious offence of which he was convicted and for which he was sentenced to three and a half years in prison, and the more recent offence of possession of a firearm and ammunition, as well as the criminal damage offence. I bear in mind also the point made by Ms Ward that the appellant does not pose a risk of harm to the community given that he will remain hospitalised until such time as it is decided that he is safe to go into the community and then would be subject to significant conditions. There are significant obstacles to the appellant's integration into Egypt, but I am not persuaded that they would be very significant, and nor do I accept that the circumstances that he would face on return, problematic for him though they would undoubtedly be, are such as to meet the very high threshold of very compelling circumstances. His appeal under Article 8 is therefore dismissed."

32.
Ms Ward submits that the Tribunal has not sufficiently explained its reasoning on the very compelling circumstances test which it correctly identified it should apply. I do not agree. The reason for the decision is clear enough. The Tribunal recognised that there were strong points to be made for the appellant, in particular by reference to Maslov (see below) and his medical condition. However, the Tribunal considered that there were very strong countervailing factors, in terms of the public interest in deportation of an individual with the appellant's record of offending. The overall effect of the balancing exercise was that in the Tribunal's view it could not be said that the appellant had shown that there were very compelling circumstances why he should not be deported.

33.
The Tribunal found that the points made by reference to the appellant's medical condition fell to be qualified somewhat by the facts that appropriate medication would be available in Egypt, as the Tribunal was entitled to find on the evidence, and there was in place in Egypt a system for treatment of people with mental illness which, even though it might not be of the same standard as is available in the NHS, would mean that he would get appropriate treatment if he needed it: see also [32]. Ms Ward submitted that if the appellant suffered a relapse he would not be able to access treatment on his own initiative. But there is no indication that Egyptian society and its medical system would fail to pick up the appellant as a person suffering from serious mental illness, if that were the result, and then supply appropriate medical assistance much as society and the health system in the United Kingdom would do, without any necessity for self-referral.

34.
Since the issue was whether it would be disproportionate under Article 8 to deport the appellant to Egypt, it was appropriate for the Tribunal to have regard to the comparison between the health care systems and the treatment available in the two countries as it did. The Tribunal was entitled to find that such gap as there was between them was not sufficient to indicate the treatment available to the appellant if he were removed to Egypt would make his removal disproportionate, particularly when applying the "very compelling circumstances" test. In that regard, it is in fact difficult to distinguish this case from a pure medical case such as was addressed in GS (India). The Convention rights of the appellant do not have the effect that it is incumbent on the United Kingdom to go on providing him with medical treatment here for his mental ill-health.

35.
So far as concerns other aspects of living in Egypt if removed there, the appellant had been brought up in Egypt and had made frequent trips there to see family members, as the Tribunal noted had been the position down to 2006: [31]. It was not suggested that the appellant could not speak the language, nor that he lacked any understanding of how society operates in Egypt. This is in contrast to the position of the individual in Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813; [2016] 4 WLR 152, an authority particularly relied on by Ms Ward on this appeal. Also, Kamara involved a person who had come to the United Kingdom at a significantly younger age (six) than the appellant. Contrary to Ms Ward's submission, it is not an authority which shows that the Tribunal erred in its assessment in the present case. She submitted that, if removed to Egypt, the appellant would not be able "to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships …" (Kamara, [14]). However, the appellant would have broadly similar possibilities to operate on a day-to-day basis in Egypt and build up human relationships there as he has in the United Kingdom. Those are limited in both cases by his mental ill-health, and the treatment for that in Egypt might not be at the same level as in the United Kingdom. But as already pointed out above, such gap as there is in that regard does not indicate that his removal to Egypt would be disproportionate for the purposes of Article 8.

36.
In the circumstances of this case, I consider that the Upper Tribunal was entitled to make the assessment it did that whilst the appellant would face significant problems of integration in Egypt, they could not be characterised as very significant problems of integration. The Tribunal was not required to assess the issue of "very compelling circumstances" and proportionality under Article 8 using this formulation, but it did not err in doing so. The scope for a degree of integration in Egypt was likely to be broadly equivalent to that in the United Kingdom, with an ongoing need for medical assistance and some relapses into more severe phases of illness, in relation to which appropriate health support would be available. That was so albeit there would be likely to be less direct family support and the healthcare services available might not be at the same level as in the United Kingdom, which are the reasons why the Tribunal assessed in the appellant's favour that there would be significant (albeit not very significant) problems for him regarding integration in Egypt.

37.
Ms Ward submitted that the Tribunal erred because it did not give proper weight to the regime set out in Part 5A of the 2002 Act and the relevant Immigration Rules and failed to assess the appellant's case in light of that regime: see now the guidance given by Lord Reed JSC in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60; [2016] 1 WLR 4799, in particular at [53]. This is a hopeless contention. The Tribunal understood very well the significance of the provisions in that

regime, as is clear from its reference to the significant parts of it in [38], set out above. I note in particular the reference in [38] to the absence of very significant obstacles to integration in Egypt (cf section 117C(4)(c) and the corresponding rule in para. 399A of the Immigration Rules) and the reference to the high threshold of very compelling circumstances (cf para. 398 of the Immigration Rules and section 117C(3) as interpreted in NA (Pakistan)).

