



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01068/2014

THE IMMIGRATION ACTS

Heard at North Shields
On 22 January 2018

Decision & Reasons Promulgated
On 22 February 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

S

(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss C. Soltani, instructed on behalf of the Appellant
For the Respondent: Mr A. McVeety, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant appeals, with permission, against the decision of the First-tier Tribunal (Judge Cope) promulgated on the 8th June 2017 in which the Tribunal dismissed the appeal of S against the decision of the Secretary of State to refuse to revoke a deportation order against him under Section 32(5) (of the UK Borders Act 2007).
2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008. Unless and until a court directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly affect him or members of his family. This direction applies both to the

Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Background

3. The background to the appeal is set out in the papers and the determination of the First-tier Tribunal and also in the decision letter of the Secretary of State dated 23rd May 2014. The Appellant is a national of Gambia. He entered the United Kingdom as a visitor in 2002. He subsequently met a British citizen and a relationship developed between them. She had children from a previous relationship. They married and he returned to Gambia to obtain entry clearance as a spouse in 2004. They had a child in 2005. Later that year the relationship broke down but he was granted leave to remain until 3 September 2006. He had a brief relationship with another woman which led to the birth of their child in 2006. He then met had a relationship with another woman L, who had a child from a previous relationship. He married her following his divorce and he was granted entry clearance in 2007. Following this he was granted indefinite leave to remain in 2009. He subsequently separated from L.
4. On 3 June 2010 he was arrested for being in possession of cocaine with intent to supply and pleaded guilty to the offence. He was committed to the Crown Court sentence and on 22 July 2010 he was given a sentence of 12 months imprisonment. The judge's sentencing remarks are set out in the determination of Mr Ockelton VP and UT Judge Dawson in their decision of the 13th March 2012 exhibited in the Respondent's bundle at paragraph 5.
5. There is a long history of litigation in respect of the Appellant.
6. The Respondent made a deportation order on 23 December 2010 pursuant to Section 32 (5) of UK Borders Act 2007 following his conviction. The Appellant appealed against that decision and his appeal was heard by the First-tier Tribunal panel on 25 February 2011. The panel dismissed his appeal against the Respondent's decision in a determination promulgated on 8 March 2011. There is a copy of that decision in the Respondent's bundle and is a matter of record. The factual circumstances in relation to his family life are not relevant for the purposes of these current proceedings due to a change in his circumstances and the nature of family life now advanced.
7. In or about September 2011 the Appellant met W and began a relationship with her in November. She is a British citizen who has two children from a previous relationship.
8. The Appellant sought permission to appeal the decision of the First-tier Tribunal panel and the appeal was heard by the Upper Tribunal panel on 13 January 2012. In a determination promulgated on 13 March 2012 they dismissed his appeal against the Respondent's decision to make a deportation order. The Appellant sought permission to appeal to the Court of Appeal and this was refused. The Appellant remained in the United Kingdom and did not leave pursuant to the deportation order.

9. The Appellant was detained in 2013 and further representations were made on his behalf from two firms of solicitors and those representations were treated by the Respondent as an application to revoke the deportation order. He was subsequently granted bail in or about 2013 and went to live with his partner W. They had a child, A, born in 2013.
10. An application to revoke the deportation order was refused by the Respondent in the decision of 23 May 2014. The Appellant appealed that decision and it was heard by another First-tier Tribunal judge who dismissed the appeal in a decision dated 2 September 2014.
11. Permission to appeal to the Upper Tribunal was granted and the substantive appeal was heard on 18 October 2016. The Upper Tribunal found that there had been an error of law in the decision of the First-tier Tribunal who had applied the wrong Rules and the appeal was allowed to the extent of it being remitted to the First-tier Tribunal to be heard again.
12. Thus the appeal came before the First-tier Tribunal again on 28 April 2017. In a determination promulgated on 8 June 2017, the First-tier Tribunal dismissed his appeal on all grounds.

The Appeal before the Upper Tribunal:

13. The Appellant sought to appeal that decision and permission was refused on the 4th July 2017 but on renewal was granted by UT Judge Perkins on the 15th September 2017 for the following reasons: -

“There are so many statements of law and self directions of arguable relevance in the decision and reasons that it needs to be read carefully to ensure that the reader has not been distracted by surplusage.

The appeal concerns an attempt to resist deportation. The judge rightly recognised that the Appellant’s criminal record, although by no means the most serious, sufficiently serious to attract “automatic deportation” and considerable weight should be given to that.

