



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: PA/00041/2015

THE IMMIGRATION ACTS

Heard at Bradford
On 23rd March 2016

Decision & Reasons Promulgated
On 18th April 2016

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR B.

(Anonymity Direction made)

Claimant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant in the Upper Tribunal

Representation:

For the Claimant: Mr B Davison (Solicitor)

For the Secretary of State: Mrs Petterson (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Kelly promulgated on the 30th November 2015, in which he allowed the Claimant's appeal against his deportation on human rights grounds under section 6 of the Human Rights Act 1988, on account of his relationship with his partner and two

children, one of whom J. suffers from a severe medical condition and the unduly harsh effect the Claimant's deportation would have upon them. Mrs Petterson on behalf of the Secretary of State made numerous concessions in this appeal.

2. Permission to appeal against the decision of First-tier Tribunal Judge Kelly has been granted by First-tier Tribunal Judge Page on the 7th January 2016. Although this is the Secretary of State's appeal, for the purposes of clarity throughout this decision, I will refer to Mr B, the Appellant in the First-tier Tribunal, as "the Claimant", and I will refer to the Secretary as "the Secretary of State".

Background

3. The Claimant is a national of the Democratic Republic of Congo, who was born on the 6th June 1992 and who is therefore now aged 23 years old. The Claimant arrived in United Kingdom on the 27th September 1999 and initially claimed asylum. That asylum claim was refused on the 20th June 2001 that the Claimant sought to appeal against that decision. Although his initial appeal was dismissed on the 11th March 2003, following an appeal to the Immigration Appeals Tribunal, his case was remitted on the 10th November 2003 and on the 25th February 2005 the Home Office withdrew the decision. On the 4th April 2005 the Claimant was granted Discretionary Leave until the 4th April 2008. The Claimant was then granted Indefinite Leave to Enter under the Family ILR exercise on the 18th August 2005.
4. On the 5th December 2006, when aged 14 years old, the Claimant was convicted of possessing Cannabis, a Class C controlled drug and possessing an offensive weapon at Leeds District Juvenile Court, in respect of which he received a 3 month referral order to run concurrently for both offences. On the 28th February 2007, he was convicted of possessing a controlled drug with intent to supply Class A Crack Cocaine, possessing a controlled drug with intent to supply Class C and possessing criminal property at Leeds District Juvenile Court, in respect of which he received a supervision order (Young Offenders) of 12 months duration; an order to participate in specified activities; a curfew order and electronic tagging. On the 27th April 2007, he was convicted of robbery at Leeds District Juvenile Court and was sentenced to a curfew order for 4 months with electronic tagging. On the 18th February 2008 he was

convicted of possessing a controlled drug with intent to supply Class A heroin, supplying a controlled drug Class A Crack Cocaine, supplying a controlled drug Class A heroin and possession with intent to supply a Class C controlled drug at Leeds Crown Court. He was sentenced to a 24 month detention and training order. On the 13th May 2010 the Claimant was convicted of burglary and theft of a dwelling at Leeds District Juvenile Court and was sentenced on the 3rd June 2010 to a youth rehabilitation order for 60 hours unpaid work. His final conviction was on the 8th December 2013, in respect of possessing a controlled drug Class B amphetamine, possessing a controlled drug Class B cannabis/cannabis resin and failing to surrender to custody at an appointed time, at Leeds District Magistrates Court, in respect of which he was sentenced to a fine of £65, cost of £85 and the victim surcharge of £15.

5. The Claimant was initially served with a liability for deportation letter on the 27th March 2008, and on the 18th June 2013, a Deportation Order was signed against him. The Claimant submitted representations as to why the Deportation Order should be revoked, and on the 9th December 2013 the decision was made to refuse to revoke the Deportation Order. A Judicial Review was submitted by the Claimant on the 11th March 2014 against the refusal decision to refuse to revoke the Deportation Order and against the decision to certify the deportation under Section 94 of the Nationality, Immigration and Asylum Act 2002, denying an in country right of appeal. On 1 July 2014, a consent order was signed giving the Claimant an in country right of appeal in respect of the decision dated the 9th December 2013, and his claim was considered on basis of him having made both a Protection Claim and Human Rights Claim.
6. That led to the decision of the Secretary of State on the 26th March 2015, which formed the basis of the appeal to First-tier Tribunal Judge Kelly. Within that original decision by the Secretary of State, it was stated that the Claimant had not fully explained his fear of returning to the DRC or provided evidence of substantiate his claim and therefore it was not accepted that he had a genuine well-founded fear of persecution in the DRC. In respect of his Article 8 claim in respect of his family life with his children as considered under paragraph 339 (a) of the Immigration Rules, it was accepted that the Claimant's son J. was a British Citizen, given that his mother

was British, and that J. had been born on the 24th January 2011 and was therefore under the age of 18 and that because J. suffered from severe haemophilia B, it would be unduly harsh to expect J. to return to the DRC with the Claimant, but it was considered that it would not be unduly harsh for J. to remain in the UK even though his father was being deported to the DRC, given that he would remain in the UK with one of his primary carers, namely his mother.