38.
Ms Ward further submitted that the Tribunal erred in its assessment for the “very compelling circumstances” test because it failed to address the issue by first finding to what extent the circumstances of the appellant departed from Exception 1 as specified in section 117C(4) and then deciding whether the extent of the notional gap could be overridden by the factors relied on by the appellant. I cannot accept this submission either. The Tribunal properly determined that the appellant’s case did not fall within Exception 1. The only question then remaining was whether he could show that there were “very compelling circumstances” at a level sufficient to outweigh the strong public interest that he should be deported. The Tribunal was entitled to approach that as a holistic exercise, taking account of a range of factors as it did. It was not incumbent on it to force its reasoning into what is, to my mind, the rather unnatural straitjacket proposed by Ms Ward. The nature of the exercise is as described by Lord Reed in Hesham Ali at [53] and does not have to follow any particular format, so long as the tribunal or court has weighed all the relevant factors bearing on the question it has to determine.

39.
Finally, Ms Ward submitted that the conclusion arrived at by the Tribunal was perverse. For the reasons given above, this submission is not sustainable. The conclusion arrived at by the Tribunal on this issue was one which was properly open to it on the evidence.

Ground 2: Failure to have regard to Maslov

40.
Ms Ward submitted that the Tribunal failed to apply the guidance in Maslov within the context of the foreign criminal regime as it should have done. In her submission, the proper approach in a foreign criminal case involving a person who came to the United Kingdom as a child to whom the guidance in Maslov applies is for the Secretary of State and a court or tribunal to bring that guidance into account as a factor in the context of the “very compelling circumstances” test.

41.
I agree with this. The “very compelling circumstances” test is the rubric which structures the Article 8 proportionality balancing exercise in a case like this, so any factors which are relevant to that exercise, including those emphasised in the guidance given in Maslov, fall to be brought into account in the context of applying that test.

42.
I note in passing that the authority Ms Ward cited in support of this - AJ Angola - is in fact an authority on the 2012 version of the Immigration Rules in relation to foreign criminals, which are different from the relevant provisions in this case in section 117C and the corresponding 2014 Immigration Rules. However, the basic point is the same in the latter regime, as NA (Pakistan) indicates: see [61].

43.
The difficulty for Ms Ward on this ground of appeal is that it is clear that the Tribunal did in fact approach the case in the way she submitted it should have done. At [36] the Tribunal directed itself by

reference to AJ (Angola) and made the point that assessment of the application of the Maslov guidance had to be integrated "within the framework of the new Rules and asking … whether there were very compelling reasons to outweigh the public interest in deportation." That is the correct approach.

44.
The Tribunal also made reference to Maslov at [31] and plainly sought to apply the guidance from that judgment to the case in hand. It should be noted that the factors referred to by the Tribunal at [37], set out above, include those referred to in the guidance in the Maslov case at [75], where the ECtHR said:

"In short, the court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify explusion. This is all the more so where the person concerned committed the offences underlying the measure as a juvenile."

45.
Having correctly stated the relevant test, incorporating consideration of the guidance in Maslov in its consideration whether the "very compelling circumstances" test was satisfied, the Tribunal was entitled to reach the conclusion it did in [38] that this test was not satisfied.

Ground 3: Section 32 of the 2007 Act

46.
When the deportation order was made in 2006, the 2007 Act did not exist. When the Secretary of State took her decision in March 2010 to maintain that order in place the 2007 Act was in force, the appellant was not yet subject to a hospital order under the 1983 Act and the Secretary of State was bound to confirm the deportation order unless the human rights exception in section 33 of the 2007 Act applied. The Secretary of State decided that there would be no breach of the appellant's Convention rights if he were deported.

47.
The Upper Tribunal was required to apply the legal regime in place at the time of its decision in 2015 in light of the facts as they stood then. By that time, the regime in Part 5A of the 2002 Act was in place and the appellant was subject to a hospital order, with the result that Exception 5 in section 33 of the 2007 Act was applicable.

48.
It is unclear whether Ms Ward or the advocate for the Secretary of State pointed out to the Upper Tribunal the significance of the hospital order in relation to the 2007 Act. I rather think they did not, since there is no reference to the point in what otherwise appears to me to be a careful analysis by the Tribunal. At all events, at [30] the Tribunal identified the issue in the appeal as being the Article 8 rights of the appellant, "bearing in mind that under section 32 of the UK Borders Act 2007 the respondent is required to make a deportation order" in relation to a foreign criminal unless deportation would breach his Convention rights. This was an error, because the making of a hospital order in relation to the appellant removed the presumption in favour of deportation under section 32 of the 2007 Act.

49.
However, this was not a material error in the Tribunal's analysis, because that analysis proceeded by reference to section 117C. That provision is directed to assessment of a foreign criminal's Article 8

rights in relation to a proposed deportation and stipulates that the deportation of foreign criminals is in the public interest (section 117C(1)) and also that in the case of a medium level foreign criminal the public interest requires deportation unless Exception 1 or Exception 2 applies or there are very compelling circumstances sufficient to outweigh that public interest (section 117C(3)). There is no exception to the application of section 117C if a hospital order is in effect in respect of a foreign criminal.

50.
Hence, so far as the present case is concerned, section 117C covers the same ground as section 32 of the 2007 Act and provides that the public interest requires deportation unless the individual can bring himself within either of the Exceptions or can show very compelling circumstances. The substantive effect of section 117C in relation to the appellant is as strong - indeed stronger, because the provision itself structures and limits the scope for successful Article 8 arguments to be made - than the effect of section 32(5) and section 33(2) of the 2007 Act would have been, had no hospital order been made in respect of him. The Tribunal’s failure to appreciate the effect of the hospital order in the context of the 2007 Act therefore had no material bearing on the outcome of the appeal.

Conclusion

51.
For the reasons given above, I would dismiss this appeal.

Lord Justice Lewison:

52.
I agree.