



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/01922/2013

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19<sup>th</sup> April 2016

Determination Promulgated  
On 9<sup>th</sup> May 2016

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

V O A  
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms G Capel, Counsel instructed by University of Law Legal Advice Centre

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

**DECISION AND DIRECTIONS**

*Introduction*

1. The appellant was born on 19<sup>th</sup> October 1964 in the Democratic Republic of Congo to Nigerian parents. He arrived in the UK illegally in January 2000. He has not

had permission to enter or remain at any point, but has been continuously resident since this time.

2. In December 2012 the appellant made a human rights application to remain in the UK on the basis of his having four biological children, two step-children and a partner in the UK. This application was refused and appeal lodged, but the decision was later withdrawn by the respondent.
3. In February 2013 the appellant was convicted of a number of fraud offences relating to a false instrument, a driving licence and statements to obtain benefits and sentenced to 16 months imprisonment. On 12<sup>th</sup> September 2013 the respondent issued a decision to deport and the appellant appealed. A deportation order was signed against him on 2<sup>nd</sup> September 2013. His appeal against the deportation decision was dismissed by a First-tier Tribunal Panel consisting of Judge of the First-tier Tribunal Pullig and Dr P L Ravenscroft (non-legal member) in a determination promulgated on the 15<sup>th</sup> September 2014.
4. Permission to appeal was granted by Upper Tribunal Judge Rintoul on the basis that it was arguable that the Panel had erred in law as it was arguable that it had not been considered whether the appellant could meet paragraph 399 (a) of the Immigration Rules. For the reasons set out in my decision appended at Annex A of this decision I set aside the decision of the First-tier Tribunal on the basis of errors of law with no findings preserved.
5. The primary question for this Tribunal is whether the applicant falls to be deported as a foreign criminal or whether in accordance with paragraph 399(a) of the Immigration Rules his deportation is not required in the public interest as it would be unduly harsh for his four biological children and two step-children to remain in the UK without him. It is accepted by the respondent that it would be unduly harsh for all the children to have to live with the applicant in Nigeria. It is accepted on behalf of the appellant that he cannot succeed on the basis of the Immigration Rules relating to a partner at paragraph 399(b) as the appellant had not lived with valid leave in the UK for 15 years prior to the date of the immigration decision. The appellant equally cannot fall within the private life exception at paragraph 399A of the Immigration Rules as he has not lived lawfully in the UK for most of his life. It is however argued by the appellant in the alternative that there are very compelling circumstances over and above those described in paragraph 399 and 399A of the Immigration Rules, enabling this appeal to succeed under paragraph 398 of the Immigration Rules, if the Tribunal finds that the argument under paragraph 399(a) of the Immigration Rules does not succeed.
6. The test for “unduly harsh” in MAB (para 399, “unduly harsh”) USA [2015] UKUT 00435 is said to be one of inordinate or excessive severeness or bleakness for the children remaining in the UK without the appellant, and that this test focuses on the children alone. In KMO (section 117 - unduly harsh) Nigeria [2015] UKUT 00543 the Upper Tribunal holds that unduly means that regard is had to

the seriousness of the offences committed by the foreign criminal when considering if the impact on the child is excessively harsh. In the decision of AB (paragraph 399(a) [2015] UKUT 657 Upper Tribunal Judge Gill opted to follow KMO. The respondent submits that this is the correct approach, and those representing the appellant submit that he can succeed on either test. I indicated that I would at least primarily follow KMO in determining this appeal.

7. Since the hearing of this appeal the Court of Appeal in MM (Uganda) v SSHD 2016 EWCA heard on 20<sup>th</sup> April 2016 held that: "The Immigration Rules were a complete code for assessment of an art.8 claim with regard to deportation, LC (China) v Secretary of State for the Home Department [2014] EWCA Civ 1310, [2015] Imm. A.R. 227 followed. In both appeals, the issue was the meaning of "unduly harsh". The reference to "unduly harsh" in s.117C(5) and r.399 had the same interpretation. It was an ordinary English expression, and its meaning was coloured by its context. That context invited emphasis on two factors: the public interest in removal of foreign criminals, and the need for a proportionality art.8 assessment. The importance of removing a foreign criminal in the public interest was emphasised in s.117C(1). Under s.117C(2), it was clear that the more serious the offence committed by a foreign criminal, the greater the public interest in deportation. That steered the court towards a proportionality assessment. Accordingly, the more pressing the public interest in removal, the harder it was to show its effects would be unduly harsh. The relevant circumstances included the deportee's criminal and immigration history. The UT had wrongly decided MAB, MAB overruled. In determining whether deportation was unduly harsh, a court or tribunal had to have regard to all the circumstances, including the deportee's criminal and immigration history. Further, in M's case, the tribunals had not considered s.117C(4), namely whether M had been lawfully resident in the UK for most of his life and was socially and culturally integrated in the UK."
8. The appellant, his current partner MM and his sister LO gave oral evidence to the Tribunal. At the end of the hearing I reserved my determination.

#### *Evidence - Remaking*

9. The evidence is, in summary, as follows.
10. The appellant claims his true name is JRN. He says that he gave the name VA when stopped by police in 2004 when he was driving a car owned by this man, and was misunderstood to be that gentleman when convicted of driving with excess alcohol in 2004. He was unaware about reference to the name VA as an "aka" on the human rights application made in November 2012 by solicitors as he was in detention at that time. The name M had become associated with him after his use of the name V A later in 2004 as he had been given this as an additional name to his true names on an improperly issued Refugee Convention travel document (as it was issued on the basis he was spouse of Ms T M a person recognised as a refugee in the UK but not someone known to the appellant) by a

corrupt UK Border Agency's member of staff. This is the matter which led to the appellant's index convictions set out below. As the name M was on the travel document he used for identity purposes from 2004 it was also entered on his children's (JN, AN and ZN) birth certificates after his correct name.