7. In respect of the Claimant's claim against his deportation in respect of his family life with a partner for the purposes of paragraph 339 (b) of the Immigration Rules, it was not accepted that it would be unduly harsh for the Claimant's partner Ms R. to live in the DRC if she chose to do so, although she was a British Citizen and that she could access the support of social services and the benefit system in the UK. It was found that it would not be unduly harsh for Ms R to remain in the UK even though the Claimant was to be deported.
8. It was further found that in respect of the Claimant's private life considered under paragraph 399A of the Immigration Rules, although it was accepted that the Claimant have been lawfully resident in the UK for most of his life, it was stated that the Claimant had failed to provide any evidence that he was socially and culturally integrated into the UK and it was not accepted that there would be very significant obstacles to his integration into the country to which it was proposed that he be returned, namely the DRC, given that he had resided in the DRC until the age of 8 years old.
9. The Claimant sought to appeal that decision, which appeal was heard by First-tier Tribunal Judge Kelly.

The First-tier Tribunal Judge's decision

10. In his decision promulgated on the 30th November 2015, First-tier Tribunal Judge Kelly noted how the Claimant is a citizen of the Democratic Republic of Congo and that he had abandoned his appeal against a refusal of his protection claim, but

pursued a claim solely on the basis of his Human Rights in respect of his right for private and family life under Article 8 and that his removal would therefore be unlawful under section 6 of the Human Rights Act 1988.

11. First-tier Tribunal Judge Kelly found that as a result of the changes to the rights of appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002, following the introduction of section 15 of the Immigration Act 2014, that it was no longer possible for a person to appeal the decision of the Secretary of State in a deportation case on the ground that “it is not in accordance with the Immigration Rules” and that in such circumstances when considering whether or not the Human Rights under Article 8 of a person who would otherwise be liable for deportation would be breached if they were to be removed, that the First-tier Tribunal therefore cannot now consider, given the new restrictive appeal rights, the appeal under paragraphs 397, 398, 399 and 399A of the Immigration Rules, and that he had to consider it purely under Article 8 terms, applying section 117A-D of the Nationality, Immigration and Asylum Act 2002, in particular section 117C, in respect of a person who is liable to deportation.

12. First-tier Tribunal Judge Kelly set out the Claimant’s criminality in full. However, notwithstanding the Claimant’s criminality, Judge Kelly found that both Exception 1 and Exception 2 under section 117C(4) and (5) applied. In respect of Exception 1 he found that Claimant had been lawfully resident in the UK for most of his life; that he was socially and culturally integrating into the United Kingdom and that there would be very significant obstacles to his integration into the country to which it was proposed he will be deported. It was found by Judge Kelly that Exception 2 also applied, taking into account in particular, the severe health problems suffered by the Claimant’s son J. He found the Claimant had a genuine subsisting relationship with both a qualifying partner and a genuine parental relationship with two qualifying children and that the effect of his deportation on the partner and children would be unduly harsh. He therefore allowed the appeal on Human Rights Grounds. The Secretary of State has sought to appeal that decision to the Upper Tribunal.

The Grounds of Appeal

13. Within the grounds of appeal to the Upper Tribunal it is argued by the Secretary of State that under Ground 1 the First-tier Tribunal Judge failed to give reasons or any adequate reasons for findings on material matters. It is argued that the Judge failed to give adequate reasons for finding that it would be unduly harsh on the Claimant's partner and children to remain in the United Kingdom without him.

14. It is further argued that the First-tier Tribunal Judge failed to recognise the precise wording of paragraph 399(b)(i) of the Immigration Rules, and that it is argued that the relationship had to be formed at a time when the Claimant (the deportee) was in the UK lawfully and their immigration status was not precarious. It is argued that having embarked upon a course of criminality in 2006, the Claimant's immigration status was precarious from that date onwards, following the Upper Tribunal case of AM (Section 117B) Malawi [2015] UK UT 0260 (IAC); that the Claimant and his partner did not begin their relationship until 2010 and they did not co-habit until 2013. It is argued that the First-tier Tribunal Judge failed to provide adequate reasons for finding that the Claimant's immigration status was not precarious when the relationship was formed and it is argued that the requirements of paragraph 399(b)(i) were not met. It is argued that the Judge's failure to engage with the Immigration Rules is an error of law which was material to the outcome of the appeal.

