Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01992/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 19 October 2015	**On 7 December 2015**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

RVC
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms A. Fijiwala, Home Office Presenting Officer
For the Respondent: Mr D. Balroop, Counsel instructed by Greenland Lawyers LLP

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves consideration of the welfare of young children. I find that it is appropriate to continue the order but make clear that anonymity has not been granted in order to protect the appellant's reputation following his conviction for a criminal offence. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. For the sake of continuity I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The appellant was granted Indefinite Leave to Remain in the UK on 12 July 2000 following his marriage to a British citizen. On 15 August 2002 he was convicted of four counts of supplying Class A controlled drugs (crack cocaine) and was sentenced to three years imprisonment for each count to run concurrently. On 02 February 2004 the respondent served a decision to make a deportation order. The appellant lodged an appeal against the decision but the appeal was dismissed on 07 May 2004. He was subsequently released on bail and absconded. On 11 March 2005 a deportation order was signed. The appellant did not come to the attention of the authorities until 19 October 2012 when he applied for leave to remain. The application was treated as a request to revoke the deportation order.

3. In a decision dated 10 October 2014 the respondent refused to revoke the deportation order. The appellant appealed. First-tier Tribunal Judge Monson ("the judge") allowed the appeal in a decision promulgated on 02 June 2015 because he was satisfied that deportation would be unduly harsh on the appellant's children and the appellant therefore met the requirements of the exception to deportation contained in paragraph 399(a) of the immigration rules.

4. The respondent's grounds of appeal seek to challenge the decision on the following grounds:

   (i) The First-tier Tribunal failed to give adequate reasons for concluding that deportation would be "unduly harsh" on the appellant's children.
   (ii) The First-tier Tribunal failed to have regard to the factors contained in section 117B and 117C of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002").
   (iii) The First-tier Tribunal Judge failed to give wider consideration to the public interest, and the relevant authorities, in his assessment of whether deportation would be "unduly harsh" on the appellant's children.

Decision and reasons

5. After having considered the grounds of appeal and oral arguments I am satisfied that the First-tier Tribunal decision did not involve the making of an error of law.

6. The First-tier Tribunal Judge gave a detailed decision in which he set out the relevant legal framework, including the deportation provisions contained in the immigration rules and in primary legislation (including section 117A-D of the NIAA 2002) [2-8]. He went on to outline in some detail the factual background to the case including the appellant's criminal conduct, the judge's sentencing remarks, the appellant's immigration history and his family circumstances [11-25]. The judge then considered the reasons given by the respondent for refusing to revoke the deportation order [26-32]. He set out the evidence given by the witnesses at the hearing and summarised the submissions made by both parties [33-43]. The appellant and the mothers of both of his children gave evidence. He then went on to discuss the issues and made his findings over the next seven pages of the decision [44-66].

7. The judge found that the appeal pivoted on whether the appellant met the requirements of paragraph 399(a) of the immigration rules [44]. He found that there was insufficient evidence to conclude that the appellant's two children were British citizens by birth despite the concession made by the respondent in the decision letter but accepted that they were likely to be qualifying children who had acquired British citizenship as a result of their length of residence in the UK. Copies of the British passports of the two children were in evidence before the Tribunal so there was no dispute as to their nationality. The children have different mothers. R is 14 year old and L is 13 years old.

8. In considering the requirements of paragraph 399(a) of the immigration rules the judge began by noting that the decision letter conceded that it would be unduly harsh for the two children to live in the appellant's country of origin [51]. He nevertheless went on to analyse whether on the underlying facts this concession was correctly made. He found that it would be unduly harsh to expect L to live in the country to which the appellant was to be deported because the appellant was not in a relationship with her mother. He concluded that given her citizenship status, age and ties to the UK it would be unduly harsh and that the concession made in the decision letter was sustainable [52].

