Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU091502015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25th May 2017	**On 2nd June 2017**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JB
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr K Norton, Senior Presenting Officer
For the Respondent: Mr Slatter, Counsel on behalf of the Appellant

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the decision of the First-tier Tribunal (Judge Lucas) promulgated on 30th September 2016 in which the Tribunal

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allowed the appeal of JB against the decision of the Secretary of State to make 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.

3. Although the Secretary of State is the Appellant before the Tribunal, I will for ease of reference refer to her as the Respondent as she was the Respondent in the First-tier Tribunal. Similarly I will refer to JB as the Appellant as he was the Appellant before the First-tier Tribunal.

Background

4. The background to the appeal is set out in the determination of the First-tier Tribunal and also in the decision letter of the Secretary of State dated 7th September 2015. The Appellant is a national of Nigeria. In 2008 he met a British citizen whom he later married in 2009 outside of the United Kingdom. On 30th December 2010 he made an application for entry clearance as a spouse of a person present and settled in the UK and on 11th March 2011, he was granted entry clearance, valid until 11th June 2013, as the spouse of a British citizen. He arrived in the UK on 2nd April 2013 and on 30th April 2013 was granted indefinite leave to remain.

5. In July 2013 the Appellant was arrested in relation to sexual offences (sexual assault on a female with no penetration) and released on bail to his home address. Following a trial in October 2014 the Appellant was convicted by the Crown Court of two sexual assaults that had occurred in June and November 2012. On 31st October 2014 he was sentenced to a period of twelve months' imprisonment concurrent and was also ordered to be the subject of notification requirements of the sex offenders' register for ten years and to pay a victim surcharge of £100.

6. The judge's sentencing remarks are set out at B1 of the Respondent's bundle.

7. On 3rd December 2014 the Appellant was served with a decision to deport dated 1st December 2014 under Section 32(5) of the UK Borders Act 2007. His legal representatives responded to that decision in representations dated 13th December 2014; the Appellant placing reliance upon Article 8 of the ECHR in the light of his relationship with his British citizen wife and their two children, K, who is a child of the family and T who is the son of the Appellant and his wife. A claim was also made in relation to Articles 2 and 3 of the ECHR however it is common ground that reliance upon those Articles was later withdrawn by his legal representatives in further communications in July 2015.

8. The Appellant was released on licence in April 2015 with supervision at a hostel which expired on 31st October 2015. He was then released on bail by the IAC on

18th May 2015 to the hostel and restrictions were imposed on 20th May 2015 by the Respondent.

9. By a letter dated 7th September of 2015 the Appellant was notified of the decision to deport him from the UK [see Respondent's bundle K1-2], the deportation order having been made on 12th August 2015. The Appellant was deported to Nigeria on 29th September 2015 and lodged the present appeal against that decision on 26th October 2015.

Decision of the Secretary of State

10. The Appellant had provided representations via his legal representatives in February of 2015. Those representations included confirmation of the nationality of the Appellant's spouse and children, including copies of their British passports, their marriage certificate and birth certificates of the children. Other documentation was also provided to the Secretary of State.

11. In the decision letter of 7th September 2015, there was no dispute that the Appellant had a family life in the United Kingdom with two British citizen children who were then aged 7 and 5. It was accepted that the Appellant had a genuine and subsisting relationship with them prior to entering custody but that the offending history demonstrated that he was prepared to jeopardise his responsibilities towards his children. The Respondent did not accept that it would be unduly harsh for the Appellant's children to live in Nigeria; both children could adapt to life in Nigeria where English was the primary language and where they could attend school. It was also stated that the Appellant could support the children. It was further not accepted that it would be unduly harsh for the children to remain in the United Kingdom even though the Appellant was to be deported. The decision letter went on to state that it was considered to be in the children's best interests to remain in the UK with their mother and enjoy their benefits and rights as British citizen children. The decision letter considered the circumstances of his wife that she had part-time employment and that the welfare of the children had not been compromised whilst in her care. It was asserted that whilst deportation would have an emotional impact on the children, it would be outweighed by the public interest and that the Appellant could remain in contact with the children through modern means of communication.

