



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: DA/01695/2014

**THE IMMIGRATION ACTS**

Heard at Field House  
On 19 July 2017

Decision & Reasons Promulgated  
On 8 August 2017

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

SHADDAI SHALOM SMITH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr D. Fadina of Fadina & Associates

For the Respondent: Mr E. Tufan, Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the re-making of the decision in Mr Smith's appeal to the Tribunal, the decision of the First-tier Tribunal having been set aside by the decision I made that it contained an error on a point of law. A copy of that decision is annexed to this determination.

**Introduction and Immigration history**

2. The appellant was born on 7 March 1990. He is a citizen of Barbados, now aged 27. He arrived in the United Kingdom to join his mother who had the benefit of a work permit. On his arrival on 26 July 2002, he was aged 12. He was granted successive periods of leave as a dependent child until 7 December 2012. By that time he was aged 22.

3. I can properly disregard any other offending save his conviction on 7 June 2010 at Wood Green Crown Court for conspiracy to rob. On 22 December 2010, when he was 20, he received a sentence of three years custody in a Young Offender Institution. Unfortunately, at the time of his sentencing, his partner (to whom I shall refer as 'Marilyn' without, I hope, showing any disrespect), was pregnant with their daughter M who was born in the United Kingdom on 4 June 2011. Both Marilyn and M are British citizens.
4. The appellant was released on 20 January 2012. He has not reoffended since.
5. Various applications then followed for indefinite leave to remain on the basis of his long residence which were unsuccessful and eventually prompted the respondent to commence proceedings to deport the appellant. On 21 August 2014 a deportation order was made by the Secretary of State under the provisions of section 32(5) of the UK Borders Act 2007. The appeal process was commenced by his notice of 1 September 2014.
6. His appeal has had an unfortunate history.
7. The first appeal was allowed on 17 January 2015 by the First-tier Tribunal but was found to have been vitiated by an error of law principally due to a lack of adequate reasoning. It was thus that the matter came before the First-tier Tribunal for a second time on 31 March 2016 which resulted in the second successful determination promulgated on 11 May 2016. Regrettably, I found out that determination was also tainted by legal error such that it required me to re-make the decision.
8. For the purposes of this hearing I had the benefit of a witness statement signed by the appellant in which he described his background. The appellant's father and mother divorced when he was 5 years old and he grew up without any knowledge of his father. He completed his secondary education in 2006 and obtained a Diploma in Sport Science in 2008. He completed the first stage of his BSc course. Upon discharge from custody in 2012, the appellant took steps to complete his degree. He did this successfully and was awarded a BSc in Sports Science from Greenwich University in 2013.
9. He describes how his mother is now a British citizen as are his brother and sister. All are present and settled in the United Kingdom. He states that he does not have any known relatives in Barbados and is unaware of the whereabouts of his biological father.
10. In the course of his evidence to me, the appellant described the relationship he developed with his daughter and her mother. He has known Marilyn for about 12 years during which time he described the relationship as being 'on-and-off'. M was born whilst he was in prison but Marilyn started bringing her to prison twice a month on play-day visits in a crèche setting. There were also other visits so that, in total, Marilyn visited about three times a month. That continued until his

release in January 2012. Upon release, the appellant was living with his mother but seeing his daughter regularly, perhaps two or three times a week. The distance was a few minutes by car, perhaps 15 or 20 minutes walking. Often the arrangement was informal when the appellant would just 'pop in' to see his daughter.

11. There was, unhappily, a breakdown in the relationship in the course of 2012. In his evidence to me, he described how Marilyn would not allow him to see his daughter as much as he wanted. This resulted in court proceedings to recommence contact. Initially, the appellant had the benefit of a contact order provided in August 2012 which permitted contact to take place in a contact centre. It is clear that the parties took steps to improve their relationship and now maintain a good relationship with each other. They agreed that this limited contact was over-restrictive. At page 35 of the bundle there is a contact order dated 4 October 2013 in which the appellant might have such contact as the parents might agree, a clear indication that their relationship had improved to the extent that they were able to make mature and sensible decisions in relation to M's future without further interventions in Court.