11. The appellant was arrested on 9<sup>th</sup> November 2012 for the index offence of having an improperly issued Refugee Convention travel document and a driving licence in the name of J M. He was convicted, following a guilty plea, in the name of J R of making a false statement / false representations to obtain a false document and false benefits claims for child benefit and child tax credit and sentenced to one year and four months in prison. In her sentencing remarks her honour Judge Williams said: "Since the year 2003 you have been living a lie in the United Kingdom". The appellant pleaded guilty to the offences, and behaved well in prison using his time well through education and work whilst in custody. The appellant was in custody as a result of his criminal conviction from 9<sup>th</sup> November 2012 until 23<sup>rd</sup> July 2013, but was then held in detention under Immigration Act powers until mid January 2015, at which point he was released on bail. He accepts he also has previous convictions for driving offences: in August 2004 he was convicted of driving with excess alcohol and in November 2012 of driving without a licence and insurance and with excess alcohol. He received a fine and disqualification from driving for each of these offences.
12. The evidence in the prison visiting documentation is that the appellant was visited by MM (his current partner) and his daughter with MM, ANM; and also by RS (his previous partner) and his children by RS, JN, AN and ZN; and also by JA the pastor of the church attended by the appellant and RS; and the appellant's half sister LO. Prison phone records show calls by the appellant to MM on both a mobile and landline, and also to RS. There are also emails to the appellant from his partner MM and former partner RS whilst he was in prison. The appellant did not have the facility to send emails himself whilst in prison. There are also letters and cards to and from the appellant and MM whilst he was in prison.
13. The documentation relating to the appellant's time in prison includes five character references and eleven certificates for educational achievements
14. The appellant states that he believes he was born in the Democratic Republic of Congo. He knows little about his father (whom he believes was a citizen of Nigeria) who died when he was young, but his mother was a citizen of Nigeria and he returned to live in Nigeria when he was about 6 years old, and he then grew up in Nigeria. He has a maternal half-brother who now lives in the USA. He has a paternal half-sister (whom he did not know well whilst he was growing up in Nigeria as his mother was estranged from his paternal family), LO, who now lives in Romford with her family and is a British citizen. He lived in Nigeria with his mother until she died in 1993. He completed his schooling and studied for most of an HND in administration there at university. He also worked in a hotel. He has been interviewed by officials from the Nigerian High Commission and the DRC Embassy on at least four occasions whilst in detention but neither have been

able to document him (and confirm his citizenship) to his knowledge. He has not obtained any documentation regarding his true identity as he has no relatives left in Nigeria to assist with this process.

15. After the appellant's mother's death he left Nigeria in 1993 and travelled to Italy, and then Holland and arrived in the UK in January 2000 on false documentation. He worked in the security industry in the UK, and relied upon the false travel document for this purpose from 2004. He worked until his arrest in 2012.
16. In 2007/8 the appellant met his partner R S, a Nigerian citizen who had been brought up in the UK, and they started to cohabit in 2009. She had a daughter born in 2005 called H F. The appellant and RS have three children JN born in 2010 and twins AN and ZN born in 2011. These children have indefinite leave to remain and are entitled to register as British citizens. The appellant played a full role in the life of his children (although his twins were conceived at a time when he had already started a new relationship with MM), and looked after them every morning until he went to work at 11am until his arrest in November 2012. His former partner, RS, was and remains angry that he left her and that since his arrest he has not been able to provide for her and his children with her financially.
17. After his arrest RS lost the accommodation which the appellant had been paying for, and had to be accommodated in temporary accommodation by the local authority until she was re-housed by them in Chatham, Kent. JN was two and a half years old when the appellant was first imprisoned. RS visited him on eight occasions when he was in prison, each time bringing the children. When he was first released RS was still living in London and he took the three children to school and sometimes brought them to his home with MM. They spoke on the phone every day; would visit them at their home three times a week; and he would see them at church every Sunday. The appellant denied that he had told the previous Tribunal in 2014 that he had not seen the children since 2012: the prison visit evidence showed this to be untrue and he had not said this, for instance RS and the children visited him on his 50<sup>th</sup> birthday in prison on 19<sup>th</sup> October 2014 in Brook House.
18. In November 2015 RS moved to Chatham. Since this time the appellant speaks regularly to the children on the telephone (at least three times a week), but only sees them once a fortnight at church facilitated by the pastor for an hour and sometimes at RS's sister's house for a period of up to two hours. The appellant and the children are very distressed by their limited contact, but he is not working so cannot afford to visit them more, and if he has travel money from his charity work for the church he uses it to buy them things. If the appellant is allowed to remain in the UK he plans to help RS rent a property in London near her sister, which is what she would like, and then see his children from her more frequently. He has recently had calls from his son JN's teacher as he is refusing to go into class as he wants to see his father. The appellant has convinced his son he should go into class on the telephone. He believes that RS does support him staying in the UK, even though she is angry with the appellant and often frustrates visits or

limits their time, because of her fears for the impact on JN. However she has refused to be involved with the case before the Tribunal.

19. As set out above at the end of 2010 the appellant's relationship with RS broke down and he started to cohabit with a new partner, MM who is a British citizen born and brought up in the UK of Jamaican parentage. She is a community nursery nurse working with a health visiting team in London. She had a previously relationship which ended in domestic violence with a man called JA. From this relationship she has two British citizen children: a daughter MA born in 1997 and a son AA born in 2002. MM and the appellant have a daughter ANM born in 2012. MM and the appellant have an on-going committed and happy relationship, and are engaged to be married. The appellant currently deals with the household tasks and looks after ANM when she is not at nursery (she currently attends nursery three days a week). MM believed the appellant was lawfully in the UK until 2012 when he was stopped for a driving offence.
20. By the time the appellant was arrested both MM's older children regarded the appellant as a father figure, and had a trusting relationship with him. MM and the appellant did not tell her older children that he had been sent to prison, but said that he was in Nigeria. The appellant continued to talk to MA and AA on the telephone during his time in prison/detention. MM visited the appellant in prison every two weeks, and she would always take ANM with her on these visits.
21. When the appellant was released from prison he resumed living with MM and the three children (MA, AA and ANM). His relationship with his two step children remains very strong. MA is studying for A level examinations in 2017, and is hoping to go to university and become an architect. AA is at school, and does sports together with the appellant. ANM is very attached to her father as he is her principal carer. He does not believe that MM would be able to cope on her own if he were forced to return to Nigeria. The appellant says it is impossible for him to express how much he had missed all of his children in detention, and the joy at being reunited with them.
22. The appellant gave evidence that Mr Horrocks, the social worker, had been with the family for about 4 hours from about 10am on 22<sup>nd</sup> March 2016. He had only spoke to MM, and seen ANM as the older children (MA and AA) were at school. Mr Horrocks had spoken to RS on the telephone but not the children, ZN, AN and JN, who were also at school.
23. MM adds in her evidence the following information. She had understood the appellant was lawfully present when she commenced her relationship but she knew that M was not his true name, and as a result they went to solicitors to investigate and for legal advice. It was after the second visit to the solicitor that the appellant was arrested. Whilst the appellant was detained this had a deep affect on her older children. At that time they just existed day to day but now they are content and able to focus on their school work. She struggled emotionally and with financial matters too. MM could not relocate her family to Nigeria as she

looks after her mother, who is elderly and lives in the UK and has a secure job with the NHS. If she remained in the UK with the children without the appellant it would be traumatic for them. She believes it would affect her older children and prevent them doing well at school when currently they are high flyers. MA had repeated a sixth form year whilst the appellant was in prison, which she partially attributed to the appellant's imprisonment because of the stress and emotional upset. She says the appellant is a good role model for them all. She is afraid that her son AA might turn to gangs without the appellant with them in the UK as there is a shortage of male role models in her family. ANM is very close to her father and his deportation would have a terrible impact on her emotional well-being. She believes that relations between the appellant and RS are worsened by the fact that he cannot support her financially at the current time. MM would be happy for the children with RS to resume visiting at their home as they used to do if RS were to permit this. She believes that the appellant had contact with RS and his children with her during his period of detention and imprisonment because he told her this and saw pictures taken with them on his birthday. JN, AN and ZN had come to her house twice in 2015 and stayed for a few hours on each occasion. They had not been to the house in 2016. Mr Horrocks had attended at their home for 3 hours from 10.30am for the social work report.