12. As to family life with his wife, the Secretary of State accepted that his wife was a British citizen in the UK. It was noted that there had been previous marital problems but it was accepted that the Appellant had a genuine and subsisting relationship with his wife having provided evidence of cohabitation and evidence from his wife in this regards. It further noted that his relationship was formed when he was outside of the United Kingdom in 2008. It was not accepted that it would be unduly harsh for the Appellant's wife to live in Nigeria and that she could apply for Nigerian citizenship. The Respondent did not accept also that it would be unduly harsh for the Appellant's wife to remain in the UK without the Appellant, stating that she would be able to support herself and her children.

13. The Respondent gave consideration to the private life exceptions to deportation set out in paragraph 399A of the Immigration Rules but did not accept that any of those requirements were met. Furthermore, at page 7 of the decision letter, the Respondent did not consider that there were any very compelling circumstances over and above the exceptions set out in the Rules for the purposes of paragraph 398 of the Immigration Rules. In this context the Secretary of State considered the medical evidence that had been produced on behalf of the Appellant.

14. The Secretary of State certified the human rights claim under Section 94B of the Nationality, Immigration and Asylum Act 2002 and it was as a consequence of that certification that the Appellant was deported in September 2015.

The Appeal before the First-tier Tribunal

15. The appeal came before the First-tier Tribunal and in a determination promulgated on 30th September 2016 the First-tier Tribunal allowed the appeal under the Immigration Rules and in particular paragraph 399(a).

16. The judge set out the background at paragraphs [1] to [20] having summarised the Appellant's immigration history, his conviction for sexual offences and sentencing remarks of the judge (paragraph [6]) and the contents of the pre-sentence report at [8]. The Respondent's reasons for deportation set out in the letter of 7th September 2015 at K1-K12 was also summarised at paragraphs [13] to [20].

17. The Tribunal also made reference to the evidence provided in the appeal bundle submitted on the Appellant's behalf of 436 pages. That bundle contained witness statements from the Appellant and his wife and from a number of witnesses. The judge recorded at paragraph [21]

> "The Tribunal explained at the commencement of this hearing that the witness statements would be heavily summarised. Mr Slatter agreed and understood this course. The Tribunal made it clear at the time and repeats it now, that it has fully considered all of the witness statements contained in that bundle. The following is a summary only."

The judge then went on at paragraphs [22] to [41] to make reference to the evidence advanced on behalf of the Appellant. As the judge set out it related to a number of witness statements from the Appellant's wife in which she made reference to the financial and other support the Appellant gave to her and the children, the maintenance of contact on a daily basis of her and the children, the circumstances of the children and the effect upon them of a move to Nigeria and in particular their son's learning difficulties. The statement made a reference to the strong family ties in the United Kingdom and that her daughter had also began to re-establish a relationship with her own biological father. The evidence made reference to the differences in the children since the Appellant had been deported. There were further witness statements from family members, including the Appellant's brother, the Appellant's wife's father, family friends, and a pastor. There were details of contact and the mediation record of child K (pages 71 to 81 of the bundle), there was

a psychological and speech assessment reports in respect of T at pages 82 to 118 and a number of school reports at pages 119-139. At paragraph [39] the judge made reference to the Probation Service report set out at pages 146-147 confirming that the Appellant was assessed at a low risk of reoffending.

18. At paragraph [40] the judge went on to make reference to the other evidence and letters/contact contained within pages 148-436 of the bundle. The Tribunal stated "the Tribunal does not propose to recite all of the other evidence and letters/contact that is contained at pages 148-436 of the bundle with the undertaking contained at paragraph [21] above."

19. The judge also recorded the following:-

> "On behalf of the Respondent, Miss Martin stated that she did not propose to cross-examine any of those witnesses. She stated that while the Respondent did not accept some of the assertions made, no useful purpose would be served through cross-examination. This was her choice and the Tribunal did not object. Both she and Mr Slatter agreed, therefore, that this hearing should proceed by way of submissions."