15. It is next argued that the Judge's analysis of "unduly harsh" at [41] is inadequately reasoned and demonstrated a lack of appreciation of the relationship between Exceptions 1 and 2 contained within the Immigration Rules and section 117C. It is argued that the Judge failed to consider the importance of criminality in the assessment of his social and cultural integration for the purposes of section 117C(4)(b). It is further argued that by the First-tier Judge not relying upon and criticising the Upper Tribunal case of KMO (Section 117 - unduly harsh) [2015] UK UT 00543 (IAC), ignored the critical analysis in that case between paragraphs 15 and 24, and failed to give effect to the principle that "the more serious the offence committed by the foreign criminal, the greater is the public interest in deportation of the criminal". It is argued that the Judge failed to provide reasons as to why the Claimant's deportation would lead to "an inordinately or excessively harsh" consequences to his partner and children, if they were to remain in the UK without

him. It is argued that the Judge failed to provide any reasons why at [43], the potential of state assistance was insufficient to meet the family's financial and medical needs. It is further argued that the Judge's analysis of section 117C(4)(c) lacks adequate reasons and does not focus on the balancing exercise.

16. Within ground 2 of the grounds of appeal, it is argued that in respect of exception 1 at section 117C(4) that the Claimant had not been lawfully resident in the UK for most of his life. It is said that he was aged 23 years old at the date of the appeal hearing and that he was first granted leave to remain in the UK on the 4th April 2005 and was subsequently granted indefinite leave to remain on the 18th August 2008. It is said that on the 18th June 2013 the Deportation Order was signed against him, thus bringing his lawful residence in the UK to an end and that therefore his lawful residence in the UK is eight years and two months, less than half of his life. It is said that this material error of fact led to a material error regarding the Judge's consideration of Exception 1.
17. Within ground 3 it is argued that the First-tier Judge failed to have due regard to the multi-faceted nature of the public interest in the deportation of foreign national offenders and that there was no consideration of the public revulsion to criminal behaviour or the need to deter other foreign criminals as expressed at paragraph 20 of the case of Danso v Secretary of State for the Home Department [2015] EWCA Civ 596.

The Grant of Permission to Appeal

18. Within the grant of permission to appeal it was stated by First-tier Tribunal Judge Page that:

"...I have read the Judge's decision and have not found it an easy decision to follow. The reasoning in the Judge's decision appears complicated. At paragraph 8 the Judge said that his conclusions are contrary to those expressed by the Upper Tribunal in Bossade (Section 117A-D Inter-relationship with Rules) [2015] UK UT 415. The Judge said that he had not followed the Tribunal's approach in Bossade when assessing the Claimant's Human Rights claim and had gone on at paragraphs

thereafter to conclude at paragraph 41 that Parliament did not intend the consequences brought upon the Claimant that his family by the Secretary of State's decision. Various questions have been raised by the Judge as to whether the authorities referred to in the decision were 'rightly decided'. I am in agreement with the Secretary of State's complaint that the Judge's decision is not adequately reasoned. If, contrary to the Judge's view, these authorities were rightly decided, then there are arguable errors in law in the Judge's decision".

The Rule 24 Reply

19. Within the Claimant's Rule 24 reply, it is argued that it is not accepted that there was any lack of precision in the wording or account of the decision, such as to amount to a material error in law. It is argued that the Judge has properly directed himself to the appropriate section of the statute at [9], and has at [8] and [41] particularly, directing himself as to the judicial authorities in the interpretation of the public interest considerations laid down by Parliament and what constitutes a removal/deportation being "unduly harsh". It is argued that the Judge has not simply indicated that the case of Bossade was concluded incorrectly, but rather that the conclusions as reached in that case are affected by the change in sections 82 and 84 of the 2002 Act, since the time that case was decided.

20. It is further argued in the Claimant's Rule 24 reply that the Judge between paragraphs [5] and [7] has set out the scope of his consideration of the appeal before him, in that it was now limited to consideration as to whether or not the Secretary of State's decision was in breach of the Claimant's Human Rights and this was not an appeal on the basis of whether or not the decision was correct under the Immigration Rules. It is argued that the Judge had also set out his consideration as to whether or not the decision would be "unduly harsh" in his discussion between [27] and [44] and that at [43] the Judge had referred back to [15] as to why he had concluded the deportation would be unduly harsh. It is said that the decision is lengthy and potentially longer than necessary, but that the reasoning behind it is sufficiently clear and does not contain a material error of law.

