



IAC-AH-KEW/CO-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/01431/2014

THE IMMIGRATION ACTS

**Heard at Birmingham
On 21st October 2015**

**Decision & Reasons Promulgated
On 10th November 2015**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

**MB
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R Sharif (Solicitor)

For the Respondent: Mr D Mills (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal to the Upper Tribunal brought with permission against a decision of the First-tier Tribunal (Judge Parkes) promulgated on 24th February 2015 dismissing his appeal against the Respondent's decision of 14th July 2014 to make a deportation order in respect of him.

The Background

2. Since an anonymity direction was made by the First-tier Tribunal, which I have decided to continue, I shall refer to the Appellant simply as MB. He is a national of Jamaica and was born, in that country, on 19th February 1976. He entered the UK on 19th May 2001 as a visitor and was given temporary admission, presumably on that basis, until 17th June 2001. It seems he was required to report to the Home Office but did not do so and that he subsequently remained in the UK, for a period of time, unlawfully. On 7th June 2002 he married a British citizen whom I shall refer to as AB. On 9th May 2005 he made an application for leave to remain on the basis of that marriage. This was granted on 29th June 2005, on a discretionary basis, for a period of three years. On 27th February 2007 he was granted a further three years discretionary leave, again on the basis of the marriage, and on 14th May 2010 he submitted an application for indefinite leave to remain, again, on the basis of that marriage. That was granted on 8th June 2010.
3. The Appellant and AB have two children of their union. Their eldest child, a daughter, was born on 12th July 2002 and the youngest, a son, was born on 11th July 2003. Their daughter is, therefore, now aged 13 years and their son is now aged 12 years. Currently, the four of them reside together as a family unit. The son has health difficulties. In a witness statement of 11th August 2014, AB has explained that he has brain damage and autism, that he attends a special school and that there is, in existence in respect of him, a statement of special educational needs.
4. The Appellant was arrested in connection with drugs offences and pleaded guilty to supplying class A drugs on two separate occasions. On 29th July 2013 he was sentenced, for these offences, to a total of three years imprisonment. That sentence was, in fact, made up of three years, to run concurrently, with respect to each offence. He has now served what he was required to serve of that sentence and has his liberty. There is no suggestion that he has subsequently offended. As to prior offending, the record shows that he was fined for possession of cannabis in January of 2007 and was cautioned, as I understand it for possession of the same drug, in October of 2006. There is no suggestion that these earlier matters did or should have had any bearing upon the decision to deport him.
5. The trigger for the decision to deport was, of course, the offending relating to class A drugs. When the sentence was passed it was noted, in the sentencing remarks that an aggravating factor was that the Appellant had taken his son with him on one of the occasions when he was selling drugs. The sentencing judge, though, did take into account, as mitigation, the Appellant's having pleaded guilty at a very early stage and his family circumstances being the health problems of his son and what was then said to be the ill-health of AB although that matter has not subsequently been relied upon in the deportation proceedings so it was, perhaps, only a temporary factor.

6. The Respondent's decision to deport was, as noted, taken on 14th July 2014. The Respondent's reasoning was explained in a detailed "Notice of Decision." Essentially, though, it was said that the deportation was justified by the offending and that any Article 8 considerations were not sufficient, as considered within the scope of the Immigration Rules, to displace the public interest in his deportation.

The Legal Framework

7. There have been significant and quite regular changes to the applicable legal regime both in the context of primary legislation and the Immigration Rules. Against that background it is perhaps worth taking some time to set out the content of the relevant provisions as they were when the Appellant's appeal was considered by the First-tier Tribunal.
8. The starting point is Sections 32 and 33 of the UK Borders Act 2007. Here, the relevant provisions provide as follows:

"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 twelve months.
- ...
- (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) ...

33. Exceptions

- (1) Section 34(4) and (5) -
 - (a) Do not apply where an exception in this Section applies (subject to sub-Section (7) below), and
- ...
- (2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach -
 - (a) A person's Convention rights, or
 - (b) The United Kingdom's obligations under the Refugee Convention."