20. Therefore it is plain that notwithstanding the large bundle of material and the witness statements that had been provided and indeed the attendance of all of the witnesses who had made those statements (with the exception of one) who had attended the hearing and had adopted their witness statements as evidence-in-chief were not cross-examined upon the factual elements of their evidence.

21. The judge then went on to set out the submissions of the parties at paragraphs [44] to [56]. The findings of the judge are set out at paragraphs [59] to [69].

22. Those findings were as follows:-

> "[59] The Appellant in this case can have no real or genuine objection to the decision of the Respondent to deport him from the UK. He committed two serious sexual offences and used his position of trust to sexually assault two allegedly vulnerable women. Both of the offences show a degree of similarity and were clearly planned with an element of grooming. He is fortunate indeed to have received a sentence of only twelve months and equally so not to have received a consecutive as opposed to a concurrent sentence for the two offences. These were unpleasant criminal offences committed by a foreign national in the UK. There is a clear public interest imposed upon the Respondent to punish, deter and ultimately remove foreign nationals who commit criminal offences in the UK. It matters not that he has had the good fortune to have been granted ILR to remain in the UK. He is, without qualification, a foreign national who has committed criminal offences in the UK. The Tribunal is mindful of the wider public interest and the individual interests of the victims in this case who have a right not to be sexually assaulted by anyone, still less a foreign national. In these circumstances, there is an unequivocal public interest in the deportation of the Appellant.
>
> [60] The Tribunal is clearly concerned about the offending in itself. It is also concerned that the Appellant denied these offences and contested a trial. His

pre-sentence report appeared to stress the Appellant feels that he has been targeted by the victims rather than the other way round. He clearly did not accept at the time that he did anything wrong and denied any criminal responsibility. Also, his attempt to justify it on the basis of his then lack of intimacy with his wife is no explanation at all for what he did. In the end, the Appellant is a convicted sex offender and he can have no real or genuine objection to his deportation. The decision to deport him is therefore in the public interest and is justified. That is not, however, the end of the matter and the Tribunal must consider the personal circumstances of this Appellant and his family. The proportionality exercise requires an analysis of any exceptions and very compelling circumstances that may undermine the decision to deport the Appellant. With regard to the Appellant himself the Tribunal has noted that he was described as being of previous good and 'exemplary character' by the sentencing judge. He has an unremarkable immigration history and was granted ILR in April 2013. He has not committed any further criminal offences since the index offence and it is, of course, of significance that he is assessed as a low risk of reoffending. It is also, of course, of relevance that he will be continued to be monitored as a sex offender until 2024.

[62] The Appellant has noted his remorse and regret for what he did, expressed after as opposed to before, his sentence. His witnesses, including his wife point to the change in his behaviour and his remorse. The Tribunal is now entitled to presume that this remorse is genuine and that there is a low risk of reoffending.

[63] The Tribunal regards it as axiomatic that the heavier the sentence imposed upon any foreign national, the greater the public interest that there will be in their deportation. If this is correct, then it must be relevant that the Appellant received a medium sentence of imprisonment of twelve months.

[64] The Tribunal is mindful of the fact that the criminal offending of the Appellant is his responsibility alone. It agrees with Miss Martin that he is the author of his own stated misfortunes. That said, the Tribunal is also mindful of the fact that the Appellant's wife and two children should not also be punished for his actions.

[65] In reality, it would almost certainly be unduly harsh to expect and require the Appellant's wife and two children to relocate to Nigeria. All three are UK citizens and none have any cultural links with Nigeria. The Appellant's wife has family here and the two children have their own difficulties which would – practically – prevent them from being able to relocate to Nigeria. T has learning difficulties and the effect of relocation upon him would have a real impact upon his progress. K is also in a situation where she has made contact with her own biological father in the UK and it would clearly not be in her best interests to relocate away from the country of her birth and in which she has settled status.