### **Marilyn's studies**

12. Marilyn is currently studying at Birmingham University for a BSc (Hons) in Dental and Oral Science, [p.22]. She wishes to pursue a career as a dental hygienist and therapist. The course has reached the end of its first year but there are still two further years. It will end in 2019.

### **M's medical condition**

13. M, now aged 5, has a congenital ptosis of her left eye. She is self-conscious and sensitive to the reaction of those around her. She is in need of support and encouragement. She has a squint. She receives support at school on the basis of her visual impairment. Ptosis is a drooping or falling of the upper eyelid, commonly due to a defect in the muscle which raises the eyelids. M has had two operations already, one in 2012 and the second in 2015. She is due to have a further operation at Great Ormond Street Hospital. This was described by Marilyn as permanent corrective surgery.
14. M is under the care of the Moorfields Eye Hospital. In reading the papers that have been submitted in support of this appeal I noted a letter from her counsellor within Moorfields who stated this;

M has definitely made progress, she comes across as more confident, her home-schoolbook shows that she's managing her behaviour well and she has a mantra when she is struggling e.g. "I can do it" or "I tried". Having said that, she seems to be struggling emotionally; for example, during the last two sessions she didn't play in the same way that she has previously, instead she spent a lot of time pulling the toys apart and although she said "I tried"

when she wasn't able to complete tasks, there was a sense of frustration and anger with herself. Also, the fact that she wet herself during the session is an indication of a lack of containment.

My concern is that M could be internalising her feelings while seemingly doing okay on the surface."

15. There are also letters making reference to a referral to the speech and language therapy service, an assessment by the Educational Psychologist and that she would benefit from regular counselling and play therapy sessions.
16. Mrs Marshall, the appellant's mother, described M as having complex needs. She had been slow developmentally. She is visually impaired. Her speech development was poor. She benefits from a team around her to care for her needs.
17. Mrs Marshall spoke of M being extremely close to her father. He provides her, she said, with much-needed reassurance.

### **The appellant's role in family life with Marilyn and M**

18. Currently, the appellant spends time with his daughter between Sunday evening and Wednesday, often staying overnight with Marilyn because she has to leave the home so early on Monday morning.
19. Marilyn described in warm terms the contribution that has been made by the appellant. She accepted that upon his release there had been a breakdown in their relationship. She was very angry that he was not around when she was pregnant. She described herself as '*shutting down*'. Tension arose after his release. She spoke intelligently that his anger had got in the way of them communicating as parents. However, since 2014 the couple have been seeing each other regularly. She spoke of the '*massive part*' he had played over those years. She told me that the appellant sees M almost every day and, of course, between Sunday evenings and Wednesday.
20. Marilyn commutes to Birmingham five days a week from Dagenham leaving at 5.30 a.m. in the morning. Her parents provide help as well on Thursday and Friday. In order to do so, she stays overnight with them but both her mother and father work.
21. She told me that she wanted to marry the appellant but they are not living together. In particular, she described the difficulties for him as he does not work. There have been disagreements. The routine of daily commuting is extraordinarily expensive, costing about £1,000 a month, most of which appears to be provided by loans.
22. More positively, once her degree course is ended in 2019 she will be able to be registered as a hygienist without any further qualifications. It is her intention to work as a hygienist in a dental surgery.

23. I was impressed by her engaging personality. She is clearly hard-working and ambitious for herself. She struck me as being committed to doing the best she could for M. She gave her evidence confidently and with an appropriate degree of humour. She struck me as being realistic.