24. The appellant's half-sister, LO, (they have the same father), gave evidence confirming the bond between the appellant and his children, and current partner. She had visited the appellant in prison and detention on lots of occasions, including some with MM, and spoken to him on the telephone during this time. She believed RS, JN, AN and ZN had visited the appellant in prison and whilst he was in detention centres. She was aware that there had been contact between the appellant and these children but currently there was conflict with RS. She had remained in close contact since the appellant came out of detention, and spent Christmas with the appellant and MM, and both their families.
25. LO also gave evidence that the appellant's true name is J R N, and that N was her maiden name. (At the end of the hearing Mr Melvin confirmed that her naturalisation certificate, which he found in the appellant's file, showed N as her maiden name.) LO explained that the appellant had been born from an extra marital affair their father, a Nigerian citizen, had with his mother. Their father had died when she was young, in 1971, and she had had limited contact with the appellant as her paternal grandmother, with whom she lived, refused to acknowledge him due to his illegitimacy. She did not know the appellant's mother but understood she was dead. She no longer has any significant family (except for family from her husband) in Nigeria, as she had no other siblings. She knew the appellant went to school in Nigeria but lost contact with him in 1985 when she travelled to the UK, and only remade contact by chance in 2004.
26. MA and AA provide a signed letter about how they would be heart broken if the appellant were to be forced to leave the UK, and how they see him as vital to their educational success. There is also a letter from a JA, presiding minister at the appellant and RS's church confirming that he facilitates contact between the

appellant and the appellant's three children with RS, and that he believes they have a close bond and the appellant's removal would have a negative impact on their emotional well-being. There is a letter from RS dated December 2013 supporting the appellant's appeal on the basis that the appellant had a loving relationship with all of their children, JN, AN and ZN, and that it had been very difficult for all of them coping without him.

27. There are also photographs of the appellant with RS and her four children (JN, ZN, AN and her older daughter HF) taken on HF's tenth birthday which would be in 2015, and of the appellant with JN, ZN, AN on his fiftieth birthday in October 2014. There are other photographs on other occasions of the appellant with JN, ZN and AN some of them in school uniforms, some clearly at home eating and playing and others in casual clothes. There is also a letter from a Ms A A with a passport copy stating that she lived with the appellant and RS and their children and confirms that he has a loving relationship with his children, paid bills and provided for his children. Other photographs show the appellant with MM and their daughter ANM, and with the other older half-siblings MA and AA. There are also receipts for the appellant giving money to RS whilst in detention, and transfers to her from the appellant and MM's joint bank account.
28. The opinion of Mr Peter Horrocks, independent social worker is that the appellant has strong emotional bonds to all six children and is fully committed to being a positive father figure.
29. He assesses all of the children as having the same physical, emotional and educational needs as children of their age. He notes that JN, AN, ZN, MA and AA have all had to deal with relationship breakdown in their lives, MA and AA as a result of the breakdown of the relationship with their biological father in circumstances of domestic violence which research shows can have a significant psychological impact.
30. Mr Horrocks is concerned that MA and AA have taken on a significant degree of responsibility for their mother, MM's, emotional well-being and function as young carers. It is only the presence of the appellant in their mother's lives which alleviates this burden. Mr Horrocks is of the opinion that for the appellant to be removed would be likely to mean that both father figures in MA and AA's lives would have been proven to be untrustworthy and unreliable figures which would be likely to impact on their ability to develop strong and loving relationships in the future, and might lead to AA turning to the gang culture in his local area. He believes the removal of the appellant would cause them emotional harm. He believes that ANM would be "severely distressed and traumatised" and suffer "emotional harm" by the appellant's removal as she would lose one of her primary carers and would also have to deal with her mother's loss. JN has already demonstrated a degree of distress by his separation and this could be compounded by the appellant's permanent removal, he is also of the opinion that the permanent separation of the appellant and JN, ZN and AN would cause them emotional harm.



31. Additional documentation confirms the appellant drops ANM at nursery and MM's employment with the NHS, the appellant's previous work for security firms including a letter confirming his ten years employment in November 2010 and payslips. There are also bank statements, health letters, HMRC correspondence and utility bills showing MM and the appellant sharing a common address.

#### *Submissions - Remaking*

32. Mr Melvin relied upon the refusal letter, his skeleton argument and oral submissions. In summary he submits as follows.
33. In relation to the identity of the appellant he maintained that the appellant is VOA as when arrested for driving offences in 2004 the appellant had given this name, and maintained this history at an interview with the UK Border Agency in the same year. Reference to this name also appeared as an "also known as" on his human rights application made in 2012. Mr Melvin maintained the appellant had failed to provide any documentary evidence of his claimed true identity JRN which he could have done. Mr Melvin did however accept that LO, the appellant's half-sister, was a credible witness and that the interview with the UK Border Agency from 2004 was not in the respondent's bundle and could not be located in his file.
34. Mr Melvin submits that the appellant should not be seen as a credible witness given his criminal convictions for fraud; his immigration history of entering unlawfully and failing to lawfully regularise his stay; his illegal working; his lack of clarity as to whether he is a citizen of the DRC or Nigeria; his failure to fully accept that he had acted unlawfully in taking the Convention Travel document issued by a corrupt UK Border Agency staff member when clearly it did not have his correct name on it; the appellant's contradictory evidence on contact with the children he has with RS today and before the Tribunal in 2014; and because he had claimed the social worker had spent longer with the family than his partner, MM had recalled. He accepted that MM and LO should be seen as credible witnesses, whilst noting that LO had not produced evidence herself of her maiden name and that her evidence regarding the appellant's contact with his children with RS was second hand.
35. The refusal letter identifies that in accordance with s.32 of the UK Borders Act 2007 it is in the public interest to deport the appellant as a foreign criminal. It follows that the appellant's deportation is conducive to the public good under paragraph 398 (b) of the Immigration Rules as he has been sentenced to a period of imprisonment between twelve months and four years. Consideration is then given as to whether the appellant deportation is not required in the public interest because paragraph 399(a) of the Immigration Rules applies due to the appellant's relationship with qualifying children.
36. In this letter, written in September 2013, it is stated that it is accepted by the JN cannot reasonably be expected to leave the UK but that he can be cared for by his

mother RS and it is not believed that the appellant has had recent contact with JN. JN can maintain contact with the appellant from abroad and his best interests are simply to be looked after by his mother. ZN and AN also cannot reasonably be expected to leave the UK however they can be cared for in this country by their mother RS and have no recent contact with the appellant and so it would be in their best interests to simply be looked after by their mother. In relation to ANM it is accepted that it would not be reasonable to expect her to leave the UK. However it is noted that the appellant has limited contact with her, and that her best interests are simply to remain in the UK and be cared for by her mother. In relation to MA and AA they have not shown to be dependent on the appellant, and whilst they cannot be reasonably expected to leave the UK, their mother is their primary carer and they can keep in touch with the appellant using modern means of communication.