He also recognised that although he decided that it was in the best interests of the children for the Appellant to remain in the United Kingdom that was determinative of the appeal. However I do not understand why, at paragraph 62 the decision, he was concerned with compassionate circumstances “over and above” as identified in section 117C of the Nationality, Immigration and Asylum Act 2002. The Appellant had not been sentenced to 4 years or more imprisonment. Arguably he misdirected himself. I give permission on each ground.”

14. At the hearing before the Upper Tribunal I heard submissions from each of the advocates and took into account the written grounds advanced on behalf of the Appellant but also a Rule 24 response in which the Secretary of State responded to the Appellant’s grounds. It is not necessary to set out the submissions of each of the parties as they are set out in the record of proceedings and I will set out the relevant aspects of those submissions when dealing with the grounds advanced on behalf of the Appellant and my consideration of those issues.

The legal framework

15. The relevant statutory background is set out as follows:

Revocation of a deportation order

The factors to be taken into account by the Respondent in deciding whether or not a deportation order should be revoked are set out in Part 13 of the Immigration Rules (HC 395), the relevant parts of which currently read:-

A362. Where Article 8 is raised the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met....

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

- (i) the grounds on which the order was made;
- (ii) any representations made in support of revocation;
- (iii) the interests of the community, including the maintenance of an effective immigration control;
- (iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in Exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

...

Deportation and Article 8

A398. These rules apply where:

...

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

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

...

- (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...

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there

are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if

–

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British Citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; 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, and
 - (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
 - (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
 - (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported."

16. On 28th July 2014 the Immigration Act 2014 ("the 2014 Act") came into force. It inserted a new part 5A into the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Sections 117A and 117D of the 2002 Act provide in relevant part:

17. Part 5A provides in relevant part as follows:

"PART 5A

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

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 E1 or Exception E2 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 E2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
- (7) The considerations in sub-Sections (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.

117D Interpretation of this part

- (1) in this Part -

"Article 8" means Article 8 of the European Convention on Human Rights:

"qualifying child" means a person who is under the age of 18 and who -

- (a) is a British citizen, or
- (b) has lived in the United Kingdom for a continuous period of seven years or more:

"qualifying partner" means a partner who -

- (a) is a British citizen, or
- (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see Sections 33(2A) of that Act).

- (2) In this Part, "foreign criminal" means a person -

- (a) who is not a British citizen,
- (b) who has been convicted in the United Kingdom of an offence, and
- (c) who -
 - (i) has been sentenced to a period of imprisonment of at least twelve months,

- (ii) has been convicted of an offence that has caused serious harm, or
- (iii) is a persistent offender.

18. In essence, the central issue determined by the First-tier Tribunal was whether or not it would be “unduly harsh” for the Appellant’s partner and children to live in Gambia or whether or not it would be “unduly harsh” for the children to remain in the UK without the person, S, who is to be deported. Thus the judge was required to consider what is meant by “unduly harsh” within the context of the law.

19. The correct approach relating to what is meant by “unduly harsh” within the context of the legislation is set out in the following paragraphs from the judgment of Laws LJ, with whom Vos and Hamblen LJ agreed, in **MM (Uganda) v the SSHD [2016] EWCA Civ 450**:

“[22] I turn to the interpretation of the phrase ‘unduly harsh’. Plainly it means the same in Section 117C (5) as in Rule 399. ‘Unduly harsh’ is an ordinary English expression. As so often, its meaning is coloured by its context. Authorities hardly needed for such a proposition but it is anyway provided, for example by **VIA Rail Calendar [2000] 193 DLR (4th) 357** at paragraphs [35] to [37].

[23] The context in these cases invites emphasis on 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. In my judgment, with respect, the approach of the Upper Tribunal in **MAB** ignores this combination of factors. The first of them, the public interest in the removal of foreign criminals, is expressly vouched by parliament in Section 117C (1). Section 117C (2) then provides (I repeat the provision for convenience):

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

[24] This steered the Tribunals and the court towards proportionate assessment of the criminal’s deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the ‘unduly harsh’ provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term ‘unduly’ is 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 could certainly include the criminal’s immigration and criminal history.”

20. This decision was followed by the Court of Appeal in **R (MA (Pakistan)) v SSHD** although Elias LJ with whom King LJ and Sir Stephen Richards agreed, express some doubts about the introduction of the public interest into the test of undue harshness.