### **Mrs Marshall**

24. The appellant's mother also gave evidence. It was readily apparent that Mrs Marshall took immediate steps to re-establish a useful life for the appellant after his release from prison. He had called her whilst in prison to arrange a return to university which she had succeeded in doing, albeit this required him to wait until the following academic year to resume his studies. She described how he was very angry and this had changed his personality. There is no suggestion that this is currently a difficulty. She described how secure he was in the relationship he had with his sister and younger brother. She was an impressive witness; articulate, sensitive and perceptive. It was no surprise to me when, later in her evidence, she described herself as acting as a Head Teacher in a Primary School.
25. She provided a certain degree of insight into the appellant's troubled youth. It was her view that he felt insecure because of the presence of her second husband within the family. Matters came to a head when her husband, not the appellant's father, hit him and this resulted in her request for social services to intervene. The turbulence of this period has resulted, she feels, in the appellant understanding that he would not like a repetition of this for his daughter. Her evidence was that the relationship over the last three years has been very settled. She clearly hopes that the three of them would continue as a family unit.

### **The statutory provisions and the Immigration Rules**

26. The appellant is a foreign criminal, according to the definition set out in s.117D of the Nationality, Immigration and Asylum Act, 2002, as inserted by s. 19 of the Immigration Act 2014 in that he has been sentenced by a United Kingdom court to a period of imprisonment of at least 12 months and references to a person who has been sentenced to a period of imprisonment include a person who is sentenced to detention at an institution for young offenders.
27. Paragraph 3(o) of the Immigration Act 2014 (Commencement No 1, Transitory (sic) and Savings Provisions) Order 2014 (SI 1820 of 2014) provided that 28 July 2014 was the day appointed for section 19 of the 2014 Act to come into force.
28. Sections 117A-C provide, where material:
- 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.
- (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.

29. This is the derivation of the 'unduly harsh' test.
30. The Immigration Rules were similarly amended to reflect the introduction of the new provisions in Part 5 of the 2002 Act:

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.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and (a) the deportation of the person from the UK is conducive to the public good [and in the public interest] because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least four years; (b) the deportation of the person from the UK is conducive to the public good [and in the public interest] because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 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 seven years immediately preceding the date of the immigration decision; and in either case (a) [it would be unduly harsh for the child to live in the country to which the person is to be deported]; and (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, [(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].

399A. This paragraph applies where paragraph 398(b) or (c) applies if – [(a) the person has been lawfully resident in the UK for most of his life; and (b) he is socially and culturally integrated in the UK; and (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported].

31. The Statement of Changes in the Immigration Rules HC 532 took effect on 28 July 2014 and applies to all ECHR Article 8 claims from foreign criminals which are to be decided on or after that date. The changes in the 2014 Rules are set out above.

## Analysis

32. It is plain that ss 117A-D of the 2002 Act (directed towards the judiciary) and the Immigration Rules (directed towards all decision makers) were designed to operate in tandem with each other and to operate as a scheme that operated in conjunction with each other and not disjunctively.
33. The expression '*unduly harsh*' has been authoritatively determined by the Court of Appeal in *MM* to which I shall return. It remains important, however, to realise that these are ordinary words, commonly used, and they should bear their ordinary meaning. They should not become encrusted with unnecessary amounts of judicial interpretation. Simple examples may afford a good insight into their ordinary meaning. It is unduly harsh to sentence a man to life imprisonment for shoplifting. It is not unduly harsh to sentence a man to life imprisonment for murder. In the former the sentence is disproportionate and unreasonable; in the latter it is not. Hence, in the former it is unduly harsh; in the latter, it may be *harsh* but it is not *unduly harsh*. To separate a child from her father when he is sentenced to life imprisonment for shop-lifting is unduly harsh as a necessary consequence of the same being so for the father. To separate a child from her father when he is sentenced to life imprisonment for murder is harsh, but for the same reasons, not unduly harsh. The consequences for the child; her sense of loss and of separation; the deprivation of the support and daily comfort afforded by her father; the harshness: all may well be the same for the child, but in the former case, it will be unduly harsh and, in the latter, not so.
34. Into this already complex mix, there must be a consideration of the particular effect upon the child. It must be taken as a given in such a situation, that there will be harshness in any separation. In the words of countless psychological reports describing the effect upon a child of a potential separation, it may well be 'devastating' but that is not enough to prevent the father being imprisoned or imprisonment would never be the proportionate sentence for a man convicted who has a young child. I have, however, found it to be unduly harsh when the child's mother has mental health difficulties and the father is the sole effective carer and separation is likely to lead to the child being placed in care. This proves little save that these cases are fact-sensitive.
35. A further ingredient into a proper assessment is paying due regard to the law. In the context of this type of case, the law is contained in statute and the statutory criteria developed for the assessment of the public interest. Unless it is struck down as unlawful, if statute draws a bright line between a person sentenced to 12 months imprisonment but less than 4 years, a decision maker must respect that distinction. Care should be taken not to misapply an unduly harsh test in order to defeat the will of Parliament because the decision maker considers a sentence of imprisonment of 12 months is too low a threshold. There is a greater risk of this now happening as the Secretary of State, through Parliament, has expressed with increasing clarity what is considered to be the public interest.