[66] The Tribunal has, only just, come to the view that the best interests of the children in this case and probably their mother, is to have their father back in their lives in the UK. In the view of the Tribunal, the overall situation of this family amounts to a very significant set of circumstances and exceptionality for the purposes of the Immigration Rules.

[67] Had he been on his own, the Tribunal would have had no hesitation in dismissing this appeal. However, in the light of all the details – risk assessment, remorse, the disproportionate effect on his children and wife – the Tribunal is prepared to give the Appellant one last chance. It bears in mind that in doing so, he will continue to be monitored as sex offender, albeit one that has been assessed as low risk of reoffending.

[68] The Tribunal needs and expects this Appellant to understand quite unequivocally that if he commits any further offending of any sort in the UK, the outcome for him will not be favourable and he can or could not have any complaint about his deportation.

[69] The Tribunal concludes that the Appellant's case does fall within the exceptions set out under the Immigration Rules. It therefore allows this appeal under those Rules."

Thus the judge allowed the appeal.

The appeal before the Upper Tribunal

23. The Secretary of State sought to appeal that decision and on 7th April 2017 First-tier Tribunal Judge Hollingworth granted permission.

24. The Upper Tribunal heard submissions from each of the parties and took into account not only the written grounds advanced on behalf of the Secretary of State but also a Rule 24 response drafted by Mr Slatter in which he responded to the Secretary of State's grounds annexing to it a copy of the decision of the Court of Appeal in **NA (Pakistan) v the SSHD [2016] EWCA Civ 662**. It is not necessary to set out the submissions of each of the parties as I will set out the relevant aspects of those submissions when dealing with the grounds advanced on behalf of the Secretary of State and my consideration of those issues.

The legal framework

25. The relevant statutory background is set out in Sections 32 and 33 of the UK Borders Act 2007. Section 32 provides for automatic deportation. It defines a "foreign criminal" as a person

(a) who is not a British citizen;

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

(c) to whom condition (1) or (2) applies.

It is common ground that the Appellant falls into all three of those cases; he is not a British citizen and he has been convicted in the United Kingdom of an offence.

26. In respect of conditions (1) or (2), sub-Section (2) is the relevant one which identifies condition (1) is that the person is sentenced to a period of imprisonment of at least twelve months. As set out in the determination of the First-tier Tribunal, the

Appellant was sentenced to twelve months' imprisonment and therefore falls within those parameters. For the purposes of Section 35A of the Immigration Act 1971 the statute sets out that the deportation of a foreign criminal is conducive to the public good and in sub-Section (5) the Secretary of State must make a deportation order in respect of a foreign criminal. Thus by operation of Section 32, subject to the exceptions to which I will refer later in the Act, the Secretary of State is under an obligation to make a deportation order.

27. Section 33 of the 2007 Act identifies the exceptions and provides that Section 32(4) and [5] do not apply where an exception in this case applies and that is exception (1) where removal of the foreign criminal in pursuance of the deportation order would breach

(a) a person's Convention rights; or

(b) the United Kingdom's obligations under the Refugee Convention.

In this case it is asserted that the deportation would breach the Appellant's Convention rights having withdrawn any other grounds that had been set out in the previous representations in June 2015.

28. In the decision of the First-tier Tribunal, it made reference to paragraphs 398 and 399 of the Immigration Rules, which deal with the deportation of foreign criminals, and Article 8. These paragraphs of the Immigration Rules were first introduced in revisions of the Immigration Rules in July 2012, which replaced earlier Rules which were less directly focused on the application of Article 8 in the immigration context.

Paragraph 396 provides:-

> "Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with Section 32 of the UK Borders Act 2007."

Paragraphs 397 and 398 make clear that the Rules aim to encompass rights protected by the European Convention on Human Rights. Paragraph 397 provides:-

> "A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. .... where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed."