9. Pausing there, it has not been claimed by or on behalf of the Appellant that he is a refugee but it has been claimed that his deportation would breach Article 8 of the European Convention on Human Rights (ECHR).

10. Turning now to the Immigration Rules, these contain the following presumption:

“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.”

11. There are then the following Rules which are largely relevant to Article 8 considerations;

“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.

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

(a) The deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least four years;

(b) The deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least twelve months; or

(c) The deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398(b) or (c) applies if

–
 (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British citizen; or

(ii) the child has lived in the UK continuously for at least the seven 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;

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported or the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.”

12. There is then Section 117 of the Nationality, Immigration and Asylum Act 2002 to be borne in mind. Section 117A states, in effect, that a court or Tribunal when considering Article 8 arguments based on private and family life must have regard to, in all cases, the considerations listed in Section 117B and, in all cases, concerning the deportation of convicted offenders who are not British citizens, the considerations listed in Section 117C.

13. Turning to those then, the relevant parts are as follows:

“117B. Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
 - (a) are less of a burden on tax payers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
 - (a) are not a burden on tax payers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
 - (a) a private life, or
 - (b) a relationship formed with a qualifying partner that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person’s deportation where –
 - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.

“117C Article 8: Additional considerations and 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 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. ..."

14. So there are now a considerable number of matters to be taken into account.

The Appeal to the First-tier Tribunal

15. The Appellant's appeal was heard on 2nd February 2015. Although it is not expressly said so it seems that both he and AB gave oral evidence. Both the Appellant and the Respondent were represented.

16. In its determination the First-tier Tribunal summarised the relevant legal provisions and the factual background. Its analysis of the competing arguments and its reasoning which led to its dismissal of the appeal may be found from paragraphs 18 to 30. It said this;

"18. So far as the Appellant's relationship with his wife is concerned the evidence shows that it is a genuine and subsisting relationship. However it was formed at a time when the Appellant was in the UK illegally, in fact he had lost contact with the Home Office by not reporting. He was in the UK unlawfully and his status was precarious, accordingly the Appellant cannot bring himself within paragraph 399(b) (i) and the other exceptions do not arise for considerations as the Appellant has to satisfy all of the requirements.

19. The Appellant cannot satisfy the requirements of paragraph 399A of the Immigration Rules as he has not lived for most of his life in the UK. Again the requirements are cumulative but in any case he grew up and lived for most of his life in Jamaica, he has relatives there including his parents and brother and support, albeit limited, would be available. It could not be said that there would be very significant obstacles to his re-integration.

20. This case principally turns on whether the Appellant can show that he meets the requirements of paragraph 399(a) and effectively on whether it would be unduly harsh for the Appellant's children to remain in the UK without him. The children are British and have lived here for

the bulk of their lives but they have visited Jamaica occasionally. In the discussion below I have concentrated more on the Appellant's son as it appears that he has the greater needs. That is not to say that the Appellant's daughter would not benefit from his presence, I accept she would and that she is struggling without him as a permanent presence in the family home and that she has not adapted to senior school well.