37. In the skeleton argument and oral submissions Mr Melvin submitted that the situation for the six children could not be said to be unduly harsh as it did not reach the necessary degree of severity. The children coped well enough when the appellant was in prison and this would not be appreciably worse for them. It was not accepted by the respondent that the appellant currently plays an active role in the upbringing of RN, ZN and AN, or that he is the primary carer for ANM. Both the mothers (MM and RS) were able to cope without the appellant whilst he was in detention and would do so in the future. If the families were financially a little worse off (as MM, for instance, would not be able to extra bank nursing and would just have to do her 3 day contract) this was not sufficient to say the impact on the children was unduly harsh. The best interests of the children should not be seen as something that had to be promoted through the legislation, but just were a factor to be considered, and in this context something far greater was needed for the appellant to succeed.
38. The evidence of the social worker should be given little weight as he had only actually met the child ANM and not spoken to any of the other children, and a number of his conclusions were not based in fact but simply on material supplied by the appellant. There was no evidence AA was likely to turn to gang culture without the appellant. Further the appellant could not be seen as a role model for children when he was a man with criminal convictions for deceit. There was no proper evidence the appellant was ANM's primary carer as she attended nursery three days a week, and he was only carer on the other two work days. There was no evidence if the appellant was allowed to remain that RS would move close to the appellant and allow more contact.
39. Finally Mr Melvin submitted that there are no very compelling circumstances over and above those in paragraphs 399 and 399A on which to allow this appeal.
40. Ms Capel made oral submissions and relied upon her skeleton argument. She submitted that with respect to the appellant's identity that the respondent had not provided the interview notes which were the basis on which they contended the appellant had said that his name was VOA, and the appellant had provided an

explanation that it had been a misunderstanding, and the human rights application in 2012 was made principally in the name of JRN. The appellant is recorded as specifically correcting his name to JR from VA during his index offence proceedings. He has been consistent about his history of nationality: he was born in the DRC of Nigerian parentage. His half sister, LO, had given corroborating evidence that his true identity is JRN, and she has been accepted as a truthful witness by the respondent. The appellant had not failed to provide evidence in support of this as he had cooperated with many interviews from the Nigerian High Commission and DRC Embassy investigating this issue.

41. In relation to the issue of the best interests of the children it is submitted that this falls very simply: it is in the best interests of all of the children that the appellant remain due to his loving relationship with them all and active role as parent. There are no countervailing factors in this case. There is substantial evidence of the appellant's relationship with MM before, during and after his period of imprisonment and his role as father to ANM and his step-children AA and MA. MM has been found to be a credible witness and she gives evidence of significant current contact with the children the appellant has with RS, which is also supported by the letter from the pastor at the appellant's church, prison phone records and prison/ detention centre visit materials. RS is angry with the appellant, and for this reason she has decided not to be involved with the Tribunal hearing. The evidence of the social worker, Mr Horrocks, cannot be said to be irrational. RS comes frequently to London and clearly would like to be near her sister, and would like the appellant to contribute financially to her and the children. In these circumstances it was reasonable to assume that she would accept the appellant assisting her with renting a home in London when she had only been moved out of London by social services. Further the CV of Mr Horrocks shows he has great expertise in this area and would clearly only draw conclusions that were reasonable based on his experience.
42. The appellant could also show he could meet the higher threshold that his removal would be unduly harsh for the children. They had all suffered detrimentally when the appellant was in prison/ detention, and the negative financial impact of the appellant's absence was a factor to be added in if not something which can be seen as determinate. If the appellant were removed there would be long term adverse effects on their emotional wellbeing, educational performance, their ability to form relationships, and possibly in the case of AA his safety. This view was supported by MM, the pastor at the appellant's church, RS, LO and Mr Horrocks. The appellant's offending was at the lower end of the automatic deportation scale. It was significantly less serious than that of KMO where the appellant was involved with the large scale professional production of false documents. It was relevant that the appellant had rehabilitated himself and must be seen as posing a low level risk of reoffending. He has glowing references from staff from prisons and immigration removal centres and has used his time in prison usefully through work and education. He has not had been arrested or in any way been involved with criminal activity since his release on Immigration Act bail fifteen months ago.

43. Ms Capel submitted that there are also very compelling circumstances over and above those in paragraphs 399 and 399A on which to allow this appeal as this appellant has no ties with Nigeria to help him reintegrate; he has close family ties with his half-sister and her family (husband and six children) in London; and he has a vulnerable partner (MM) who was previously the victim of domestic violence with caring obligations to her mother, and who has a child AA growing up in an environment where gang culture prevails and another MA who whilst no longer a minor remains a child of the family who is in full time education and living at home.

#### *Conclusions - Remaking*

44. The legal framework is as follows:

Sections 32 and 33 of the UK Borders Act 2007 provide, so far as material:

#### *"32. Automatic deportation*

(1) In this section "foreign criminal" means a person –

(a) who is not a British citizen,

(b) who is convicted in the United Kingdom of an offence, and

(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that-

(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (serious criminal), and

(b) the person is sentenced to a period of imprisonment.

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33). ...'

#### *33. Exceptions*

(1) Section 32(4) and (5) –

(a) do not apply where an exception in this section applies (subject to subsection (7) below), 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."

Para 396 of the immigration rules provides 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.

And paras 397 and A398 make clear that the rules aim to encompass rights protected by the ECHR:

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.

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;
- (b) a foreign criminal applies for a deportation order made against him to be revoked.

That ambition is reinforced by the heading that follows of "Deportation and Article 8" under which the framework of the rules is set out:

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 4 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 4 years but at least 12 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 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported or

(b) 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.

These rules must be seen in the context of the statutory framework now found at s117 of the Nationality, Immigration and Asylum Act 2002. S.117A sets out, in mandatory terms, what is expected of a court or Tribunal:

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).