21. It is therefore clear from the decision in **MM (Uganda)** that it is not appropriate to consider the question of “unduly harsh” solely from the perspective of the impact which deportation would be likely to have upon the children or partner involved.

Discussion

22. Miss Soltani on behalf of the Appellant submitted that the judge had not applied the correct legal framework at paragraph [162] and that he referred himself to the wrong test of whether there are “very compelling circumstances”. She submitted this only applied where the Appellant had been sentenced to 4 years or more and this did not apply in the Appellant’s case as he was someone who had received a sentence of 12 months imprisonment. Thus she submitted the test of “very compelling circumstances” was higher than that which applied to this Appellant, namely whether the separation from him from his family (either by way of effect upon him or upon his family) would be unduly harsh. Thus the judge applied the wrong test or at best, had been confused about the test and the threshold that he was bound to apply.
23. I have considered that submission in the light of the determination when read as a whole. In my judgement, the First-tier Tribunal did apply the correct legal framework and did not apply a threshold which was higher than that which was relevant to this particular Appellant. It is plain from paragraph [162] that the judge was dealing with the alternative test, that is, whether there were circumstances over and above those described in Exceptions 1 and 2. On the facts of this appeal, it was Exception 2 that was in issue. In the preceding paragraphs to [162] the judge had dealt with the central issue of whether it would be unduly harsh for the child to live in the country to which the person is to be deported and whether it would be unduly harsh for the child to remain in the UK without the person who is to be deported. I can see no confusion as to what the correct test was as demonstrated in the determination when it is read as a whole.
24. It is right to observe that the decision is a comprehensive one. The judge dealt with the law in a number of paragraphs. The legal framework to which I have already referred were set out at paragraphs 11 - 15. He set out the basis of the appeal at paragraphs 23 - 38 and then proceeded to set out what he described as “legal analysis” at paragraphs 39 - 55 taking into account relevant case authorities including the Supreme Court’s decision in Hesham Ali v SSHD[2016] UKSC 60. It is also right to point out that he expressly gave consideration at [51) to the decision in MM (Uganda) (as cited).
25. Therefore within the decision, the judge set out in summary terms the issue that he had to decide; noting that the Appellant was a foreign criminal who had been sentenced to a period of imprisonment of twelve months and thus the issue was whether he fell within Exceptions 1 and 2 (see Section 117C (5) and paragraph 399(a) or (b)) and if so, whether his Article 8 claim succeeded. This is in line with the decision of the Supreme Court in Hesham Ali (Iraq) v the SSHD [2016] UKSC 60 at [38] where Lord Reed said this:-

“[38] The implication of the new Rules is Rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under Article 8 by countervailing factors. Cases not covered by those Rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between twelve months and four years but whose private or family life does not meet the requirements of Rules 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances; in other words, by a very strong claim indeed, as Laws LJ put it in **SS (Nigeria)**. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and Rules 399 and 399A provide an indication of the sort of matters which the Secretary of State regards as very compelling. As explained at paragraph [26] above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. ...”.

26. As to the Appellant circumstances, he recognised that by reason of his sentence of 12 months imprisonment he fell into the category described as “medium offender” and properly identified that consideration should be given as to whether he fell within Exception 1 or 2 of S117(5)C of the 2002 Act, and if he did, the appeal succeeded. If not, the next stage was to consider whether there were very compelling circumstances over and above those which are set out in Exceptions 1 and 2 (see [43]).

27. Contrary to the submission of Miss Soltani, it is plain from that paragraph in which he cited the decision of NA that he correctly identified Exceptions 1 and 2 and the consequences of not satisfying them. At [45]- [46] he then again correctly identified the test that was in issue stating as follows:

“45. In the case of a child the Respondent considers that it has to be shown that it would be unduly harsh for the child to both live in the country that it is proposed to return the applicant or Appellant to, and for it to be unduly harsh for the child to remain in the United Kingdom without the applicant or Appellant.

46. In relation to a partner the Respondent takes the view that it has to be shown that the relationship was formed to time when the applicant or Appellant was in this country lawfully and the immigration status was not precarious; that it would be unduly harsh that partner to live in the country to which deportation is proposed because of compelling circumstances over and above those described in paragraph EX 2 of Appendix FM to the Immigration Rules; and that it would be unduly harsh for that partner to remain in the United Kingdom without the applicant or Appellant.”

