Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01725/2014

THE IMMIGRATION ACTS

Heard at City Centre Tower, Birmingham	**Decision & Reasons Promulgated**
On 22 October 2015	**On 30 October 2015**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SBS
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Smart, Senior Home Office Presenting Officer
For the Respondent: Mr Bramall of Counsel instructed on direct access

DECISION AND REASONS

Directions Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

1. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

2. This is an appeal against the decision of First-tier Tribunal Judge Matthews promulgated on 3 June 2015 which allowed the appeal against deportation. The appeal is brought before me by the Secretary of State for the Home Department. For the purposes of this determination I refer to the Secretary of State as the respondent and to SBS as the appellant, reflecting their positions as they were before the First-tier Tribunal.

Background

3. The background to this matter is that SBS was born in Belize in 1972. His mother married a British national and he moved with his mother and step father to the United Kingdom on 29 November 1989 at the age of 17. He has remained in the United Kingdom since that date with indefinite leave to remain.

4. On 12 July 2014 following guilty pleas to an offence of possession with intent to supply a Class B drug namely cannabis he received a sentence of twelve weeks' imprisonment. That offence followed seven previous convictions for twelve offences between 15 April 1994 and 27 January 2014 for offences including affray, going equipped for burglary, possessing a controlled drug Class A, possessing a controlled drug with intent to supply Class C, resisting or obstructing a constable. None of the previous convictions attracted a custodial sentence. As a result of the 12 week sentence in 2014, however, the Secretary of State deemed his deportation to be conducive to the public good. On 19 August 2014 a decision was made to make a deportation order by virtue of Section 5 of the Immigration Act 1971.

5. It is not disputed that the appellant has three British children born to three different British mothers. His oldest child BM was born on 7 November 2003. His second child, EM, was born on 26 October 2013 and his third child, a second son, LH was born on 5 November 2013. The appellant does not maintain that he has a relationship with the mothers of any of the children any longer.

Decision of the First-tier Tribunal

6. The appeal before the First-tier Tribunal was allowed because the First-tier Tribunal Judge found that the appellant came within the provisions of paragraph 399(a)(i)(a) and (b). It was accepted that he had a genuine and subsisting parental relationship with children under the age of 18 who were British and that it would be unduly harsh for the children to live in Belize and to remain in the UK without him.

7. It is not disputed that the appellant has a genuine and subsisting relationship with his three British children. This appeal turns on the finding that it would be "unduly harsh" for them to remain in the UK without him. The Secretary of State does not object to the finding that it would be unduly harsh for them to travel to Belize with him.

8. The First-tier Tribunal comments as follows on the appellant's relationship with his children at [36] to [48] of the determination:

> "36. I shall consider each child separately, taking Brent first. From the oral and documentary evidence I find that the appellant has had a very close relationship with BM since birth. I accept that for a period of about twelve months before BM's second birthday the appellant had fallen out with BM's mother and spent less time with BM since that time I accept and find that the appellant has acted as BM's father, has provided financial support when he is able to do so, sees his son every weekend and for much of the time during school holidays, and has been involved in selection of the secondary school to which BM will shortly go. I also note that BM has a close relationship with the appellant's mother.
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> 37. In relation to EM, the appellant similarly sees her every weekend and also once or twice during the week, she lives close to the appellant. The appellant provides financial support when he is able to do so. EM is also close to the appellant's mother.
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> 38. In relation to LH the appellant has a more difficult relationship with LH's mother and so sees LH once per month, again he provides financial support when he can.
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> 39. I find from the documents and oral evidence before me that all of the appellant's three children are British citizens as are their mothers.
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> 40. I accept that the children are normally resident with their mothers, all of whom have employment and in the case of BM and EM's mothers they also have other children in the UK by other relationships. I do not find that the mothers of any of the three children could be expected to, or are able to relocate to Belize. In relation to the children I do find that the appellant has a genuine and subsisting relationship with each of them. Brent, who is 11, has a long established and close relationship with his father that has continued for a decade in round terms, he sees him very frequently, as does EM who is of course younger having been born in 2013.
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> 42. I find that the appellant has a full paternal role in the lives of BM and EM, and contributes emotional and financial support to them to the best of his abilities. I find that he also has a parental role also in the case of LH though that is somewhat limited by the fact that he sees LH less frequently.
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> 43. These findings are at stark contrast to the respondent's understandable doubts given the lack of evidence available at that stage.
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> 44. It is perhaps sensible at this stage to turn to the applicable law, since it is agreed that in considering the proposed deportation and whether or not there is a relevant exception, I must apply the provisions of paragraph 399 of the Immigration Rules. In relation to that provision I do find that this appellant has three children with British citizenship. I must then go on to consider whether it would be unduly harsh for those children to return with their father to Belize, or to remain in the UK without him. In doing this I take account too of the provisions of Section 117 of the Nationality, Asylum and Immigration Act 2002. In so doing I observe that the appellant is fluent in English, and has a

positive work history as set out in his pre-sentence report, he has been in the UK entirely legally when fathering his children and has genuine and subsisting relationships with all of his children. The question of the harshness or otherwise of separation from the children is addressed below.