21. The Appellant has been separated from his wife and children since he was detained following his arrest. It is clear from the sentencing remarks that the Appellant spent some time on bail whilst subject to an electronic tag. However since June 2013 he has been in prison of one sort or another and contact with his family has been necessarily heavily restricted. If deported it also obvious that there would be further serious restrictions on his contact with his family and whilst revocation of the deportation order could be sought but would necessarily follow.
22. By the fact of his imprisonment there has already been a significant interference on the Appellant's family life and a heavy burden has been placed on his wife in the need to care for their children in his absence and the emotional distress that his absence has caused to them. There is no suggestion that the interference brought about by his conviction could be regarded as being disproportionate despite the burden it has placed on his family.
23. A professional assessment of the Appellant's son would have assisted in this matter but I have to make the decision on the information that is available. It is not ideal and I accept that it has been deeply upsetting and difficult for all concerned. There is a difficulty in this case in relation to the children's best interests. Ordinarily it is in the best interests of children to be cared for by both parents in a stable and loving environment where their interests are properly considered and their needs are met, particularly if their needs are greater than the usual.
24. That clearly has not happened in this case where the Appellant spectacularly failed his son by drug dealing and taking him along to one of the deals. It could not, on any view, have been in his son's best interests for his father to be involved in drug dealing let alone for him to be present. Claims that their son's best interests are met by the Appellant remaining in the UK are severely undermined by what he did. The Appellant was aged 36 at the time and old enough, if not mature enough, to appreciate the seriousness of what he was doing.
25. The Appellant states that at the time he was trying to clear a credit card debt, no evidence of that debt has been produced. I do not underestimate the pressure that financial difficulties can cause but that is not mitigation. The Appellant also stated that he has attended courses in prison and has learnt from his mistakes. Given that he had managed to avoid committing offences for so long it is difficult to see why the Appellant would need imprisonment and courses when inside to tell him what was blatantly obvious, not only that selling drugs was a serious offence but that taking his son seriously aggravated the situation and was the opposite of his best interests.
26. The question is whether, in all the circumstances, the best interests of the Appellant's children and his son in particular, are such that the

public interest in the Appellant's deportation is outweighed and made disproportionate? To ascertain whether it would be unduly harsh for them to remain in the UK without him requires an assessment of their needs, hampered by the absence of a professional report relating to his son, against what the Appellant, his risk of re-offending and in the context of the public interest in the deportation of foreign criminals.

27. The regime that applies to deportation is now considerably stricter than it had been. The presumption is that the Appellant should, in the ordinary course of events, be deported. His offending was serious and was committed with aggravating features. The Appellant showed himself unable to appreciate his son's best interests or to act upon them and has brought about his removal from the family home to the detriment of his wife and children.
28. The Appellant's behaviour, the public interest in the deportation of foreign national criminals and the deterrent effect and effect of the Rules that now apply in these case lead me to find that the Appellant has not shown that the exceptions to the automatic deportation provisions apply in his case.
29. In making this decision I do not underestimate the difficulties this will cause for the Appellant's wife and children. Contact can be maintained and the family can visit the Appellant in Jamaica, a country they have visited in the past. The evidence does not show that they could not live if they chose, I accept that their circumstances would be more difficult than in the UK but not to the extent that it would be unjustifiably harsh for them to do so.
30. I have considered the Appellant's situation mainly in relation to his son's best interests as his needs are the most significant and if the Appellant could not succeed in relation to his son's position then he would not be able to succeed in relation to his daughter's or wife's circumstances. There is nothing in the evidence that would justify considering the Appellant's case, or those of his family, under Article 8 outside the Rules and I decline to do so."

17. That is why, therefore, the appeal failed.

The Proceedings Before the Upper Tribunal

18. The Appellant, through his representatives, applied for permission to appeal. The grounds were, in summary, to the effect that the First-tier Tribunal had erred in failing to consider whether the Appellant fell within Exception 2 of Section 117C of the Nationality, Immigration and Asylum Act 2002; had failed to adequately consider the situation of the children, particularly the Appellant's son and had inadequately reasoned its conclusions as to that; and had failed to consider Article 8 of the ECHR outside of the Immigration Rules.
19. Permission was granted by a Judge of the First-tier Tribunal on 24th March 2015. The salient part of that grant reads as follows;

"On 29th July 2003 A was sentenced to three years imprisonment for supplying controlled drugs of class A: he had no previous convictions. The NOMS Report described him as being at low risk of serious harm

to the public with a low risk of re-offending. A has been granted ILR and has two British children, a daughter aged 12 and an 11 year old disabled son. Consequently, it is arguable that the judge's comments at [18] that A was in the United Kingdom unlawfully and with a precarious status are inaccurate. However, there is scant evidence of a balancing exercise, no mention of proportionality and he does not deal with paragraph 117A-D save for a reference in [8]."