28. At [51] he made reference to the decision in MM Uganda and what was meant by “unduly harsh” in section 117C (2).

29. At [52] he returned to the importance of the public interest in deportation and at [53] made reference to the jurisprudence of the ECHR reflected in the Immigration Rules

and that it contemplates the deportation of a non-citizen parent of British citizen children who remain in the United Kingdom and that it can be compatible with Article 8. At [55] he reminded himself that this was an appeal against the refusal of an application to revoke an automatic deportation order. The purpose of this must be clear; the Appellant is someone who has remained in the UK after the deportation order has been made and the appeal dismissed and it is a matter that should be given significant weight in favour of the public interest.

30. Within the determination the judge makes it plain that the earlier test that he referred to at paragraphs 45 and 51 (relating to unduly harshness) is the test that he had to apply and then proceeded to set out the agreed factual basis upon which he was to make his decision. That can be summarised as follows; at [64] it was accepted that the basis for the deportation order was his sentence received in 2010 for a period of imprisonment of 12 months and his plea of guilty and the sentencing remarks of the judge. At [65] -[66] he set out that it was accepted that the Appellant had a genuine and subsisting relationship with his partner and his daughter A and L (his stepdaughter). Both were British citizens and the family lived together. At [67]-[69] it was accepted that the Appellant no longer had any current parental relationship with a previous child. At [70] he observed that was no suggestion on behalf of the Appellant that any of the relationships with the other three women or the other five children or stepchildren formed the basis of any Article 8 claim. Thus at [71] he set out the ultimate issue to be decided.
31. He then turned to the factual basis at paragraph [72 - 78] whereby he summarised the basis of the family life that the Appellant had in the United Kingdom, namely that of a genuine and subsisting relationship with his partner W, that he had a child of that relationship and had a genuine subsisting relationship with W's daughter L as her stepfather.
32. At [81 - 83] the judge considered the Appellants factual basis of his private life; he been resident in the UK since 2002 (save for short periods where he returned to Gambia) he had been granted indefinite leave to remain in 2009 and thus as he had lived in the United Kingdom for 15 years and that he developed a private life.
33. He then went on to undertake an assessment following the statutory framework of section 117A-D at paragraphs [89 - 98]. He found that both parties spoke English but as to financial independence, he concluded that he was not satisfied that it been shown that the Appellant with the rest of the family were financially independent. He found that the Appellant had been living lawfully in the United Kingdom until the deportation order was made in 2010 but since then he had no leave to enter or remain and had been in the UK unlawfully. Applying section 117B (4) (a) the 2002 Act he placed some weight on the private life since August 2002. He also observed that he had not worked for a period of nearly 7 years and that whilst they had been a number of letters in the bundle none of the authors had been called to give evidence.
34. He then turned to consider the Appellant's relationship with W and when the relationship began and the precariousness of the Appellants status (see [101 - 102]).

35. He then turned to the provisions of section 117C and addressed the relevant issues in relation to the Appellants factual circumstances. He placed weight on section 117C (1) the deportation of foreign criminals is in the public interest and that the Appellant was not a British citizen, he been convicted of an offence which had resulted in a sentence in prison for at least 12 months and thus fell within the definition. At paragraphs [112 – 120] the judge gave reasons why Exception 1 was not met by the Appellant (which related to private life). Some of those findings were relevant to the overall assessment of the Appellant’s circumstances and those of his partner when looking at Exception 2, in particular, that the judge found there to be no very significant obstacles to the Appellants reintegration to the Gambia on the basis that he had strong and continuing family link there for the reasons given at [119)].
36. The judge then went on to consider Exception 2 at [122] having already made reference to this earlier at paragraphs 44 and 45.
37. The judge considered the best interests of the children and properly identified that they were a primary consideration. In the case of A [127] he made an uncontroversial finding that he accepted that it would be in the best interests of A that she stay with both of her parents. Whilst it is submitted on behalf of the Appellant that this is inconsistent with a later finding made at [132] in which the judge stated that the Appellants deportation “would have a serious effect on family life and the individual relationships involved”, I do not consider that that there is any lack of clarity or confusion in those two separate findings.
38. I also remind myself of what was said in the decision of SSHD v AJ(Zimbabwe) [2016] EWCACiv 1012 at [17] where it was stated:
- “17... In many, if not most cases where this Exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child that relationship to continue. If that were enough to render deportation a disproportionate interference of family life, it would drain the rule of any practical significance. It would mean the deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adverse affected and the carefully framed conditions in rule 399(a) would be largely otiose”.
39. Whilst the court was dealing with the old rules, it seems to me that those observations are still applicable.
40. As to the best interests of L, he set out his conclusion that [128]. Contrary to Counsel’s submission, that the judge failed in the decision to appreciate the complex family situation, it is plain that he considered the best interests of L with care and that he had observed that they were “complex to identify”. He identified that the Appellant was not her natural parent and that he had not been involved in her life save for the last 5 ½ years and that she did have some contact with her father, albeit from her viewpoint it was unsatisfactory and that she had expressed the view that the Appellant was a father figure to her. At [129] he took into account her age and that she was at the “very upper limit of childhood” and gave reasons as to why he had reached the conclusion that she had started to move towards more independent