9. The judge went on to consider whether it would be unduly harsh for the appellant's younger child to live in the country to which he was to be deported [53]. He observed that if the appellant was in a genuine and subsisting relationship with R's mother as claimed then it was arguable that it would not be unduly harsh on R to relocate to Jamaica with his parents. However, for the reasons given in paragraph 50 of the decision, which are unchallenged, the judge was not satisfied that the appellant was still in a genuine and subsisting relationship with R's mother. For similar reasons to the other child he concluded that it would be unduly harsh to expect R to live in the country to which the appellant would be deported in circumstances where his mother would remain in the UK.

10. Although paragraph 8 of the respondent's grounds make a general assertion that the appellant does not meet the requirements of paragraph 399(a)(ii)(a) or (b) no meaningful challenge has been put forward to the

First-tier Tribunal Judge's findings relating to the first limb of the test. The judge did not just accept the concessions already made in the decision letter and examined the relevant circumstances in a balanced way before coming to the conclusion that it would be unduly harsh for either child to be expected to live in the country to which the appellant would be deported. In light of the particular factual matrix of this case those findings were open to the judge to make and disclose no material errors of law.

11. As the judge pointed out in paragraph 55 of the decision the crux of the case turned on whether it would be unduly harsh to expect the children to remain in the UK without the appellant if he were to be deported. He weighed the circumstances and accepted that the case in relation to L was weaker than the case for R because she did not live with her father. The role that her mother played as her primary carer would not be disturbed by his removal. While the judge noted that there was no independent evidence to show that the appellant lived with R he heard evidence from the witnesses to the effect. He took into account the fact that the oral evidence was unchallenged and for these reasons accepted on the balance of probabilities that the appellant lived in the same household as R and his mother. He accepted that there was credible evidence to show that the appellant shared responsibility for R's care and upbringing. While he noted that R's mother was primarily responsible for R's maintenance and accommodation he accepted that it would be contrary to R's best interests to lose direct and regular contact with his father, which he concluded was also true of L, albeit to a lesser extent [55].

12. The judge summarised the main findings of an expert report prepared by an approved social worker who specialised in mental health work [56-60]. She assessed the relationship between the appellant and his two children and their mothers. She concluded that there were already signs that R had taken the news of his father's possible deportation very badly and that his permanent removal from the UK was likely to cause "significant detriment" in the form of lasting and damaging effects on the children. She concluded that it was in the best interests of both children for their father to remain in the UK. The judge noted that in so far as those observations went they were uncontroversial and commented that he was sceptical about the claim that the children have no contact with other relatives in the appellant's country of origin 60]. In so far as those findings went they were well balanced and considered the positive and the negative aspects arising from the report.

13. The First-tier Tribunal Judge went on to remind himself that the best interests of the children were of substantial importance but were not determinative of the question of whether it would be "unduly harsh" for them to remain in the UK without their father. He directed himself to relevant case law of the Tribunal in *MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 223. The decision does not give quite the correct citation but this minor error is immaterial because the Tribunal nevertheless took into account the correct case [61-62]. In citing paragraphs 46 and 47 of *MK (Sierra Leone)* the judge quite clear had in

mind the only guidance available at the time relating to the meaning of "unduly harsh" for the purpose of the immigration rules:

> "45. The determination of the two questions which we have posed in [44](d) above requires an evaluative assessment on the part of the Tribunal. This is to be contrasted with a fact finding exercise. By way of self-direction, we are mindful that "*unduly harsh*" does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "*unduly*" raises an already elevated standard still higher. Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less than cruel.
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> 46. The final question is whether it would be unduly harsh for either child to remain in the United Kingdom without the Appellant. This is a different question from that considered in [46] above. We have identified a range of facts and considerations bearing on this issue. Once again, an evaluative judgment on the part of the Tribunal is required. In performing this exercise we view everything in the round. The Appellant plays an important role in the lives of both children concerned particularly that of his step son. He is the provider of stability, security, emotional support and financial support to both children. We have rehearsed above the various benefits and advantages which he brings to the lives of both children, coupled with his personal attributes and merits. We remind ourselves of section 55 of the 2009 Act. We acknowledge the distinction between harsh and unduly harsh. We remind ourselves again of the potency of the main public interest in play, emphasised most recently by the Court of Appeal in SSHD v MA (Somalia) [2015] EWCA Civ 1192. The outcome of our careful reflections in this difficult and borderline case and in an exercise bereft of bright luminous lines is as follows. Balancing all of the facts and factors, our conclusion is that the severity of the impact on the children's lives of the Appellant's abrupt exit with all that would flow there from would be of such proportions as to be unduly harsh."