20. Pausing there, what is said in the grant about the Appellant having no previous convictions is not, strictly speaking, correct though the earlier convictions, referred to above, did not play a part in the decision to make a deportation order. As to the accuracy of the First-tier Tribunal's comments at paragraph 18 of its determination, it seems to me that what it was saying there was simply that the relationship with AB had been formed when the Appellant was in the UK illegally. It seems to me that that must be right because he did not have any lawful status as at the time the two married. I do not think, therefore, that what the First-tier Tribunal said was inaccurate and Mr Sharif did not seek to argue before me that it was.
21. Leading on from the grant of permission there was a hearing before the Upper Tribunal. Representation was as indicated.
22. Mr Sharif, for the Appellant, relied on all three of his grounds though the third was adjusted somewhat. He contended there ought to have been a full consideration as to the Section 115C(5) exception and this was lacking in the determination. As to the second ground, the First-tier Tribunal had recognised that there was a difficulty with respect to the children and had said that this called for a proper assessment as to their needs but had then failed to carry out any such assessment. Whilst there was not an expert report about the children's needs there was information in the witness statements and documents which it failed to consider. As to the third ground, it was right to say that with respect to Article 8 in the context of deportation, the Immigration Rules provided a complete code such that whilst what was suggested in this ground was not technically correct, there was an absence of a full consideration of the relevant circumstances in the context of proportionality, and particularly in relation to the relationship with AB, within the Rules.
23. Mr Mills, for the Respondent, submitted that the Section 117C provisions are reflected in the Immigration Rules relating to deportation such that if the Appellant failed under the Rules, which he did, he would necessarily fail with respect to 117C arguments so there had been no error in failing to specifically address the exemption. The First-tier Tribunal's consideration of the children's situation had been hampered by a lack of evidence of their needs. A decision should not be set aside on the basis of a failure to provide sufficient evidence where it could have been provided and the burden does rest upon an Appellant. In any event it had been accepted that the family had coped whilst the Appellant had been in prison. As to the Appellant's relationship the First-tier Tribunal had been required, by

the Rules and primary legislation, to attach only little weight to it. Essentially, what was being said was that the only potentially persuasive element of the case was the arguments surrounding the son and if those were not sufficiently persuasive then the lesser arguments surrounding AB and the Appellant's daughter were bound to fail.

Discussion

24. As to the first ground, it is clear that the intention behind Section 117C is that the various matters contained therein are to be taken into account by Courts or Tribunals when considering the public interest within the Immigration Rules.
25. The First-tier Tribunal did consider, amongst other things, whether the relationship the Appellant has with AB fell within paragraph 399(b). It clearly concluded that it did not. It is apparent, from what it said at paragraph 18 of the determination that it had concluded the requirements in 399(b)(i) was not met because the relationship had been formed when the Appellant was in the UK unlawfully. It is apparent from what it said at paragraph 29 that it had concluded the requirements in 399(b)(ii) were not met because it considered it would not be unduly harsh for AB to join the Appellant in Jamaica despite its acceptance that the circumstances there would be more difficult than in the UK. It used the term "unjustifiably harsh" but it can, in my judgment, be taken to have had the "unduly harsh" test in mind. In any event there would not appear to be any obvious difference between them and no point about that was taken. In my judgment it is also implicit in what the First-tier Tribunal had to say in the first two sentences of paragraph 29 of its determination that it was also finding it would not be unduly harsh for AB to remain in the UK without the Appellant. Were it not so finding it would not have needed to make reference to the possibility of contact and visits. It is also implicit from its indication that the appeal principally turned upon the interests of the Appellant and AB's son that it had not found the "unduly harsh" requirements as contained in paragraph 399 to have been met. It is clear that, in fact, whilst deciding that even the son's situation did not justify the appeal succeeding under the Rules it did regard that as being the stronger element of the Appellant's claim such that the argument based upon the relationship was, relatively speaking, weaker. Putting all of that together it can be taken to have decided, although it did not expressly say so, that the exception contained within 117C(5) did not apply insofar as it related to the relationship between the Appellant and AB.
26. As to the exception in the context of the children, there is no doubt that the First-tier Tribunal accepted that there was a genuine and subsisting parental relationship with two qualifying children. It is, though, again, apparent that factors relevant to the exception were considered. It is clear from what it said at paragraph 26 of its determination that it was concerned to establish whether it would be unduly harsh for the children to remain in the UK without the Appellant. It is apparent from what it said at paragraph 29, that it had resolved that issue against the Appellant and