living taking into account the circumstances of having left education, being in employment and also taking into account L's older sibling who had been living independently for a number of years. At [130] the judge concluded that he was prepared to accept the best interests of L were that she was to continue to have contact with the Appellant but that this "need not necessarily by living in the same household as him."

41. At [131] he returned again to the guidance in MM(Uganda) and the issue of undue harshness.
42. I can see no tension between the judge's findings at [127] and [132] as submitted on behalf of the Appellant. It is said that those two paragraphs make the determination unclear as to whether he properly considered their best interests. However, the judge was simply observing at [132] that in most, if not all cases based on family life, and in view of the genuine and subsisting family life with partners and children, that a person's deportation would have a serious effect on the family life and the individual relationships involved.
43. It was also submitted on behalf of the Appellant that the judges' assessment of undue harshness and the findings that he made were "muddled" and that he failed to properly assess the effect upon W and the children and failed to take into account a number of relevant considerations. I invited Counsel to identify those relevant considerations and she referred me to the grounds at paragraph 4 (e) in which they were summarised. For avoidance of doubt she submitted they were as follows;
 - (1) low risk of offending
 - (2) not committed further offences
 - (3) length of time since last offence
 - (4) sentencing judge's remarks
 - (5) the circumstances of W's other child
 - (6) L had no meaningful relationship with her father
 - (7) the judge had not considered the effect upon W's mother.
44. Mr McVeety submitted that those factors had been considered by the FTT when reaching his overall conclusions and there was no error of law identifiable.
45. I have considered the determination in the light of the submissions made but I do not consider that the criticism advanced by Miss Soltani is borne out by the judges' assessment of the issues.
46. The judge had earlier properly directed himself as to the law and in accordance with the decision of MM (Uganda) and was well aware of the test that he was to apply. He then set out the children's best interests and made specific findings relating to A in the light of her age (nearly 4) and it was open to the judge to take a different

approach to the best interests of L, whose needs he observed were more complex given different parentage, age (nearly 18) and circumstances (see [129]). He then set out to balance the relevant considerations. Looking at the factors identified, he plainly had regard to the Appellant's offending history and the matters outlined by Counsel [133] including the low risk of reoffending at [133], that he had not committed any further offences and the length of time that had elapsed [see 134]. He was entitled to balance those factors in the light of the sentencing remarks of the judge at [135] and the public interest identified. In this case it was a pre-deportation revocation whereby the Appellant had not left the United Kingdom after dismissal of his appeal in 2011. However the judge took into account that his offence was at the lower end of the provisions (at 135). Thus I am satisfied at the judge place those factors into the balance.

47. Contrary to the submissions, the judge did consider whether it would be unduly harsh for the children to live in the country to which the Appellant was to be deported. At paragraphs [136 - 139], he gave reasons why A would not be at risk of harm from FGM. He took into account the relationship between the half siblings L and A at [141] and that if A went to live with her father, L would be very upset about being separated from A. He found at [142] that A was a young age and thus would be able to adapt to different culture with both parents and at [143] placed weight upon her family and cultural heritage which he considered was arguably in her best interests also. At [145] he found that there was no evidence to show that A had any health or educational difficulties which needed to be addressed, either in the UK or in Gambia.
48. As regards L, it was accepted by the Respondent that it would not be reasonable to expect her to relocate in view of her relationship with her natural father and her length of residence in the UK [146] thus the Respondent's case contemplated a different outcome for A and L.
49. The judge therefore considered again the circumstances having regard to the best interests at [128 - 130] and that the best interests of L were that she should continue to have contact with the Appellant but that did not mean necessarily living in the same household and thus same country.
50. The judge was not immune to the difficulties of this and at [147] he observed that L would find it emotionally difficult if the Appellant were to leave the United Kingdom and she were to remain and that this would be "intensified" if her mother were to leave with A. However he balanced this against L's particular circumstances and her age. Miss Soltani submitted that the judge had not properly considered L's circumstances in accordance with the evidence. However I do not find that is borne out by the judge's careful assessment. He was plainly aware of L's age and that she was in employment and the form of that (see [148] which underpinned his finding that she had taken her first steps to independence. It was also open to him to find that in the light of her circumstances that any dependency (whether emotional financial) upon the Appellant and her mother was likely to decrease bearing in mind his finding at [129] in which he made reference to L's sibling who had been living independently for number of years and that this is not a family where it could be said