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 well-being 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 taxpayers, 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 well-being 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 taxpayers, 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 removal 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 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.



45. As stated at the start of this decision I will adopt the approach taken by Upper Tribunal Judge Southern in KMO to the decision-making in the light of the support for this by Upper Tribunal Judge Gill in AB, the unequivocal support for this approach by the respondent and fact that the appellant principally relies upon this approach too in the submissions made and the recent decision of the Court of Appeal in MM (Uganda). This approach means that I will consider that whether the deportation of the appellant is unduly harsh to the children in accordance with paragraph 399(a) of the Immigration Rules factoring in the level of criminality of the appellant, and the impact this has on the weigh to be given to the public interest in deportation. Both KMO and MAB adopt a unified approach to what is harsh, see paragraph 26 of KMO citing MAB as follows:

“Whether the consequences of deportation will be “unduly harsh” for an individual involves more than “uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging” consequences and imposes a considerably more elevated or higher threshold.

The consequences 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 of the circumstances of the individual.”

46. The respondent accepts that it would be unduly harsh for all of the children to have to leave the UK and return with the appellant to Nigeria.
47. The respondent does not accept that the appellant is a credible witness and does not accept that weight should be given to the social worker’s report of Mr Horrocks.
48. I am however satisfied that the appellant is a credible witness for the following reasons. Whilst I give full consideration to his criminal history of offences of dishonesty, obtaining a false travel document which enabled him to live, work and claim benefits in the UK, and his very poor immigration history I am satisfied that the evidence he gave to the Tribunal was heartfelt, detailed and the truth to the best of his knowledge and belief. His evidence was consistent with that of the other two witnesses whom the respondent conceded, and I find, to be credible witnesses. I do not find the fact that the appellant assessed the social worker as being present for an hour longer than his partner MM or the fact that his half-sister LO did not know about a maternal half-brother of his in the USA who is unrelated to her affects my assessment. Whilst the evidence recorded as given by the appellant to the Tribunal in 2013/2014 is that he had last seen JN, AN and ZN in September 2012 at paragraph 46 (although he spoke to them on the phone every day) I accept that this was a misunderstanding as clearly evidence of prison visit by them to the appellant was before that Tribunal and submissions made that they have seen him in detention (where he remained at the time of that hearing) at paragraph 98. I find that the appellant has given the fullest information he is able about his nationality: he has provided the nationalities of his parents and his place of birth. In the context of the apparently refusal by both the DRC and Nigeria to

document him he is right to be cautious as to whether either country acknowledges him as a citizen and thus to claim a citizenship.

49. I am also satisfied that the appellant's true name is JRN. The other two names VOA and M arose in the context of criminal matters and the appellant has provided a coherent explanation as to how. There is no advantage in the appellant saying that JRN is his true name. Further it is undoubtedly the maiden name of his half-sister as Mr Melvin has confirmed it is recorded on her naturalisation certificate; and it is the evidence of his half-sister LO, found to be a credible witness, that this is his name. It is also a name which appears on the birth certificates of JN, AN and ZN with the addition of M, which was necessitated by the false Refugee Convention document under which the appellant lived at the time of their births. It is regrettable that the appellant has not tried to obtain documentation to support his true identity but I accept his evidence that he was not fully advised on this point as his representatives (The University of Law Legal Advice Centre have written to the Tribunal in relation to issues with other documents stating that: "We act pro bono for the Appellant and we are currently under resourced.") I also accept that it would not be easy or straight forward for the appellant to find evidence of his citizenship given his birth in a country where he has no family connections and the death of his parents and the fact he has no siblings in Nigeria.
50. The respondent does not accept that weight should be given to the social work report of Mr Peter Horrocks. I have no hesitation in accepting that Mr Horrocks has appropriate qualifications to provide the report as he worked as a social worker in the voluntary and local authority child care sectors for 20 years prior to becoming an independent social worker and also has appropriate social work qualifications. It is also clear that he was provided with all the documents that were before the First-tier Tribunal and conducted a lengthy interview with the appellant, MM and was able to observe the appellant with MM and ANM. It is clear from the report that Mr Horrocks was not able to speak to RS, AN, ZN, JN, AA or MA. Mr Horrocks therefore relies upon information gained from the documents, interviews, social work research and observations of the family members he does meet to draw his conclusions. I do not find any of the conclusions irrational as has been contended by Mr Melvin: I find to the contrary that they are reasonable, clear and appropriately measured. For instance at paragraph 4.16 in relation to AA and the possibility of his involvement with gangs is (a concern raised by his mother MM) Mr Horrocks says this "could" occur given his understanding of the research into gang culture and Afro-Caribbean boys, citing two sources on the issue. So whilst the report has less value than a report where all of the children had been interviewed I do assess that it is one which properly can be given weight in the determination of this appeal with the provenance of the information being born in mind.
51. I find that the appellant has a strong parental relationship with all five minor children and that it is in their best interests that the appellant remains in the UK. As stated in EA (Article 8 – best interests of the child) Nigeria [2011] UKUT 00315

it is in the best interests of a child to live with and be brought up by both of his or her parents subject to any very strong contra-indications. All the evidence leads me to conclude that there are no contra-indications for this appellant. This is clearly the view of Mr Horrocks who has been provided with full information concerning the appellant's criminal convictions and imprisonment. It is clearly relevant in this regard that the appellant's convictions are not for violence or drugs.

52. The committed caring parental relationship of the appellant with ANM is supported by overwhelming evidence from the appellant, MM and the social worker Mr Horrocks who observes her with her parents. It is also supported by photographs, the evidence of LO and of prison visits. I find that the appellant is caring for her alone two days a week when MM has extra work. In this context it is accurate for Mr Horrocks to find that the appellant is a primary carer and a secure attachment figure. Mr Horrocks also makes the same finding that MM is a primary carer and a secure attachment figure.
53. AA has provided a joint letter with his older sister in which he refers to the appellant as his "father" and as a kind and loving man, who assists with their education and without whom things were difficult and hard. He also signs cards to the appellant, which he received in prison with his own personal notes and best wishes and there are family pictures of him with the appellant. It is the evidence of the appellant and MM that the appellant has a parental relationship with AA, in which he provides a positive male role model involving AA positively in things such as sports and deflecting any interest in this thirteen year old Afro-Caribbean boy from south London local gangs. AA is unaware that the appellant has been in prison for a criminal offence, being given to believe by MM that the appellant was abroad not in prison during his absence. Mr Horrocks assesses that whilst it may ultimately have been an unwise decision not to tell AA the truth about his step-father's absence, from the material provided to him, AA sees the appellant as a positive father figure in particularly as he is not a violent man who rarely shows an interest in him like his birth father, and because he makes his mother MM happy. Mr Horrocks was in a good position to assess the role of AA's birth father and the nature of his relationship with MM as he had reliable detailed testimony from MM on these issues.
54. I am satisfied that the appellant has provided a truthful account of his history of his involvement with his children from RS, namely ZN, AN and JN, and that he has a close and loving parental relationship with these children. His account is supported by the testimony of MM whom is accepted by all as being a credible witness. It is also supported by the prison visit material, the letter from the pastor who facilitates the fortnightly contact of the appellant at church, the telephone records from prison, and the photographic evidence. It is clear that the appellant, RS, ZN, AN and JN had family celebrations for the appellant's 50<sup>th</sup> birthday in October 2014 and for RS's oldest daughter's 10th birthday in 2015 from the photographs, as well as it being clear that the appellant had seen the children on a number of different occasions / contexts in recent times from the places and