29. In relation to a claim by a person that his deportation would violate Article 8, paragraph 398 provides in relevant part that where the deportation of the person from the UK

> "is conducive to the public good and in the public interest because they have convicted of an offence for which they have been sentenced to a period of imprisonment of less

than four years but at least twelve 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."

30. Paragraph 399 states that it applies in a case like JB's if:

> "(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK and
>
> (i) the child is a British citizen: or
>
> (ii) the child has lived in the UK continuously for at least the seven years immediately preceding the date of the immigration decision: and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it will be unduly harsh for the child to remain in the UK without the person who is to be deported …".

31. 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:

32. 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 2E.

(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.

33. Whilst the case advanced on behalf of the Appellant before the First-tier Tribunal relied upon paragraph 399(b) relating to the Appellant's partner, and as the skeleton argument set out at paragraphs 21-27, that was an alternative submission premised upon the Tribunal finding that exception 2 in Section 117C(5) in conjunction with paragraphs 399(a) and (b) of the 2004 Rules were not met. In essence, the central

issue determined by the First-tier Tribunal was whether or not it would be "unduly harsh" for the children to live in Nigeria or whether or not it would be "unduly harsh" for the children to remain in the UK without the person who is to be deported. Thus the judge was required to consider what is meant by "unduly harsh" within the context of the law.

34. 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."

35. 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.

36. 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

37. Mr Norton on behalf of the Secretary of State submitted that the judge had not applied the correct legal framework which I have set out in the preceding paragraphs. In particular, he submitted that the judge did not make reference to paragraph 398 in the Rules as it was not possible when looking at the determination to see if the judge did properly apply the legal framework. In essence he submitted that the judge went straight to the consideration of "unduly harsh" in his conclusions at paragraph [65].

38. Whilst this ground was not advanced in the written grounds, it is not one that I consider is made out when reading the decision of the First-tier Tribunal on the material that was before him. Contrary to the submission made, the judge in the determination did make reference to the legal framework which was set out in the skeleton argument at paragraphs 8 to 13. It is not in dispute that those paragraphs set out the basis upon which the case was advanced on behalf of the Appellant. As the judge observed, the skeleton argument set out the legal framework correctly within that skeleton argument (see paragraph [46]). Furthermore the judge went on to make reference to the Appellant's claim within the legal framework as follows:-

> "[46] On behalf of the Appellant Mr Slatter relied upon his skeleton argument dated 31st August 2016. The refusal decision is correctly summarised at paragraphs 3-7. The legal framework is again correctly at paragraphs 8-13. The Appellant is, correctly, described as a medium offender having been sentenced to a period of twelve months' imprisonment and he therefore:
>
> > 'Can in principle avail himself of the safety nets of exception 1 or 2 in Section 117C(3) read in conjunction with paragraphs 398-399 of the 2014 Rules. The first task, as stated in **NA (Pakistan)** at [36] is to see whether the Appellant falls within exception 1 or 2 – if he does, then his Article 8 claim succeeds.'"

39. Therefore at paragraph [46] 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. …".

40. It is plain from reading the determination at paragraph [46] that the judge had in mind the correct legal framework. As set out in the decision of the Court of Appeal in **NA (Nigeria) v the SSHD [2017] EWCA Civ 10** at paragraph [27]:-

> "[27] Decisions of Tribunals should not become formulaic and rarely benefit from copious citation of authority. Arguments that reduce to the proposition that the First-tier Tribunal has failed to mention dicta from a series of cases in the Court of Appeal or elsewhere will rarely prosper. Similarly, as Lord Hoffmann said in **Piglowska v Piglowska [1999] 1 WLR 1360**, 'reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account.' He added that an 'appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.' Moreover, some principles are so firmly embedded in judicial thinking that they do not need to be recited. For example, it would be surprising to see in every civil judgment a paragraph dealing with the burden and standard of proof, or in every running down action a treatise, however short, on the law of negligence. That said, the reader of any judicial decision must be reassured from its content that the court or Tribunal has applied the correct legal test to any question it is deciding."