The Oral Submissions

21. Mrs Petterson on behalf of the Secretary of State made numerous concessions in this appeal.
22. Mrs Petterson agreed that in this case the Judge was considering an appeal under the new limited grounds of appeal contained within section 82(1) of the Nationality, Immigration and Asylum Act 2002, and that the Judge therefore was not in a position to consider whether or not the appeal should be allowed under “the Immigration Rules” or on the basis of the decision “not being in accordance with the law”. She agreed that the First-tier Tribunal Judge simply had to decide whether or not the decision was unlawful under section 6 of the Human Rights Act 1988, under the new grounds of appeal set out within section 84 of the Nationality, Immigration and Asylum Act 2002, following the refusal of the Claimant’s Human Rights claim.
23. Mrs Petterson argued that in considering the case in respect of Article 8, this had to be viewed through the “prison” of the Immigration Rules. She argued that if the requirements of paragraph 399 of the Immigration Rules were not met, then there would have to be exceptional circumstances to say that Article 8 was breached. Mrs Petterson on behalf of the Secretary of State argued that in considering the Article 8 claim, the Judge had to consider the provisions of sections 117A-D of the Nationality, Immigration and Asylum Act 2002, in considering the proportionality assessment, as these were mandatory requirements. Mrs Petterson submitted that the Immigration Rules had been amended to bring them in line with section 117A-D.
24. Mrs Petterson on behalf of the Secretary of State said that as this was an appeal being considered under the new restrictive rights of appeal, she was not seeking to argue on behalf of the Secretary of State that the Judge had erred in law in failing to decide the appeal as “not being in accordance with the Immigration Rules” or “otherwise not in accordance with the Law”. Nor was she seeking to argue that the First-tier Tribunal Judge materially erred in not considering the requirements of paragraph 399, when he had taken into account the considerations under section 117A-D, which had to be taken into account by him, to the extent that the Rules matched the Statutory provisions.
25. Both parties further agreed that the case of Bossade was decided before the appeal

rights had changed, and that therefore that case dealt with the situation when an appeal was being brought under the Immigration Rules under the old appeal rights, rather than the situation in this case where the appeal was being brought on the much more restricted new rights of appeal.

26. In respect of Exception 1, Mr Davison agreed that the Claimant had been lawfully resident for less than half of his life in the UK, but sought to argue in this regard that the Secretary of State had made a concession that the Claimant had been resident for more than half of his life and that it was not for the Judge to correct the Secretary of State's mistakes, or to go looking for errors in the concessions that have been made.
27. In this regard Mrs Petterson said that there had been a concession made at paragraph 51 of the Refusal Letter, but that she did not know what submissions had been raised in that regard before First-tier Tribunal Judge Kelly. She argued that if it had been argued, then it should have been dealt with, but it was not clear that the issue regarding there being an error in the concession had been argued before him. She was not in a position to say that any concession was withdrawn. She did argue that there was clearly an error there, but as she was not in a position to say that this had been canvassed before First-tier Tribunal Judge Kelly. Mrs Petterson told me that in such circumstances he was not saying that this amounted to a material error of law, given the concession that had been originally made within the refusal notice.
28. In respect of the issue as to whether or not the Claimant was socially and culturally integrated into the United Kingdom, Mrs Petterson argued that the Claimant's criminality fed into the question as to whether or not he was socially and culturally integrated and that this also needed to be factored in when considering whether or not there had been lawful residence for the purposes of Section 117C(4)(a) and (b). She argued that the Judge had failed to take account of the Claimant's offending behaviour since 2006, which led to the actual conviction in 2008 and further convictions which were dealt with at [42] of the decision and that the Judge had attached too little weight to the convictions that led to a non-custodial sentence. In reply on this point, Mr Davison argued that the First-tier Tribunal Judge had set out the Claimant's criminality at [28] and he argued clearly had the criminality in mind when making these findings and that the finding that the Claimant was socially and

culturally integrating here was a finding that was open to him. He submitted that the Judge had set out the full extent of the Claimant's criminality at [13] and the extent of his family life at [14].

29. In respect of whether or not there were very significant obstacles to the Claimant's integration into the country to which it was proposed that he be deported for the purposes of section 117C(4)(c), Mrs Petterson sought to argue that the Judge had failed to mention within his decision what those very significant obstacles might be, apart from him having a lack of a network in the DRC. She argued that the Judge had failed to take account of the fact that he had no health problems and had benefitted from a UK education, which he could use in the DRC. In this regard Mr Davison sought to argue that the Judge had identified precisely what the "very significant obstacles" were, and had described how the Claimant would in effect be "being sent back to an entirely alien territory", and the fact that he had a good English education did not alter that fact.
30. In respect of the question as to whether or not Exception 2 applied, Mrs Petterson sought to argue that in consideration as to whether or not it would be unduly harsh for the Claimant's partner and children to remain in the UK without him, the fact that they might struggle given the fact that one of the children suffered from a medical condition and that they might have to live on welfare, did not mean that it was unduly harsh and that many people struggle with financial problems and have young children or children who are ill. Mrs Petterson stated specifically that she was not pursuing the argument contained within the grounds of appeal that the Judge materially erred in not following the case of KMO, given that the Judge had considered the question as to the Claimant's criminality in any event in that regard at [42] of the Judgment.
31. Mr Davison argued that the Judge had given ample reasons as to why the decision would be unduly harsh on the sponsor and children, if they were to be left in the UK without the Claimant and that the Judge had given adequate and sufficient reasons for his findings regarding undue harshness and that the Secretary of State's arguments in this regard simply amounted to a disagreement with the reasons.