14. With that guidance in mind the judge weighed up the relative strengths and weaknesses of this appellant's case to that of the appellant in *MK (Sierra Leone)*. He observed that the appellant's offending was considerably less serious and the position of the child was stronger than in *MK (Sierra Leone)* but went on to weigh the serious fact that the appellant had absconded, which contrasted with the immigration history of the appellant in *MK (Sierra Leone)* [64]. The judge summed up by taking into account public interest factors such as the seriousness of the offence and the fact that the appellant had not reoffended, which he considered justified the original assessment that he was at low risk of reoffending. The judge made clear that the seriousness of the offence was sufficient reason for the respondent to justify the order being maintained. However, after having made a "holistic assessment" of the relevant factors he concluded that deportation would be "unduly harsh" on the appellant's two children. He explained that in light of the unchallenged expert evidence he was satisfied that the abrupt removal of the appellant from the children's lives would not merely damage them but "cause a gaping chasm in their lives to their serious detriment" [65].

Discussion

15. In order to assess whether the First-tier Tribunal Judge erred in his consideration of paragraph 399(a) it is necessary to consider the meaning of the phrase "unduly harsh".

16. In *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 the Court of Appeal concluded that the immigration rules relating to deportation provided a "complete code" to Article 8. This was largely because the provisions contained in paragraph 398 of the immigration rules were deemed to be sufficiently wide to encompass a full proportionality assessment that was compliant with Article 8 of the European Convention. The plain wording of paragraph 398 makes clear that a full balancing exercise should be conducted because it states that "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". The respondent's own guidance recognises that the exceptions relating to family and private life are separate considerations and that the assessment of the cumulative effect of all the relevant factors is likely to take place within the wider ambit of paragraph 398 of the immigration rules: see paragraph 6.6 "Chapter 13: Criminality guidance in Article 8 ECHR cases".

17. Part 5A of the NIAA 2002 introduced a statutory requirement for courts and tribunals to have regard to certain factors when considering "the public interest question". Nothing in the wording of sections 117A-D would appear to undermine the assessment under the immigration rules, which remain a complete code due to the broad nature of the enquiry under paragraph 398. By virtue of section 117A(2) a court or Tribunal *must* have regard to the factors outlined in sections 117B and 117C (in deportation cases) when "considering the public interest question". Section 117A(3) goes on to define "the public interest question" as "the question of whether an interference with a person's right to respect of private life is justified under Article 8(2)". The definition contained in section 117A(3) shows that the "public interest question" is intended to be the same as the proportionality assessment under Article 8(2). The wording of section 117A(3) reflects the long established case law relating to the proper interpretation of Article 8 of the European Convention: see questions (iv) and (v) of Lord Bingham's five stage approach outlined in *R v SSHD ex part Razgar* [2004] 3 WLR 58.

18. It is clear that the combined effect of the UK Borders Act 2007, section 117C of the NIAA 2002 and the amendments made to Part 13 of the immigration rules now emphasise the significant weight that should be given to the public interest in deportation of foreign criminals. The wording of paragraph 398 of the immigration rules reflects the basic principle outlined in section 117C(1) that the deportation of a foreign criminal is in the public interest. The sliding scale of offending contained in paragraph 398(a)-(c) and sections 117C(4)-(6) recognises the principle outline in section 117C(2) that the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation. The sliding scale

shows that a person who has been sentenced to a period of imprisonment of more than four years will only be able to resist deportation if there are "very compelling circumstances" that outweigh the public interest. In cases involving sentences of less than four years the scheme recognises that Article 8 rights might still outweigh the public interest in deportation in certain circumstances where the foreign criminal meets the requirements of the exceptions contained in paragraphs 399 and 399A (reflected in sections 117C(4)-(5)).