clothing of the children. It is also clear from the bank statements and prison money transaction records that the appellant has provided funds to RS in 2012 and 2014, and purchased school uniform in September 2015 (evidenced by receipts) in quantities very likely to relate to RS's children.

55. Mr Horrocks observed the emotional distress of the appellant when talking about ZN, AN and JN and the current difficulties with contact. I am satisfied that the appellant wishes the contact to be more than it has been since RS was forced to move to Chatham, and that if the appellant is permitted to remain he will, on the balance of probabilities, be in a position to provide financially for these children once again. Whether RS ultimately moves to London or not the appellant will be able to afford to visit these children who still live relatively near to London (it is a 45 minute train ride), and RS will not feel a need to withdraw contact to try to extract financial support. I accept the appellant's account of JN expressing distress at his separation from the appellant when at school, and see this as indicative of the best interests of all three siblings maintaining their relationship with their father.
56. However ZN, AN and JN are not actually British citizens (although they are lawfully present and entitled to register as such) and none of these children have lived in the UK continuously for seven years preceding the date of the immigration decision as they are only currently five (ZN and AN) and six (JN) years old. As such these children cannot assist the appellant to remain in accordance with paragraph 399(a) of the Immigration Rules.
57. As Ms Capel rightly observes a finding that it is in the best interest of these children for the appellant to remain in the UK does not mean it would be unduly harsh for them to remain here whilst he is deported as this is a significantly more challenging test. I ultimately conclude for the reasons set out below however that the situation of the two qualifying minor children ANM and AA would be unduly harsh, in the sense of being inordinately and disproportionately bleak without the appellant.
58. I reach my conclusion in part because ANM and AA have suffered previous emotional upsets in their lives. ANM clearly had limited contact with her father, the appellant, due to his imprisonment and detention during the first three years of her life and lived with the stress and upset this caused her mother and step-siblings for these first years. She has only over the past year settled into a situation where she has her father normally available to her on a day to day basis and a happy, contented and emotionally supported mother. AA, as described by MM to Mr Horrocks the social worker, has witnessed up to the age of 5 years his biological father being violent towards his mother, the intervention of the police and finally a court order preventing his biological father having contact with his mother. His biological father continues to make promises he does not keep and to be an inconsistent parent who sees him only four times a year. For each child there are therefore reasons why they do not face the deportation of the appellant

from a position of strength which I find enhances the bleakness of the loss of the appellant.

59. The loss of the appellant would in each case be all the more acute because the appellant is an active and committed parent whose loving care is a necessary part of the children's upbringing contributing to their development.
60. It would also be specifically excessively harsh for AA, as Mr Horrocks has observed from discussions with MM, as AA and his sister MA take on inappropriate emotional responsibility for their mother, MM, when the appellant is not present (as happened during his period of imprisonment and detention) and to an extent become young carers. This responsibility would seem likely to fall more heavily on AA as his sister is older and is planning to go to university in 2017, and thus potentially to leave the family home or at least be heavily committed to studies. It would be clearly the case that the deportation of the appellant would lead AA to lose a second father in his short life, and as Mr Horrocks has argued to AA suffering a probable significant loss of trust in the adult world, having a detrimental impact on his trust enabling him to form secure adult relationships in the future. There is also the concern that the lack of other male relatives in the family (testified to by MM) could lead AA, who is just entering his teenage years (making the situation quite different to the point when the appellant was in detention/prison), turn to local gang culture for role models and thus to subject himself to physical danger and negative influences which would affect his school work. This concern raised by MM is shown to be a real possibility when the social work research, as set out by Mr Horrocks, is considered, and clearly would also be a development contrary to the public interest in reducing crime.
61. For ANM it would be particularly excessively harsh as she is very young and unable to understand any explanation given to her for her father's disappearance and because the appellant is now one of her primary carers and a secure attachment figure, providing for her at least equally with MM, her mother. Clearly the situation was different for ANM compared to the period when the appellant was previously imprisoned/detained as she was born at a time when the appellant was in prison and thus did not experience the breaking of such a bond. If the appellant is removed this will in all probability, according to the social work research cited by Mr Horrocks, cause her significant distress and trauma: a truly profoundly bleak prospect.
62. I therefore find, for all of the reasons set out above, that the removal of the appellant would on the balance of probabilities lead to permanent emotional harm to these two children, and that this is a highly significant factor in the assessment as to whether it would be unduly harsh for them to remain in the UK without the appellant.
63. However I now move on to place the appellant's poor immigration history and criminal offending in the balance in considering whether the removal of the

appellant would be unduly harsh. The appellant has remained in the UK for the past 16 years without leave to remain, having entered unlawfully and worked without permission in the UK. Clearly his criminal offence relates to this lack of status, and was an attempt to circumvent immigration controls. The only thing that could be said in his favour in relation to his immigration history is that he had attended lawyers to start to regularise his stay on the truthful basis of his relationship with MM prior to his arrest for the index offence.