36. None of this, of course, permits a violation of an individual's human rights but neither can the proportionality balance be artificially re-adjusted if the public interest threshold is set high by the misapplication of an unduly harsh test in circumstances when it cannot properly be said that the relevant consequences are unduly harsh.
37. It was these considerations that prompted me to set aside the decision of the First-tier Tribunal Judge on the material that I then had before me. He was an appellant who was not a British citizen and who had no substantive right to remain under the Immigration Rules. He had committed a very serious offence - a gang robbery of a petrol-filling station netting £14,000 cash - for which he had been sentenced, aged 19, to spend three years in a Young Offender Institution. He had been in the United Kingdom since he was 12. He was the father of M but did not live with his mother, to whom he was not married but had substantial contact with his daughter. That brief summary of the basic facts lead me to question how the First-tier Tribunal Judge might properly conclude that it was unduly harsh on any of the participants - the appellant, his daughter or her mother.
38. I have now had the opportunity of considering this appeal in far greater depth and hearing the oral evidence of the appellant, Ms President and the appellant's mother as well as looking at the documentary evidence, including medical evidence affecting M. I shall now consider that material in greater detail.
39. I can now so well understand how the First-tier Tribunal Judge came to the conclusion that she did. I felt great sympathy for all those concerned. The appellant's efforts to turn himself around, the low risk he presents of further offending, his pleasant manner; Ms President, expressing in simple terms, why she did not want to marry; the effort she is putting into developing her career and the complex arrangements necessary whilst, for the next two years she tries to manage her degree course and the responsibilities of looking after M. The bond that exists between the appellant and M and the emotional and physical support and care she is provided by him. Were sympathy sufficient, the appeal would succeed as it has done before. However, whilst in the course of the hearing I was engaged in the process of sympathising with the participants, I struggled in the course of the hearing to see how the situation was unduly harsh.
40. First, I was concerned that, in most circumstances, the commission of such a serious offence by a non-national who was liable to deportation renders removal proportionate. The fact that such an appellant might be a married man living with his wife and children would not, normally, prevent his removal. That is the common effect of deportation. Was the appellant's situation substantially different, albeit he was not married to his partner and they lived in separate accommodation, although spending much time together. M has a medical condition but it is not life-threatening and will be managed. No-one is suggesting that she will be forced to leave the United Kingdom and the unequivocal

evidence of her mother is that she will not do so. Their support-network is United Kingdom-based and M is under the care of one of the greatest Children's Hospital in the world.

41. Second, the circumstances of this case generate sympathy, in part, by the fact that those concerned are well-educated, articulate, competent and engaging. I do not suggest they are wealthy but they live in a world of values and aspirations, shared by many and, regarded by society, as commendable. I would wish to distance myself from reaching a conclusion that the consequences for them will be unduly harsh but would not be for a family poor-educated, operating on the fringe of society, who may well feel the same sense of impending loss but cannot as well articulate it.
42. In the course of argument, I suggested whether society might benefit more by this appellant remaining in the United Kingdom; his getting a job; for her, the completion of her studies and obtaining work in the health service; securing the couple's partnership, bringing up M together, paying taxes and living the roseate life of a nuclear family. Compare this with the disadvantages of being a single mother. However, the same applies in almost all such cases and, importantly, it fails to take into account the importance of reflecting the public interest in the treatment of foreign criminals: Parliament has to a significant degree abandoned the model of preserving family life at all costs and has elected a model which is harsher even to the point of hitting the public purse but such a course is permissible by operation of statute, providing, of course, it is not unduly harsh, unreasonable or disproportionate resulting in a violation of the human rights of those affected.