My Findings on Error of Law and Materiality

32. Given that the initial decision of the Secretary of State in this case is dated the 12th March 2015, it thereby post-dates the amendments brought about in respect of the grounds of appeal and the restriction in the rights of appeal in deportation cases in general which came into effect under the Immigration Act 2014 on the 10th November 2014.
33. As a result of section 15 of the Immigration Act 2014, section 8(2) of the Nationality, Immigration and Asylum Act 2002 has been amended so that the right of appeal to the Tribunal now only exists where the Secretary of State has decided to:
- (a) refuse a protection claim made by P;
 - (b) decided to refuse a Human Rights claim by P, or
 - (c) decided to revoke P's protection status.
34. Further, pursuant to section 15, the grounds of appeal under section 84 of the Nationality, Immigration and Asylum Act 2002 have equally been restricted so that now, under the amended wording of section 84(2) an Appeal under section 82(1)(b) (refusal of Human Rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998. The old wording of section 84 in respect of the grounds of appeal and in particular section 84(1)(a) that the decision was 'not in accordance with the Immigration Rules' and section 84(1)(e) that the decision is 'otherwise not in accordance with the law', have been removed. In such circumstances, as Mrs Petterson quite properly pointed out on behalf of the Secretary of State, this was an appeal to which the new limited rights and grounds of appeal applied, given the date of the original decision, such that the Claimant could now only appeal under the new wording of section 84(2) in respect of the refusal of his Human Rights claim, on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998. The Claimant no longer had the right to argue that the decision made by the Secretary of State was 'not in accordance with the Immigration Rules' or 'otherwise not in accordance with the law'.

35. Although the Claimant was not as result of the new appeal rights, able to argue that the decision was 'not in accordance with the Immigration Rules', I do agree with Mrs Petterson that in considering the appeal on Human Rights grounds, the First-tier Tribunal Judge still had considered the case through the prism of the Immigration Rules.
36. The Upper Tribunal in the case of Bossade (Sections 117A-D - Inter-relationship with Rules) [2015] UK UT 00415 (IAC) decided that "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 substantial 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 effect at the second stage of the Article 8 analysis. That method of approach does not amount to according priority to the Rules over primary legislation but rather of recognising their different functions" and that "...in the context of foreign criminal cases (because the provisions found in Part 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 339 or 339A of the Immigration Rules. They only have direct application at the second stage, viz. assessment under the Rules that involves 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 of the Rules".
37. The case of Bossade dealt with the situation where the Secretary of State had made a Deportation Order on the 23rd July 2013, such that the old appeal rights in that case applied. That case did not deal with the situation under the new restricted appeal rights and grounds following the amendment to sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002, and the restriction in the grounds of appeal, such that the Appellants could no longer appeal on the basis that the decision was 'not in accordance with the Immigration Rules' or 'otherwise not in accordance with the law.'

38. In the context of Article 8 in visitor visa appeals when considering the new limited Appeal Rights, the Upper Tribunal in the cases of Mostafa (Article 8 in entry clearance) [2015] UKUT 00112 (IAC) and Adjei (visit visas-Article 8) [2015] UKUT 0261 (IAC), decided that when considering the Article 8 question outside of the Immigration Rules, this has to be considered through the lens of the Immigration Rules. Therefore, if Article 8 is engaged in such a case, the Tribunal will need to look at the extent to which the Rules were satisfied, even though not considering the appeal on the basis as to whether or not the decision was “in accordance with Immigration Rules”, or on the basis as to whether or not the decision was “otherwise in accordance with the law”. The extent to which the Rules were met was a factor that would inform the proportionality assessment when considering the Article 8 issue.
39. In my judgment, the Tribunal has to adopt a similar approach when considering whether there has been a breach of Article 8 in a deportation case, and the Article 8 assessment still has to be looked at through the lens of the Immigration Rules in respect of paragraphs 397 to 399A. As was previously stated by the Court of Appeal in the case of MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 that the Immigration Rules were a complete code in respect of the assessment of an Article 8 claim brought by a foreign criminal. I do not consider that the requirements of the Rules can be ignored simply given the changes in the appeal rights. The fact that the appeal, if allowed, would now be granted on the basis of the decision not being in accordance with the appellant’s human rights and the decision being contrary to Section 6 of the Human Rights Act 1998, as opposed to “not been in accordance with the Immigration Rules” or “otherwise not in accordance with the law” does not mean that the provisions of paragraphs 397 to 399A should be ignored. The question as to whether or not the provisions of the Rules on deportation are met has to form the basis of the consideration of the Human Rights issue under Article 8.
40. The cases of both Bossade and MF Nigeria therefore do remain correctly decided, even though the ultimate answer would be now that the decision was unlawful under section 6 of the Human Rights Act 1990, rather than being either “not in accordance with the Immigration Rules” or “otherwise not in accordance with the law.” Given that as stated by the Court of Appeal in MF (Nigeria) v Secretary of