64. It is clear that the appellant has been convicted of serious offences of dishonesty as he was given a 16 month sentence. His criminal behaviour led to the loss to the public purse of £14,000 of child related benefits to which the appellant's children by RS were not entitled, and to legitimising his illegal work in the UK. However in his favour is that he entered a guilty plea and that his sentence is at the lower end of the spectrum of cases in the 12 month to 4 years bracket at paragraph 398(b) of the Immigration Rules. His crime was not a professional planned fraud (as in KMO) but one in which he wrongly took advantage of the opportunity to be provided with false documentation by a corrupt Home Office official. He has never been convicted of any offences of violence or relating to drugs.
65. The appellant has clearly used his time in prison and detention well: working, studying and obtaining qualifications. He has five glowing references from chaplains, managers and officers. He is noted to be hardworking, polite, reliable, friendly, respectful, committed to detainees being treated fairly and equally, as having a positive behaviour record and having made 100% effort to make his time in prison productive. In HMP Elmley he was made a "Violence Reduction Representative" which is described by Officer R Crowther as a very important role. The Reverend Nicky Startin believes that he will continue in the changed way of life he has demonstrated in prison and detention and states: "From my knowledge of him he has committed himself utterly to the standards of the Christian life, and puts the Christian values into practice in his thoughts, words and deeds." The appellant has not been arrested for any offences since being released on Immigration Act bail 15 months ago, and has abided by the conditions of his bail. Given the facts of his crime and the information about his behaviour since his release I conclude that he is at low risk of re-offending if permitted to remain in the UK lawfully. This is clearly a factor relevant to the public interest, see OH (Serbia) v SSHD [2008] EWCA Civ 694 at paragraph 15, particularly as the appellant's criminal record is not one of the most serious crime.
66. Whilst giving very significant weight to the public interest in the need to deter foreign nationals from committing serious crimes; to maintain confidence from the public in the system of immigration control; and the need to deport such individuals to express society's revulsion against those foreign citizens who commit serious crimes I find in all the circumstances of the appellant's case, conducting a proportionality exercise which includes a full assessment of his criminality and offending and the public interest as well as the impact of living in the UK without their father for AA and ANM, that in accordance with paragraph


399(a) of the Immigration it would be unduly harsh for the appellant's qualifying children to remain in the UK whilst he is deported.

67. In these circumstances I do not need to consider whether the appellant is able to succeed under paragraph 398 of the Immigration Rules.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal and do not preserve any findings so the remaking will take place de novo.
3. I remake the appeal allowing it under paragraph 399(a) the Immigration Rules.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We do so in order to avoid a likelihood of serious harm arising to the appellant's children.



Signed:  
Upper Tribunal Judge Lindsley

Date: 3<sup>rd</sup> May 2016

## Annex A

### DECISION AND DIRECTIONS

#### *Introduction*

1. The appellant is a citizen of Nigeria born on 19<sup>th</sup> October 1964. He arrived in the UK illegally in January 2000. He has not had permission to enter or remain at any point, but has been continuously resident since this time. In December 2012 the appellant made a human rights application to remain in the UK on the basis of his having four biological children, two step-children and a partner in the UK. This application was refused and appeal lodged, but the decision was later withdrawn by the respondent. In February 2013 the appellant was convicted of a number of fraud offences relating to a false instrument, a driving licence and statements to obtain benefits and sentenced to 16 months imprisonment. On 12<sup>th</sup> September the respondent issued a decision to deport and the appellant appealed. His appeal against the deportation decision was dismissed by a First-tier Tribunal Panel consisting of Judge of the First-tier Tribunal Pullig and Dr P L Ravenscroft (non-legal member) in a determination promulgated on the 15<sup>th</sup> September 2014.
2. Permission to appeal was granted by Upper Tribunal Judge Rintoul on the basis that it was arguable that the First-tier judge had erred in law as it was arguable that it had not been considered whether the appellant could meet paragraph 399 (a) of the Immigration Rules.
3. The matter came before me to determine whether the First-tier Tribunal had erred in law.
4. It was agreed at the start of the hearing that there were clear errors of law by the First-tier Tribunal. The First-tier Tribunal had applied the wrong Immigration Rules as they applied the Rules as they stood prior to 28<sup>th</sup> July 2014 rather than the amended version from that date, although the decision was promulgated on 15<sup>th</sup> September 2014. The First-tier Tribunal had also failed to appreciate that the Immigration Rules are a complete code in relation to Article 8 ECHR in deportation matters, following MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and thus that no assessment outside of the Immigration Rules should have taken place.
5. Mr Kandola had no file so it was agreed that there would be a short adjournment so he could read the summary bundle of papers. Mr Kandola said on resumption of the hearing that whilst errors of law existed in the decision of the First-tier Tribunal he contended for the respondent that the errors were not material given safe factual findings of the Tribunal which meant that the appellant could not have succeeded in any case in his appeal.



6. It was agreed that the central plank of the appellant's case was that he was entitled to succeed in this appeal because he argued that if properly determined his appeal could have succeeded under paragraph 399(a) of the Immigration Rules, which in essence involved him showing he had genuine and subsisting relationships with his children in the UK who were British citizens, and that it would be unduly harsh for the appellant's children to remain in the UK without him. The Tribunal accepted that none of the children could reasonably be expected to accompany the appellant to Nigeria, as does the respondent in the refusal letter, and the hearing proceeded on the basis that the First-tier Tribunal had made findings tantamount to accepting that it would be unduly harsh to require the children to live with the appellant in Nigeria.
7. I was alerted to the fact I need to be aware that there was potentially a problem of interpretation of the meaning of "unduly harsh", a key concept in paragraph 399(a) of the Immigration Rules, as there are currently two significantly different decisions of the Tribunal as to how this test should be interpreted. This conflict of approach was likely to be resolved fairly shortly however as a Presidential Panel was hearing a case to resolve the matter next Tuesday.

#### *Submissions*

8. Ms Capel relied upon the grounds of appeal. She argued that the errors of law by the First-tier Tribunal were material. In summary she said that the assessment of the best interests of the children was flawed, and this was central to looking at whether it was unduly harsh for the children to remain in the UK without the appellant. She argued that evidence of the appellant's partner about telephone contact with children had not been taken into consideration without proper reasoning. No reasons had been given why it would be in the best interests of children with family life relationships with the appellant not to have contact with him. There had been a failure to consider what future relationships between the appellant and the children would be likely to consist of if he were allowed to remain. Further there was a failure to factor in the relatively low-end offending that the appellant had been convicted of, which on one view was part of the unduly harsh test. There had been a notable lack of reference in the decision of the First-tier Tribunal to evidence regarding the risk of harm and re-offending in the future in the form of letters which should have been considered in the absence of an OASys report and any substantial sentencing remarks.
9. Ms Capel also argued that there had been no proper consideration of whether there were very compelling circumstances over and above those in paragraph 399 and 399A of the Immigration Rules.
10. Mr Kandola argued, in summary, that there were clear findings, not affected by errors of law, in the decision of the First-tier Tribunal which showed that there was no genuine and subsisting parental relationship between the appellant and his children. In these circumstances the errors of approach by the First-tier Tribunal did not result in material errors of law. Further even if there were

potentially such relationships the evidence was not there to show that it could be “unduly harsh” for those children to remain in the UK without the appellant as they all had mothers who would care for them here. There was certainly nothing very compelling over and above paragraphs 399 and 399A of the Immigration Rules which outweighed the public interest in deportation.