***MM (Uganda) & Anor v Secretary of State for the Home Department* as part of the analysis**

43. In *MM (Uganda) & Anor v Secretary of State for the Home Department* [2016] EWCA Civ 617 (20 April 2016), Laws LJ with whom the others agreed gave the judgment of the Court. The Upper Tribunal had stated at the outset of its determination that the question to be decided was the proper construction of the phrase "unduly harsh" in section 117C of the 2003 Act and paragraph 399 of the Rules as amended:
 

...In particular, when carrying out an assessment as to whether the impact upon a qualifying child or partner will be unduly harsh, should that assessment be informed by the seriousness of the offence committed by the foreign criminal facing deportation or is that assessment focused entirely upon the impact upon the innocent family member, with no reference whatsoever to the seriousness of the offence?
44. The view that the assessment should altogether leave out of account the gravity of the foreign criminal's offence was taken by the Upper Tribunal in *MAB (USA)* [2015] UKUT 435. The Upper Tribunal in *KMO (section 117 – unduly harsh)* Nigeria [2015] UKUT 00543 (IAC) however disagreed, giving full reasons (paragraphs 8 to 23). The Upper Tribunal concluded in *KMO*:

46. ... As I do not adopt the MAB approach, the claimant has not established that the impact of deportation upon his children would be unduly harsh and so paragraph 399 does not apply. It has not been suggested that para 399A applies. Therefore, the public interest in his deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described on para 399. The only such matter identified that has not already been had regard to is that the claimant has now lived in the United Kingdom for a very long time, some 28 years. But that period of stay has been unlawful from start to finish and so little weight can be given to any private life established and there is nothing that comes even close to displacing the public interest arguments.

45. Law LJ stated that the phrase 'unduly harsh' plainly meant the same in section 117C(5) as in Rule 399. 'Unduly harsh' was an ordinary English expression but, as so often, coloured by its context. The context emphasised two factors, (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights. The Upper Tribunal's approach in *MAB* ignored the combination of these factors notwithstanding the fact that the public interest in the removal of foreign criminals was expressly vouched by Parliament in s. 117C(1) and more particularly, s. 117C(2) that:

The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

46. This steered tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it would be to show that the effect on his child or partner would be unduly harsh. However the term 'unduly' must not be mistaken for 'excessive' which imports a different idea:

What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history.

47. For these reasons the Court of Appeal concluded in paragraph 25 that *MAB* was wrongly decided by the Tribunal. The expression 'unduly harsh' in section 117C(5) and Rule 399(a) and (b) requires regard to be had to all the circumstances including the criminal's immigration and criminal history.

## Conclusion

48. As I have already pointed out, the circumstances of this family are, as they are in every case, unique but the broad summary of their situation is not significantly different from many others. They are a family unit which will suffer the effects of but if this alone were the criteria for a prohibition against removal, most foreign criminals would be entitled to remain by reason only of having a family in the United Kingdom that cannot reasonably travel with them to the offender's destination. I accept that the appellant has not been offended since his original conviction. The risk of re-offending is a relevant criterion but, taken alone or out

of context, fails to recognise that the public interest is not simply a risk limitation exercise but encompasses a wider public interest that, according to the statute and the rules, emphasises the weight to be accorded to removal when offences are committed that are particularly serious. I also accept that the conviction took place when the appellant, although an adult, was significantly younger and less mature. There is no evidence that he continues to keep company with his fellow offenders. Nevertheless, the offence was so serious as to merit a substantial period in detention. These considerations also play into the significance of the time that has passed since the offence itself. However, this has not been occasioned by culpability on the part of the Secretary of State in pursuing the appellant's removal. The delay has been the result of the time taken to consider the appellant's applications for further leave to remain, the associated appeals and the need to re-make the decisions.