State for the Home Department [2013] EWCA Civ 1192 that the codification of the Immigration Rules in respect of Deportation is intended to be a “Complete Code”, it is hard to envisage that even with the new restricted appeal rights, that there might be circumstances where a Claimant who failed to meet the requirements of the Immigration Rules in respect of deportation would be able to successfully establish the decision was unlawful under section 6. The Tribunal still has to look at the Rules as a “Complete Code”, and to use the Rules as informing the decision on the Human Rights issue, in respect of Article 8.

41. In such circumstances, although First-tier Tribunal Judge Kelly did properly consider the question as to whether or not the decision was unlawful under section 6 of the Human Rights Act 1998, I do find that he did err in law in failing to take into account the extent to which the provisions of paragraph 397 to 399A of the Immigration Rules were met, when reaching his decision on proportionality and breach of Article 8 and consequent breach of section 6 of the Human Rights Act.
42. However, as was quite properly conceded by Mrs Petterson on behalf of the Secretary of State, given that the provisions within the Immigration Rules within paragraph 397 to 399A in respect of deportation have been amended to bring them in line with sections 117A-D of the Nationality, Immigration and Asylum Act 2002, the error of First-tier Tribunal Judge Kelly in this regard may not necessarily be material, if in looking at the case solely in line with section 117 A-D, he has considered and applied the criteria that should have been that should have been looked at by him under paragraphs 397 to 399A.
43. In respect of Exception 1, which was considered by First-tier Tribunal Judge Kelly under section 117 C (4) the wording of that paragraph does mirror exactly the provisions in paragraphs 399A of the Immigration Rules. Therefore, the error of First-tier Tribunal Judge Kelly in not considering the provisions of paragraph 399A does not in itself amount to material error, given that he has clearly considered the wording of the identical provision under section 117C(4).
44. When First-tier Tribunal Judge Kelly looked at the appeal in respect of Exception 1 under section 117C(4) Mrs Petterson conceded that she could not say whether or not

the error in terms of the concession that had been made by the Secretary of State at paragraph 51 of the decision, namely that the Claimant had been lawfully in the UK for more than half his life, had been withdrawn. She therefore stated specifically that she could not argue that the Judge materially erred by relying upon that concession, even though in fact the Claimant had not been lawfully resident within the UK for more than half of his life.

45. I do find that the Judge did err in finding that the Claimant had been lawfully resident in the UK for most of his life, given that he was 23 years old at the date of the hearing and had been first granted leave to remain in the UK on the 4th April 2005 and was subsequently granted indefinite leave to remain on the 18th August 2008, but was served with a Deportation Order on the 18th June 2013, meaning that he had been lawfully in the UK for eight years and two months, less than half of his life. However, given that this resulted from a concession wrongly made by the Secretary of State, , I do not find that there is a material error in Judge Kelly's decision in him relying upon the concession made by the Secretary of State in the refusal letter, as conceded by Mrs Petterson on behalf of the Secretary of State.
46. In respect of the second limb for Exception 1, in terms of whether or not the Claimant was socially and culturally integrated into the UK, although in this regard the Secretary of State seeks to rely upon paragraph 33 of the decision of the Upper Tribunal in the case of AM (Section 117B) Malawi [2015] UK UT 0260 (IAC), that paragraph of the Upper Tribunal's decision was dealing with whether or not a person's status in the UK was 'precarious' as opposed to whether or not the Claimant was 'socially and culturally integrated' into the United Kingdom. Clearly a Claimant's criminality may well impact upon the extent to which he is socially and/or culturally integrated into the United Kingdom, but criminality in itself is not necessarily a bar per se to a person being socially and/or culturally integrated into the UK. In this regard, First-tier Tribunal Judge Kelly clearly had in mind the Claimant's criminality, which he had set out in full at [13] of his decision, but nevertheless had given clear, adequate and sufficient reasons at [33] as to why he found that the Claimant had been socially and culturally integrated into the UK in terms of the Claimant having lived and been educated in the United Kingdom since the age of eight years old and the work which he had undertaken within his local

community. This was a finding that was open to him on the evidence.