41. I now turn to the other grounds advanced by Mr Norton on behalf of the Secretary of State which submit that the judge erred in law by failing to correctly apply the "unduly harsh" test contained in paragraph 399(a) and (b) and Section 117C of the 2002 Act.

42. It is submitted that the First-tier Tribunal in determining that the Appellant's removal would have an "unduly harsh" effect upon the Appellant's children and wife, the Tribunal failed to apply the correct threshold and failed to apply substantial weight to the public interest and failed to correctly apply the decision in **MM (Uganda) [2016] EWCA Civ 450** citing paragraph [26] of that decision. It is further submitted that the judge failed to consider the Appellant's serious criminality when deciding whether the Appellant's deportation would be "unduly harsh" upon the family members.

43. Mr Norton relies upon the judge's finding set out at paragraphs [65] and [66] in which he submits there is no balancing of the public interest. He further seeks to

criticise the judge's decision at paragraphs [67] and [68] whereby the judge made reference to a "second chance" which Mr Norton said does not exist in the public interest and the finding at [68] that if he committed further offences that the outcome would not be favourable to the Appellant. He submitted that that was improper to consider as part of the public interest. He further submitted that this was not simply an observation but was part of the judge's reasoning.

44. I have made reference earlier in this determination to the decision of **MM (Uganda)**. The facts of the case can be summarised shortly. In the appeal the Secretary of State appealed against the Upper Tribunal's finding that the Respondent M should not be deported. He had arrived in 1990 and had one child. He had been convicted of drugs offences (supplying class A) and had received a sentence of 22 months' imprisonment. Upon appeal to the First-tier Tribunal, who applied the old Immigration Rules in error, placed weight upon the relevant child's emotional development concluding overall that deportation of the Appellant would be disproportionate and therefore in breach of Article 8. The Upper Tribunal dismissed the Secretary of State's appeal on the basis that whilst the First-tier Tribunal had applied the wrong Rules, the error was not one that was material given the finding made relating to the impact that deportation would have upon the Appellant's child and her emotional development. In the second appeal, the Appellant appealed against his deportation. He had been living in the UK illegally and had arrived with five dependants. He had been convicted of fraud and sentenced to imprisonment of 22 months. The First-tier Tribunal allowed his appeal. The Upper Tribunal thereafter allowed the Secretary of State's appeal holding that the seriousness of the foreign criminal's offence should be taken into account in assessment of whether deporting him would be "unduly harsh" for his wife and children.

45. The issue in **MM (Uganda)** was whether the seriousness of the offences concerned were relevant when deciding if deportation was "unduly harsh" or whether the decision of the Upper Tribunal in **MAB (paragraph 399: "unduly harsh": US) [2015] UKUT 435** had been correct. In that case the Upper Tribunal had found that the phrase "unduly harsh" did not import a balancing exercise between the public interest in deportation and the effect on the Appellant's child or partner and that the focus should be exclusively on the effect upon them.

46. As set out the Court of Appeal held that the importance of removing a foreign criminal which was in the public interest was emphasised in Section 117C(1) and under Section 117C(2) it was clear that the more serious the offence committed by the foreign criminal, the greater the public interest in deportation. That steered the proportionality assessment. Thus the more pressing the public interest in removal the harder it would be to show its effects would be "unduly harsh". The case also made it plain that the relevant circumstances included the Appellant's criminal and immigration history thus the Court of Appeal found that the Upper Tribunal had wrongly decided **MAB**.

47. Therefore it is plain that it is not appropriate to consider the issue of "undue harshness" solely from the perspective of the impact deportation would have or

would be likely to have upon the children involved. The court or Tribunal must have regard to all the circumstances including the criminal immigration history of the person to be deported.