19. In *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 the Tribunal found that the plain wording of the rule including the phrase "unduly harsh" does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual. The focus is solely upon an evaluation of the consequences and impact of deportation on the individual concerned. Whether the consequences of deportation will be "unduly harsh" involves a considerably higher threshold than the consequences merely being "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging". The consequence for an individual will be "harsh" if they are "severe" or "bleak" and they will be "unduly" so if they are "inordinately" or "excessively" harsh taking into account all the circumstances of the individual. The Tribunal's interpretation in *MAB (USA)* was broadly consistent with the observations in paragraph 46 of *MK (Sierra Leone)* as to the demanding threshold required to show that a deportation decision is "unduly harsh" on a child.

20. In *KMO (section 117 – unduly harsh) Nigeria* [2015] UKUT 00543 the Tribunal took a different approach. The Tribunal conducted an analysis of the statutory framework, including the provisions of section 117A-D of the NIAA 2002. The Tribunal concluded there was nothing in the rules or statute to eliminate from the assessment of what is "unduly harsh" considerations of the seriousness of the offence committed by the foreign criminal. The Tribunal concluded that the phrase anticipated an evaluative assessment that should include consideration of the seriousness of the offence in order to reflect the statutory considerations outlined in section 117C. The Tribunal concluded:

> "24. The immigration rules, when applied in the context of the deportation of a foreign criminal, are a complete code. Where an assessment is required to be made as to whether a person meets the requirements of para 399 of the immigration rules, as that comprises an assessment of that person's claim under article 8 of the ECHR, it is necessary to have regard, in making that assessment, to the matters to which the Tribunal must have regard as a consequence of the provisions of s117C. In particular, those include that the more serious the offence committed, the greater is the public interest in deportation of a foreign criminal. Therefore, the word "unduly" in the phrase "unduly harsh" requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh."

21. On the face of it the Tribunal's conclusions in *KMO (Nigeria)* would appear to accord to some extent with the broader approach taken in paragraph 47 of *MK (Sierra Leone)* but as the Tribunal pointed out the issue did not form

the focus of argument in *MK (Sierra Leone)* and was arguably immaterial to the case given the fact that the appellant had apparently been sentenced to a period of imprisonment of over four years and would not have been eligible to rely on the exceptions to deportation contained in paragraph 399(a) (reflected in section 117C(5)) in any event.

22. I find that the reasoning of the Tribunal in *MAB (USA)* as to the focus of the enquiry under paragraph 399(a) and (b) of the immigration rules (reflected in section 117C(5) NIAA 2002) is more persuasive. In clear contrast to the wording of paragraph 398 the plain wording of paragraph 399 is not phrased in a way that gives rise to a full proportionality assessment. It does not state that the impact on the child or partner must be weighed against the public interest or against the seriousness of the offence. Either a decision to deport is unduly harsh on an individual or it is not. Seeking to weigh the consequence of deportation against the seriousness of the offence does not make it any more or less harsh on an individual.

23. The partial balancing exercise proposed by the Tribunal in *KMO (Nigeria)* does not equate to a full proportionality assessment, which in order to be compatible with Article 8 of the European Convention must weigh <u>all</u> the relevant circumstances in a particular case. For the purpose of Article 8 a partial proportionality assessment is no proportionality assessment at all.