46. None of the appellant's children have any experience of living in Belize, their mothers are British citizens unable to contemplate moving to Belize as a result of their own jobs and family circumstances beyond their links to the appellant. The children are all settled in the UK, Brent is about to enter secondary education. Deportation will inevitably separate the appellant from his children, or possibly separate the children from their British mothers with whom they are settled. I find that it would be unduly harsh to consider moving the children to a separate country given that it would separate them from their maternal families.

47. I must consider the impact upon the children of the appellant returning alone to Belize. To do so would effectively remove an established father figure from certainly two of the children. BM has a ten year full parental relationship with the appellant. I find that such a lost would be emotionally devastating for BM in particular, and would occur at a very important stage of his education. I recognise that the appellant could still speak to his son by Skype, but find that to be no real substitute for the regular real contact that is enjoyed every weekend for two of the children.

48. I find that it would be unduly harsh for BM and EM to remain in the United Kingdom without their father because he has a close relationship with them and sees them date (sic) very regularly supports them financially and emotionally and is in every sense the father figure from whom the children will inevitably benefit. BM in particular I find would be devastated by the loss of his father. The best interests of the children could not be clearer, to keep the appellant as their father figure and for him to continue the regular day-to-day, face-to-face and positive role that he has in their lives.

49. In making this finding I have kept close at heart the appellant's previous convictions but I am satisfied, as I have already found, that there is a low risk of further offending and the frequency of his offending is reducing. I take account too of the nature of the offences and their age. It is in those circumstances that I discount the offending from substantially undermining this man's role as a father figure."

Finding on Error of Law

9. Mr Smart clarified the Secretary of State's challenge at the hearing. He maintained that the First-tier Tribunal Judge erred in the "unduly harsh" assessment because a range of factors that he was required to take into account from paragraphs 117B and 117C of the Nationality, Immigration and Asylum Act 2002 had not been considered. In making that submission the respondent relied on the decision of the Upper Tribunal in the case of **KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 543**. The headnote of that case states:

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

10. Mr Smart also identified a second challenge from the grounds relevant to the "unduly harsh" assessment in that the respondent considered the finding that this criteria was met to be irrational or perverse and not open to the judge on the evidence before him.

11. I found that I was in agreement with Mr Bramall's submissions opposing the grounds of the Secretary of State. He relied on two decisions of the Upper Tribunal which found, contrary to **KMO**, that in the assessment under the Immigration Rules of the "unduly harsh" test it was not correct to import the additional criteria or consideration of the matters set out in paragraphs 117B and 117C. The two cases relied on by Mr Bramall were **MAB (para 399; "unduly harsh") USA [2015] UKUT 435 (IAC)** in which the headnote states:

> "1. The phrase "unduly harsh" in para 399 of the Rules (and s.117C(5) of the 2002 Act) does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned.
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> 2. 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.
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> 3. 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 of all the circumstances of the individual.
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> (MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 223 (IAC) at [46] and BM and others (returnees – criminal and non-criminal) DRC CG [2015] UKUT 293 (IAC) at [109] applied.)"

and the case of **Bossade (ss. 117A-D – interrelationship with Rules) [2015] UKUT 415 (IAC)**:

> "1. For courts and tribunals, the coming into force of Part 5A of the Nationality, Immigration and Asylum Act 2002 (ss.117A-D) has not altered the need for a two-stage approach to Article 8 claims.
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> 2. Ordinarily a court or tribunal will, as a first stage, consider an appellant's Article 8 claim by reference to the Immigration Rules that set out substantive conditions, without any direct reference to Part 5A considerations. Such considerations have no direct application to rules of this kind. Part 5A considerations only have direct application at the second stage of the Article 8 analysis. This method of approach does not amount to according priority to the Rules over primary legislation but rather of recognising their different functions.
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> 3. In the context of foreign criminal cases (because the provisions found in Part 13 of the Rules are a complete code encompassing both stages of the Article 8 assessment), this means that Part 5A considerations have no direct role at the first stage when a court or tribunal is deciding whether an applicant meets the substantive conditions of paragraphs 399 or 399A of the Immigration Rules. They only have direct application at the second-stage, viz. assessment under the rules that involve a proportionality assessment: viz. paragraph 398 and (in revocation cases) paragraph 390A. In cases other than those concerning deportation of foreign criminals, where the Rules are not a complete code, it may still be necessary to conduct this second stage outside the Rules: see Secretary of State for the Home Department v AJ (Angola) [2014] EWCA Civ 1636 at [39].
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> 4. Whilst Part 5A considerations may have indirect application to the Immigration Rules, including those setting out substantive conditions such as paragraphs 399 and 339A, this is limited to their role as statements of principles that can be used where appropriate to inform the meaning of key terms set out in such paragraphs.
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> 5. New paragraph 399A of the Immigration Rules remains similar to the old in considering the foreign criminal deportee's situation both in the UK and in the country of return. However, so far as concerns focus on a person's situation in the UK, time in the UK is no longer relevant as such except in the context of lawful residence (399A(a)) and paragraph 399A(b) introduces new criteria that relate to social and cultural integration in the UK. So far as concerns focus on the situation in the country of return, paragraph 399A no longer looks at 'ties' per se but at the more inclusive notion of integration and obstacles thereto. By requiring focus on integration both in relation to a person's circumstances in the UK as well as in the country of return, the new Rules achieve a much more holistic assessment of an appellant's circumstances. Thereby they bring themselves closer to Strasbourg jurisprudence on Article 8 in expulsion cases which has always seen consideration of both dimensions as requiring a wide-ranging assessment: see e.g. Jeunesse v Netherlands (GC) App.No. 12738/10, 31 October 2014, paragraphs 106-109."

12. Put simply, I prefer the arguments relied on in the cases of **Bossade** and **MAB** that the now well established principle that the Immigration Rules relating to deportation in part 13 are a "complete code" and preclude importation of the s.117 considerations in a paragraph 399 "unduly harsh" assessment. **MAB** applies the "complete code" ratio of **MF Nigeria** at [32]

and [33] and again at [42] to [49]. The Tribunal in those paragraphs highlights the importance placed by the legislation and in case law from the Court of Appeal on the pre-eminence of the Immigration Rules and the approach set down in cases such as **MF Nigeria,** identifying at [48] that Part 5A of the Nationality and Immigration Act 2002 only becomes relevant in a second stage consideration outside of the provisions of paragraphs 399 and 399A. The Tribunal identifies at [49] of **MAB** that the interpretation that they apply is also indicated in the Secretary of State's own Immigration Directorate Instructions which indicate that a case "will succeed" if the exceptions set out in paragraphs 399 or 399A are met.

13. This position is **MAB** is further supported by the Upper Tribunal in the case of **Chege (section 117D – Article 8 approach) [2015] UKUT 165 (IAC)**. **Chege** was decided by a High Court Judge sitting as an Upper Tribunal Judge and set down that the consideration under 399 and 399A takes place *simpliciter* before moving on to the consideration of proportionality which only then includes the Section 117B and 117C criteria.

14. The Tribunal in **Bossade** reaches the same conclusion. The Tribunal identifies at [30], as in **MAB**, that there is an inexorable clarity from **MF Nigeria** onwards going through to **SSHD v SS Congo** that the Rules remain a complete code and require a two-stage analysis when considering an Article 8 claim against deportation. At [35] the Tribunal identifies that there is nothing expressly stating that Part 5A applies to consideration under the Immigration Rules and provisions of paragraphs 399 and 399A. At [36] the Tribunal identifies that a key characteristic of the Immigration Rules is that they can be or maybe determinative of a person's immigration status and that nothing in Part 5A acts to the contrary.

15. I noted also that the Tribunal in **KMO** referred only to the case of **MAB** and did not take into account the learning of the Tribunal in **Bossade**. It is also of note that the Tribunal in **MAB** drew support from two Presidential decisions which made no attempt in an "unduly harsh" assessment to introduce the Section 117B and 117C criteria.

16. So for those reasons, having preferred the legal interpretation provided by **MAB** and **Bossade**, I found that the First-tier Tribunal Judge did not err in not carrying out a 117B and 117C criteria assessment when establishing whether the "unduly harsh" test under paragraph 399(a) was met.

17. As regards the respondent's second challenge, the findings of the Tribunal were open to it on the basis of the evidence before it of the particularly strong relationship between the appellant and, certainly, his older child, the evidence from that child's mother referring to the devastation that would occur were the appellant to be deported. The respondent's grounds did not, in my judgment, show that the First-tier Tribunal Judge acted out with a range of responses reasonably open to him on the evidence before him such that the finding that the children would be in "unduly harsh"

circumstances could be said to be irrational or perverse and amount to legal error.

18. For those reasons I did not find that the decision of the First-tier Tribunal disclosed an error on a point of law.

Decision

The determination of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed  Date: 29 October 2015
Upper Tribunal Judge Pitt