49. The conclusion I have reached, and I do so conscious of the effect that this will have on the family, is that the removal of the appellant is the proportionate outcome of the commission of a single serious offence. It cannot be said that this is unduly harsh, unreasonable or disproportionate notwithstanding the effect that this has on all of the individuals intimately involved in the outcome of this appeal and, in particular, his daughter M. Rather, it is the recognition that certain types of behaviour have consequences both for the individual and his family. Those consequences cannot be avoided unless the severity of those consequences – their harshness - bears no proportion to the nature of the offending and thereby becomes unduly harsh. The public interest in removing a non-national who commits a serious offence, as reflected in the material that we have about it, is legitimate; its effect is inevitably harsh but cannot properly be classified as unduly harsh. In essence, the effect is both proportionate and reasonable. This takes into account the effect upon M and Ms President and, indeed, upon the appellant's mother. It also takes into account the appellant's conduct since this offence was committed and the consequent effect this has on the public interest in his removal.

## DECISION

1. I allow the appeal of the Secretary of State against the decision of the First-tier Tribunal.
2. The First-tier Tribunal made a material error on a point of law and I set it aside.
3. I re-make the decision, dismissing the appeal of Mr Smith against the decision of the Secretary of State to decide to make a deportation order.

ANDREW JORDAN  
JUDGE OF THE UPPER TRIBUNAL  
7 August 2017

## Appendix

**REASONS FOR FINDING AN ERROR OF LAW**

1. This is the first stage of an appeal made by the Secretary of State in a case where the respondent is Mr Smith. I shall refer to Mr Smith as the appellant as he was in the First-tier Tribunal.
2. The Secretary of State seeks to appeal on the basis that the First-tier Tribunal Judge erred in permitting the applicant to remain in the United Kingdom on human rights grounds. It is not necessary for me to say any more than what I said in January of 2017 when I granted permission. What I had in mind was often the facts speak more eloquently than a recital of legal principles and in this case the appellant was the driver of a switch vehicle which he and his associates had agreed to use in a robbery which targeted a BP garage and which netted £14,000. He was sentenced to three years in custody.
3. There is obviously a clear case for the public interest being operated in favour of his removal notwithstanding the fact that he had remained in the United Kingdom for the previous ten years. At that time there was before the judge evidence that the appellant did not live with the mother OF his daughter, who was then aged 4. The daughter was looked after principally by the mother and the judge went on to find that the parents were not in a subsisting relationship although it was apparently the case that there was an order made in the County Court that the appellant should have contact rights with his daughter.
4. In those circumstances it might be difficult to see how the circumstances of this case were of a type which permitted the operation of Article 8 to render the appellant's removal unlawful. The judge's approach to the question of the proportionality balance was that the appellant had submitted that it would be unduly harsh for his daughter to live in Barbados and the judge considered that the appellant's daughter, as a British citizen, was somebody who could not be required to leave the United Kingdom and that the application should be treated on the basis that the daughter should remain in the United Kingdom.
5. It was in the best interests of the appellant's daughter for her to remain in the care of her mother and not to be removed. That was the basis on which the First-tier Tribunal Judge moved on to conclude as the next step that the circumstances were such that this prevented the appellant from being removed. In fact, the latter step was a non-sequitur; it does not follow from the former. I am bound to say that I do not understand the basis upon which the judge reached the conclusion he did. The judge's reasoning would only hold good if, in every case, the presence of a British child in the United Kingdom prevented the removal of the child's parent. For this reason I find that there was a material error of law.
6. That does not of course conclude the consideration of this case because there will be an opportunity for the appellant to advance whatever additional material he might

wish to do so in order to say why he should not be removed. In particular he referred to some medical considerations and the need for continuous therapy.

7. He also submitted that the mother is studying dentistry at Birmingham University as a result of which the father, with assistance, looks after the child full-time and there is also consideration that the couple will be moving in to live together. Those were not matters which were before the judge, who dealt with the matter on a very much more limited basis. In these circumstances I am not going to remake the decision this afternoon but I am going to find that there was a material error of law and that the matter will have to be remade.