that it had also concluded, additionally, that it would not be unduly harsh to expect them to accompany the Appellant to Jamaica if that were wished. In effect, therefore, it had concluded that the effect of the Appellant's deportation on the children would not be unduly harsh such that the exception contained within Section 17C(5) as it relates to the children, did not apply. That, then, disposes of the first Ground of Appeal.

27. As to the second ground, it is certainly right to say, as does Mr Sharif, that the First-tier Tribunal recognised the position of the children and, in particular, the son might be difficult (see paragraph 23), and that ordinarily it would be in the best interests of children to be cared for by both parents in a stable and loving environment (the same paragraph). However, it also found, and it was open to it to do so, that the Appellant had "spectacularly" failed his son by drug dealing and, as it put it "taken him along to one of the deals". It found that claims that the son's best interests were met by the Appellant remaining in the UK were severely undermined by that. As the argument was developed at the hearing, though, Mr Sharif focussed upon what he said was the First-tier Tribunal's failure to look at the material which was before it regarding the children and, in particular, the son and his specific difficulties. In this context, the First-tier Tribunal had specifically noted the absence of an expert report. I would also observe that it might be thought surprising that the existing statement of special educational needs which is said to be in force in respect of the son had not been provided. Whilst that might not have had the same value as an expert report it may well have provided helpful background material. I do not think it can be said that the First-tier Tribunal erred in failing to adjourn for further evidence or for expert evidence regarding the son. The Appellant had competent legal representation and no such application had been made to it. Mr Sharif, though, referred me to the witness statements of the Appellant and AB, in particular that of AB, and said that there was information contained therein which it had either disregarded or failed to properly consider. The First-tier Tribunal did, indeed, have the Appellant's witness statement of 22nd September 2014 and AB's witness statement of 11th August 2014. As he accepted, though, with respect to the former, there is little of a specific nature regarding the son and his particular difficulties contained therein. I do note that at paragraph 7 of the statement it is said that when he "plays up" it requires the input of both parents to calm him. At paragraph 10 he says that both of the children are emotionally dependent upon him. At paragraph 13 he says that it would not be possible to afford the fees for "a specialist school" for his son in Jamaica. That, though, does not amount to detailed evidence. There is, though, some further information contained in AB's witness statement. In particular, at paragraph 6, she says that her son suffers from brain damage and autism, that he is "statemented" (that is a reference to their being in force a statement of special educational needs in respect of him) and that he attends a special school.
28. It does not seem to me that it can be successfully argued that the First-tier Tribunal was not aware of the information contained in the witness statements or did not take it into account. At paragraph 17 of the

determination it referred to the witness statements and it noted that the son is disabled, that he attends a special school and that he receives disability living allowance. Further, it did clearly regard the son's difficulties and the consequent question of his best interests as being the most significant factor in the appeal. In truth, though, the witness statements did not go into a great deal of detail regarding the particular needs of the son nor, indeed, the needs of the daughter and, insofar as it might be argued that the First-tier Tribunal's assessment of those needs was inadequate, it seems to me that it simply did the best it could with the evidence before it.