that the children would necessarily continue to stay within the household. He therefore concluded whilst accepted it would be unduly harsh for L to live there “it is a different matter though when considering whether it will be unduly harsh for her to remain in the United Kingdom without the Appellant – for the reasons that I have given above about best interests, in my judgement it would not.” (See [150]).

51. The judge returned to the issue of undue harshness by considering the position of W. He did not find that it would be unduly harsh for her to live in Gambia as he found that there would not be very significant difficulties faced by the couple in continuing family life outside of the UK. He noted that it was a matter of choice whether W would accompany her spouse abroad and made it plain that she would not be required to leave the United Kingdom because she was a British citizen. Whilst Miss Soltani submitted in reliance on ground 5 that Parliament did not intend the undue harshness test to apply to the relocation of a British child, as Mr Mc Veety pointed out there was no compulsion for either W or their child a to leave the United Kingdom and that this was a matter of choice.
52. The judge found at [158] that this choice “may not be particularly palatable” for W to make and would involve “considerable disruption to her established life” which was identified at [158] including separation from members of her family.
53. Miss Soltani submitted the judge did not consider the effect on other family members however the judge gave express consideration to those other family members within the determination. At [158] the judge considered that there would be separation from W’s older child L. At [159] the judge considered the point raised concerning W’s mother and dependency advanced. It was open to the judge to find that there was no independent evidence adduced to establish whether and to what extent there was a continuing difficulty for W’s mother and as a result how much support she actually received from her daughter. Furthermore, the judge found that it had not been explained why other members of the wider family would not be up to provide appropriate support to W’s mother if W chose to leave the UK with the Appellant.
54. The judge had considered W’s eldest child at [129] who had been living independently for some time. The judge was aware of the past history which had been referred to in the previous determinations and that he had been described as having mild learning difficulties.
55. Contrary to the submissions made, the judge also considered the circumstances of the family as remaining in the United Kingdom with the Appellant being deported to Gambia and that he was unable to conclude that the refusal to revoke the deportation order would have the effect of being unduly harsh upon them. He considered the arguments that W would have to give up her work at [156] and the effect of this but at [157] the judge rejected this for the reasons given. He also considered L’s circumstances at [146 – 148] and A’s circumstances at [141 – 145]. In reaching his conclusion, the judge factored into the balance that W had entered into the relationship with the Appellant knowing that he was someone who had committed a serious offence and that a deportation order been made against him and that there was an expectation from the outset that he might have to leave the United Kingdom

for a lengthy period before any return. The judge's overall conclusion was set out at paragraphs [165 - 167]. It is plain from reading paragraph [165] the judge did not seek to minimise any upset which would be caused to the family or to the Appellant but that he had reached the conclusion overall that it had not been demonstrated that the deportation order should be revoked.

56. Consequently I have reached the conclusion that the First-tier Tribunal did properly take into account the public interest and the Appellant's circumstances and immigration history when reaching the conclusions overall when assessing whether the Exceptions in Section 117C(5) of the 2002 Act and been met and did so in accordance with the decision of **MM (Uganda)**.
57. It was against this background that the judge's conclusions in my view, were open to him to reach that the effect of relocation was such that it would not cross the threshold of being "unduly harsh". It is not apparent that the judge left anything out of account and that it is a fact-based assessment that the judge was entitled to make.
58. It is plain that the decision was finely balanced as reflected in the First-tier Tribunal's decision and it may be said that a different decision could have been made by the First-tier Tribunal however the decision was made following consideration of the evidence and in the context of the legislation. It may well be that this was not the only outcome possible on the facts but in this particular case I am satisfied that the judge did take into account the correct legislative background and that the conclusions that were reached by the First-tier Tribunal do not demonstrate any legal error.

Notice of Decision

The decision of the First-tier Tribunal does not demonstrate the making of an error on a point of law. Thus the decision of the First-tier Tribunal stands.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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.

Signed SM Reeds

Date 16/2/2018

Upper Tribunal Judge Reeds