### *Conclusions*

11. The appellant has four biological children in the UK and two he regards as step-children. It is clear that his step-children from his partner/ fiancée Ms M and his daughter with her are all British citizens. It appears that his three biological children from his past relationship with Ms S who has indefinite leave to remain are also British citizens as their mother holds indefinite leave to remain and they were born in the UK.
12. The First-tier Tribunal made conclusions about the relationship of these children with the appellant at paragraphs 131-133 of the decision as follows. In relation to the three children from Ms S “there is no functioning family life”; in relation to his biological daughter with Ms M “There is no evidence of bonding”; and in relation to the step-children again no “functioning family life”. It follows that if these findings are sound then the errors of law by the Tribunal are not material as clearly the Tribunal would not have found he had genuine and subsisting parental relationships with the six children, and thus paragraph 339(a) of the Immigration Rules could not have provided a basis for the appeal to be allowed.
13. However I am not satisfied that these conclusions were lawfully made. I accept the submission of Ms Capel that the evidence of Ms M regarding the relationships of the appellant with the children was discounted with insufficient reasons. She gave evidence that her older children spoke to the appellant daily in prison/detention and gave examples of their bonding prior to this in her written and oral evidence. She also gave evidence about regular contact prior to imprisonment with his children by Ms S. Her evidence was discounted only on the basis that it was said to be “vague” at paragraph 114 of the decision. This is not factually correct and is insufficient reasoning for discounting the evidence, especially as it would appear to have been consistent with documentary evidence that Ms S visited the appellant with her children in prison, and the prison evidence of telephone calls which showed evidence of telephone contact with Ms M’s number.
14. I also accept Ms Capel’s submission that the best interests of the children have not been assessed in a rational fashion by the First-tier Tribunal. It was unclear how it could have been rationally found at paragraph 132 of the decision that it was in the best interests of Ms M’s child with the appellant to have contact with the appellant but not for his three older biological children to maintain contact, as is done at paragraph 131, in the context of an overall finding that family life existed with all of these children at paragraph 139, and given similar findings about the level of contact between the appellant and all of these children. As

was said in EA (Article 8 –best interests of child) Nigeria [2011] UKUT 00315: “The correct starting point in consideration the welfare and best interests of a young child would be that it is in the best interests of a child to live with and be brought up by his or her parents, subject to any very strong contra-indications.” There are no contra-indications in this context with respect to this appellant as a parent to his children, particularly as his offending does not relate in any way to drugs or violence.

15. It is also clear from the judgement of Baroness Hale in ZH (Tanzania)v SSHD [2011] UKSC 4 that she approved the UNCHR Guidelines on Determining the Best Interests of the Child, which in turn make clear that the best interests include the child’s need for security, continuity of care and affection and the opportunity to form long term attachments based on mutual trust and respect”, see paragraph 21 of MK (best interests of child) India [2011] UKUT 00475, which I find means that consideration of the future development of the relationship between the appellant and his children was needed. I find that such consideration cannot be found in the decision of the First-tier Tribunal. I am therefore satisfied that the assessment of the best interests of the children is further incomplete in this respect.
16. However even if the appellant remaining in the UK had been found to be in the best interests of his children this does not suffice to show that he would succeed under paragraph 399(a) of the Immigration Rules. It is clear that the test of unduly harsh goes considerably beyond requiring it to be shown that removal of the appellant whilst they remain in the UK would not be in the best interests of the children.
17. The test for “unduly harsh” in MAB (para 399, “unduly harsh”) USA [2015] UKUT 00435 is said to be one of inordinate or excessive severeness or bleakness for the children remaining in the UK without the appellant, and that this test focuses on the children alone. In KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 00543 the Upper Tribunal holds that unduly means that regard is had to the seriousness of the offences committed by the foreign criminal when considering if the impact on the child is excessively harsh. I accept that on the KMO test an analysis of the appellant’s criminality is required (an example of which is set out in their remaking at paragraph 36 of that decision), and that the five letters from prison and removal centre staff, ought to have been considered by the First-tier Tribunal on this basis particularly in light of the absence of an OASys report and any detailed sentencing remarks. It is clear that this was not done at paragraph 142 of the decision as there is no reasoned assessment of the appellant’s criminality.
18. Whilst the evidence going to the impact of the appellant’s departure being unduly harsh on the children is a long way from conclusive I find that it would not be possible to be certain that the appeal could not succeed on this basis, particularly in the light of the indicators of the appellant’s level of risk of future

reoffending and harm in society, and the evidence of the impact of his deportation on his children from his partner.

19. For all these reasons I find that the errors with regarding the lack of specific consideration of paragraph 399(a) of the Immigration Rules to be material ones.

#### Decision:

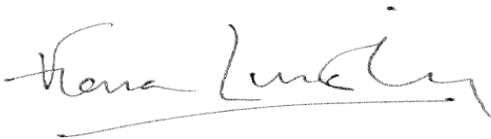
4. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
5. I set aside the decision of the First-tier Tribunal and do not preserve any findings so the remaking will take place de novo.

#### Directions

1. The appeal should be listed before me for a 'for mention' hearing on 17<sup>th</sup> November 2015 at 10am when it is hoped that it should be clear when the Presidential Panel will issue their decision, if it has not taken place by that date, on the meaning of "unduly harsh" for the purposes of, inter alia, paragraph 399(a) of the Immigration Rules.
2. The respondent should be ready to inform the Tribunal at the 'for mention' hearing whether it is accepted for the remaking hearing that it would be unduly harsh for all or any of the children to live in Nigeria with the appellant.
3. The bundles provided to date are chaotic and in part poorly photocopied. It is asked that at the 'for mention' hearing Counsel for the appellant and the Secretary of State's representative identify what of the material supplied to date is relied upon at the remaking hearing and put it in order.
4. The appellant should give careful consideration to obtaining more detailed statements from all witnesses and a report from an appropriate qualified independent social worker on the best interests of the children and the impact on all of the children if the appellant is removed to Nigeria. I make this directions in the light of the finding in JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 that being adequately informed is one of the elementary prerequisites of identifying the best interests of the child and in this case also in identifying whether or not the impact or removal of the appellant/ their having to live in Nigeria would be that of severe harshness on all or any of the children.
5. The appellant should also endeavour to obtain evidence regarding the citizenship of the three children from Ms S or alternatively supply evidence of their right to remain in the UK.
6. Any evidence either party wishes to rely upon in the remaking hearing which has not already been filed with the Tribunal and sorted into the agreed bundle at the 'for mention' hearing should be filed in accordance with Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 with the Tribunal and

served on the other party 10 prior to the full hearing date along with chronologies and skeleton arguments.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We do so in order to avoid a likelihood of serious harm arising to the appellant's children.

A handwritten signature in black ink, appearing to read 'Hana Lindsley', with a horizontal line underneath the name.

Signed:  
Upper Tribunal Judge Lindsley

Date: 21<sup>st</sup> October 2015