24. The Tribunal in *KMO (Nigeria)* was correct to point out that the statutory framework outlined in sections 117A-D of the NIAA 2002 reflects the significant weight that should be placed on the public interest in deportation. Section 117A(2) makes clear that a court or tribunal "must have regard" to the factors outlined in sections 117B-C. The scheme of paragraphs 398, 399 and 399A of the immigration rules is broadly reflected in the provisions contained in section 117C but the statutory provisions do not stand alone as a complete code to Article 8. The fact that the scheme contained in the immigration rules and Part 5A of the NIAA 2002 is tautological in nature does not detract from the plain wording of section 117A(2), which makes clear that the provisions only apply when a court or tribunal comes to consider the "public interest question" i.e. the Article 8(2) balancing exercise.

25. It is established law that deportation decisions should be considered through the lens of the immigration rules. The respondent has chosen to set out certain "exceptions" to the general principle that it is in the public interest to deport a foreign criminal. Unlike paragraph 398 the plain wording of those exceptions does not import the language of proportionality or expressly state that any particular matter should be weighed against the public interest. As has been recognised by the Tribunal in all three of the above cases the phrase "unduly harsh" provides a demanding threshold before the exception to deportation is engaged. The very nature of such a stringent test reflects the weight that is normally given to the public interest in deportation but it does not follow that the phrase imports a balancing exercise. The immigration rules are

said to strike a fair balance that is compliant with Article 8 of the European Convention: see policy statements outlined at paragraphs 11-13 of *MF (Nigeria) v SSHD* [2014] 2 All ER 543.

26. In cases involving less serious criminality the rules (echoed in the statutory framework) accept that if the effect of deportation is "unduly harsh" on a partner or child the foreign criminal will meet the requirement of the exception. The focus of the enquiry is quite clearly on the effect that deportation would have on qualifying family members, which must be sufficiently serious to engage the operation of the exception.

27. While the important principles regarding the weight to be given to the public interest in deportation underpin the immigration rules and statutory framework, on the face of the wording, paragraph 398 appears to be the only provision which directly engages the "public interest question" for the purpose of section 117A(2) NIAA 2002. The provision places significant weight on the public interest that will only be outweighed by other factors in "very compelling circumstances". However, in order to be compliant with Article 8 of the European Convention, at its heart, paragraph 398 includes the question of "whether an interference with a person's right to respect for private and family life is justified under Article 8(2)" as outlined in section 117A(3). It is at this point that the factors contained in section 117B and 117C must be considered by a court or tribunal.

Findings relating to this appeal

28. The respondent's grounds of appeal submit that the appellant did not meet the requirements of the immigration rules and argue that the First-tier Tribunal Judge was not entitled to conclude that the effect of deportation was unduly harsh on the facts of this case. It is also argued that the judge erred in failing to take into account the factors outlined in section 117B and 117C NIAA 2002 and failed to give sufficient weight to the public interest in deportation.

29. It is apparent from the above analysis that it was not necessary for the judge to conduct a partial balancing exercising as part of is assessment of the "unduly harsh" test. Even if I am wrong in relation to the legal position it is apparent that the judge clearly had in mind the full circumstances of the case including the serious nature of the offence and the appellant's immigration history. He set out the statutory framework at the beginning of this decision. The test of "unduly harsh" is the same whether considered through the lens of the immigration rules or the statutory framework. The judge made reference to *MK (Sierra Leone)* and it is quite clear that the stringent meaning of the phrase "unduly harsh" was at the forefront of his mind when he made his assessment. He was entitled to take into account the citizenship, age and family circumstances of the children as well as the unchallenged expert evidence of the social worker. He heard evidence from witnesses and was in a position to assess the effect of deportation in light of the other evidence before him. For these reasons I conclude that the grounds are phrased in terms of a

disagreement with the First-tier Tribunal decision and do not disclose any material errors of law.

30. For the reasons given above I conclude that the First-tier Tribunal did not involve the making of an error on a point of law and the decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error on a point of law

The First-tier Tribunal decision shall stand

Signed Date: 30 November 2015
Upper Tribunal Judge Canavan