29. There was a written contention, in Ground 2, to the effect that the First-tier Tribunal had failed to explain how the best interests of the two children would be best served by the Appellant's deportation. However, as Mr Mills correctly points out, that was not at all the test which it had to apply. There was a suggestion, with reference to case law, that the First-tier Tribunal had not properly taken as its starting point the fact that the best interests of children will be for them to be with their parents and to have stability. It is said that it did not give adequate reasons "as to how this is achieved by the Appellant's removal from the United Kingdom". Again, though, that seeks to pose the wrong question. In any event, the First-tier Tribunal did take the view that, ordinarily, it would be in the best interests of children to be with their parents, it said so, but it then explained why such arguments were weakened in light of the view it took as to the Appellant's conduct.
30. In view of all of the above I conclude that Ground 2 does not establish any error of law on the part of the First-tier Tribunal.
31. The third Ground of Appeal was to the effect that the First-tier Tribunal had simply failed to consider the possibility of Article 8 outside of the Immigration Rules. However, in **MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192**, it was said that with respect to deportation cases, the Immigration Rules provide a complete code when considering whether the deportation of a foreign criminal is contrary to Article 8. Thus, strictly speaking, there was no scope for a consideration of Article 8 outside the Rules at all. However, Mr Sharif, in oral submissions, adjusted the argument to the effect that there had not been an assessment, within the Rules, as to whether or not the public interest in deportation was outweighed by other factors which amounted to very compelling circumstances over and above those described in paragraphs 399 and 399A of the Rules. Thus, Mr Sharif had in mind paragraph 398.
32. The First-tier Tribunal, with admirable succinctness, summarised the relevant Immigration Rules at paragraph 4 of its determination. It is clear from what it said there that it appreciated it would have to consider the exceptional circumstances issue if it were to find that paragraphs 399 or 399A did not apply. Its reference to "exceptional circumstances" at paragraph 4 seems to suggest it had, in this particular context, the

Immigration Rules in the form they were prior to 28th July 2014 in mind, otherwise, in all probability, it would have referred to a test of very compelling circumstances and, of course, it had already taken the view, which was not challenged, and which it set out at paragraph 5 of its determination, that it had to apply the Immigration Rules in the form they were as at the date of the hearing (2nd February 2015). If that did amount to any form of error, though, it was one which was in favour of the Appellant in any event.

33. In considering 398 the First-tier Tribunal did not specifically indicate it was conducting a balancing exercise. Hence the reference to the “scant evidence” in the grant of permission to appeal. It did not specifically say it had concluded that there were not very compelling circumstances over and above those described in paragraphs 399 and 399A or even (to refer back to the Rules as they were prior to 28th July 2014) exceptional circumstances. Nevertheless, it had given full consideration to all of the relevant circumstances. It had concluded that it was not unduly harsh for the family to remain in the UK without the Appellant and it had concluded that the evidence did not show they would not be able to accompany him to Jamaica if that is what was wished. It had noted a lack of clear evidence, in the form of an expert report, regarding the son’s best interests. It had accepted that the son had the difficulties it referred to and also that the daughter had been “struggling without him” as a permanent presence in the family home” and that she had not adapted well to life at senior school. It took a dim view of his offending, which it was entitled to do, and attached weight to the public interest in the deportation of foreign criminals, as it was obliged to do, and the deterrent effect that would have on others. It seems to me that it is apparent from what it said that it was, in effect, finding that, the requirements of 399 nor 399A being met, there were not very compelling circumstances or exceptional circumstances. Looked at from another perspective it is clear, from the findings, that if it had specifically asked itself that question it would have inevitably resolved it against the Appellant and that would have been so whichever version of the Rules it was applying.
34. In light of the above I conclude that the third Ground of Appeal is not made out.
35. My having concluded that the decision of the First-tier Tribunal did not involve an error of law I must decide that its decision shall stand. As the First-tier Tribunal itself noted, the regime that applies to deportation is now considerably stricter than it has been. It had to apply the statutory regime in existence and I have had to consider its decision against the background of that statutory regime.

Conclusions

36. The decision of the First-tier Tribunal did not involve the making of an error of law.

37. Its decision shall stand.

Anonymity

The First-tier Tribunal made an order pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed

Date

Upper Tribunal Judge Hemingway