47. In respect of the argument that the Judge's analysis under section 117C(4)(c) lacked adequate reasons and focused upon the negative rather than a balancing exercise, in terms of whether or not there would be very significant obstacles to the Claimant's integration into the country to which it was proposed he would be deported, I find that the Judge has given sufficient and adequate reasons for his findings in this regard at [33] of the decision. The Judge specifically noted how the Claimant had only retained a limited residual knowledge of the French language and that he did not have any social or familial network or support within the DRC. First-tier Tribunal Judge Kelly also how his removal to that country and subsequent exclusion from the UK for a period of 10 years would in the Judge's opinion, amount to exiling him to an entirely alien territory, in circumstances where he had lived and had been educated in the UK since the age of eight years old.
48. Therefore, although First-tier Tribunal Judge Kelly did err in finding that Exception 1 applied, on the mistaken belief that the Claimant have been lawfully resident in the UK for most of his life, for the reasons set out above and in light of the concession made by Mrs Petterson on behalf of the Secretary of State, I do not find that this amounts to a material error of law.
49. In any event, for the reasons set out below, the Judge's findings in respect of Exception 2 in respect of his relationship with his children and the unduly harsh effect upon them of his deportation in respect of the very particular circumstances of this case, I find were open to him and do not disclose a material error of law for the reasons discussed below. In such circumstances, although the Judge did err in respect of Exception 1, given that I find the Judge's reasoning in respect of Exception 2 in respect of his relationship with his children and the effect of his deportation on them were both adequate and sufficient and open to him for the reasons set out below, such that any error in respect of Exception 1 is not material.
50. In considering Exception 2, in terms of whether or not the relationship with the Claimant's partner was capable of being recognised under the Exception, within the grounds of appeal it was argued that the Judge failed to have regard to the precise

wording of paragraph 339(b)(i) of the Immigration Rules, in that under the Immigration Rules the relationship had to be formed “at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious”.

51. The wording under section 117B(4)(b) is that, “little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person was in the UK unlawfully”. The wording in the statute is simply ‘unlawfully’ rather than ‘unlawfully and precarious’.
52. Under section 117C, Exception 2 applies where the Claimant has a genuine subsisting relationship with a qualifying partner, or a genuine subsistent parental relationship with a qualifying child, and the effect that the Claimant’s deportation would have on the partner or child would be unduly harsh.
53. I do accept the argument on behalf of the Secretary of State within the grounds of appeal that the Judge’s analysis as to the relationship with his partner was flawed by failing to recognise the precise wording of paragraph 339(b)(i) of the Immigration Rules. Although the wording under section 117 B (4) (b) is wider than the wording of paragraph 339(b)(i), this I find was a deliberate distinction drawn within the Immigration Rules, that people who are subject to deportation should be subject to stricter requirements. In this regard, given that the First-tier Tribunal Judge did not consider the precise wording of paragraph 339 (b)(1), I do find that First-tier Tribunal Judge Kelly did err in this regard, to have taken account of the fact that the relationship between the Claimant and his partner was formed at a time when his status was precarious, when considering the appeal Human Rights Grounds.
54. Next, in regards the issue regarding did the Judge err in considering the question of whether or not the effect of the Claimant’s deportation on the partner or children would be “unduly harsh” for the purposes of section 117C(5). Given the concession made by Mrs Petterson on behalf of the Secretary of State that she was not proceeding with the argument raised within the grounds of appeal that the Judge erred in failing to follow the analysis of the Upper Tribunal in the case of KMO (Section 117 – unduly harsh) [2015] UK UT 00543, on the basis that First-tier Tribunal Judge Kelly had gone on to consider the issue on the basis of the effect if KMO was

rightly decided and had considered the seriousness of the offence as a factor in the assessment of undue harshness at [42]. Mrs Petterson conceded that the First-tier Tribunal Judge having considered the seriousness of the offence as a factor in the assessment of undue harshness at [42], there was no material error in the Judge's analysis in this regard.

55. Turning to the Secretary of State's argument that the Judge failed to provide adequate reasons as to why the deportation would lead to "inordinately or excessively harsh" consequences and as to why the protected availability of the state assistance would be insufficient to meet the family's financial and medical needs in the Claimant's absence. When First-tier Tribunal Judge Kelly considered the question of undue harshness at [43] he makes specific reference to the circumstances as summarised by him at [15] in particular the fact that one of the Claimant's children suffers from severe haemophilia B which means that he has a deficiency in factor 9, which is one of the essential clotting factors in blood and that consequently he is prone to bleeding episodes into any part of his body, which can result from traumatic injury or bleeding spontaneously. Judge Kelly pointed out that this was a lifelong condition that can cause long-term joint problems and that the child requires prophylaxis treatment at least twice a week and sometimes daily when there is a bleed. The Judge accepted that this was currently administered by the Claimant's partner, with the assistance of the Claimant and that the child struggles while the procedure is being administered and the Claimant's role was to hold him still and that when the Claimant was in immigration detention for a the few weeks in 2014, the Claimant's partner was forced to take the child to hospital twice a week, in order that a nurse could hold him still whilst the Claimant's partner administered his drugs.

56. Judge Kelly at [43] went on to find in his Judgment the consequences of the Claimant's deportation to both the partner and the two children would appropriately be characterised as "unduly harsh". He found that the difficulties that the partner would face in struggling to provide financial and medical support for the child without assistance would be obvious and that those difficulties would be exacerbated by the fact that she would in addition have to cope with bringing up a second child who at that stage was only 12 months old. Although the Secretary of

State argues that many people struggle with ill children or forced to live on benefits, it was relevant in that regard that as found by First-tier Tribunal Judge Kelly at [16] the Claimant's partner was at that stage working 16 hours a week as a shop assistant, during which time the Claimant was caring for the two children whilst she was at work.

57. In my judgment, the finding of First-tier Tribunal Judge Kelly that the consequences of the Claimant's deportation on his two children were such that it would be unduly harsh for them to remain in the UK without the Claimant, in such circumstances where their mother would then be forced out of her job and onto benefits, and where she would then have the difficulties in caring for J., a child who suffers with severe haemophilia B, as set out by Judge Kelly at [15], in addition to bringing up a second child who was only 12 months old, were findings that were open to him. His reasoning in this regard has been adequately and sufficiently explained, and it cannot be said that his decision in that regard is either irrational or perverse. This was a finding that was open to him on the evidence presented, in light of the specific circumstances of the case and the severe medical condition of the Claimant's son.
58. In respect of the argument that the Judge has failed to have regard to the multi-faceted nature of the public interest in the deportation of foreign national offenders and the need to keep other foreign nationals from offending, the Judge, I find has properly borne in mind and weighed both the Claimant's criminality and the public interest in the deportation of foreign criminals, both of which he made reference to within his determination and clearly had taken into account.
59. In such circumstances, therefore, in light of First-tier Tribunal Judge Kelly's findings, had he properly considered the Article 8 question through the lens of paragraph 399 of the Immigration Rules, he would in any event have found that the Claimant did have a genuine and subsisting parental relationship with two children under the age of 18, who were in the UK and who were British citizens. It had already been conceded by the Secretary of State in the refusal letter that it would be unduly harsh to expect the Claimant's son J. to return to the DRC with the Claimant, given J's severe medical condition. Further, Judge Kelly although not having referred to paragraph 399, also properly considered the other criteria stated within that

paragraph of the Rules, in respect of the parental relationship between the Claimant and his children and the effect on them, that found that it would be unduly harsh for the children to remain in United Kingdom without the Claimant, for the reasons set out above and detailed by the Judge at [43], with reference to paragraph [15]. It was open for him to do so in the circumstances of this particular case, for the reasons discussed above.

60. Therefore, had First-tier Tribunal Judge Kelly properly considered the Human Rights Appeal through the prism of paragraph 399 of the Immigration Rules, he would have reached the same conclusion in any event in respect of the relationship between the Claimant and his children and the effect of his deportation on them.

61. In such circumstances it was open for him to find that taking into account the effect on the Claimant and his children, in particular on J., bearing in mind his severe health issues, that notwithstanding the Claimant's significant criminality, that the Claimant's own human rights and those of his children would be breached by his deportation and that the decision was therefore unlawful and contrary to section 6 of the Human Rights Act 1998. Given that the decision of First-tier Tribunal Judge Kelly would therefore have been the same, irrespective of the errors that he made in the way that he approached the case, the errors made by him do not amount to material errors. The decision of First-tier Tribunal Judge Kelly, thereby does not contain a material error and is maintained. The Secretary of State's appeal is dismissed.

Notice of Decision

The decision of First-tier Tribunal Judge Kelly does not contain a material error of law and is maintained. The Secretary of State's appeal is dismissed.

Given that the case involves two children, unless and until a Tribunal or Court directs otherwise, the Claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the

Claimant and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Dated 27th March 2016

R McGinty

Deputy Judge of the Upper Tribunal McGinty