48. It is against this background that I have considered the submission made on behalf of the Secretary of State. It would be wrong in my judgment to only consider the First-tier Tribunal's determination at paragraphs [65] and [66] as the grounds contend. This would be a failure to have regard to the earlier paragraphs which also set out the judge's analysis (see paragraphs [59] onwards). As Mr Slatter submits, the judge applied the correct approach set out in **MM (Uganda)** which he had been referred to by the parties (see skeleton argument, paragraphs 9-13). In particular, the judge in determining whether the Appellant could meet the exceptions set out in Section 117(5) of the 2002 Act, the judge properly had regard to the public interest and the relevance of the Appellant's criminal and immigration history.

49. At paragraphs [59] and [60], the judge properly made reference to the seriousness of the offence and the strong public interest in his deportation. The judge had earlier set out the nature of the offences and the judge's sentencing remarks at [6], to the sentence imposed at [7] and the content of the PSR [8]. At paragraph [59] the judge then analysed the offences further paying due weight and regard to the seriousness of those sexual offences by reference to the particular facts (at [60]) and in the context of the Appellant's original denial of the offences. In doing so, the judge stated:-

> "At [59] there is a clear public interest imposed upon the Respondent to punish, deter and ultimately remove foreign nationals who commit criminal offences in the UK. It matters not that he has had the good fortune to have been granted ILR to remain in the UK. He is, without qualification, a foreign national who has committed criminal offences in the UK. The Tribunal is mindful of the wider public interest and the individual interests of the victims in this case who have a right not to be sexually assaulted by anyone, still less a foreign national. In these circumstances, there is an unequivocal public interest in the deportation of the Appellant".

50. And at paragraph [60] the judge stated following:-

> "[60] … in the end the Appellant is a convicted sex offender and he can have no real or genuine objection to his deportation. The decision to deport him is therefore in the public interest and is justified. That is not, however, the end of the matter and the Tribunal must consider the personal circumstances of this Appellant and his family. The proportionality exercise requires an analysis of any exceptions …".

51. In my judgment those paragraphs properly reflect the words of Lord Reed in **Hesham Ali** in which Sections 32 and 33 of the UK Borders Act 2007 make clear parliament's view that there is a strong public interest in the deportation of foreign nationals who have committed serious offences and that the procedure for the deportation should be expeditious and effective. Those paragraphs when read in conjunction with the later paragraphs in my judgment properly reflect Sections 117B(1) that it is in the public interest for the maintenance of effective immigration control but also that the deportation of foreign criminals is in the public interest (see

Section 117C(1)) and that the more serious the offence, the greater the public interest in deportation (see Section 117C(2)). The judge did not seek to dilute the public interest by applying it solely to the risk of reoffending but by reference to the strong public interest in deterring foreign criminals from committing offences and in the light of public revulsion of such offending (see paragraph [59] of the First-tier Tribunal's decision). The judge therefore properly applied **MM (Uganda)** and had regard to the Appellant's criminal and immigration history. The judge made reference to the offences and their seriousness at paragraphs [59] and [60] when read in conjunction with the earlier paragraphs. He took into account that the Appellant had been of previous good character which the sentencing judge had described as "exemplary character" and that he had not committed any further offences since the index offences in 2012 and upon his release (see paragraph [61]). The judge also had regard to the uncontested evidence regarding the risk of reoffending which was said to be low (see the evidence recorded at [39] and [53] and the conclusions at [61] and [62] that the Appellant posed a low risk of reoffending and that he would be monitored until the year 2024).

52. The Tribunal also weighed in the balance his stated remorse, which the judge accepted. Whilst this was a case where the Appellant did not give oral evidence as he was out of country, the judge accepted the evidence of the other witnesses, the Appellant's wife and family members who attested to his remorse. None of that evidence had been challenged by the Secretary of State (see paragraph [42]) and thus the judge was therefore entitled to place weight on that evidence in reaching his conclusions in this respect (at paragraph [62]).

53. As to his immigration history, the judge placed in the balance that he had an "unremarkable immigration history" and that he was granted ILR in April 2013. When looking at the judge's finding that his immigration history was "unremarkable" I understand that to mean that this was a case whereby he had not entered the UK unlawfully but had married a British citizen outside of the UK in 2009 but had then applied lawfully for entry clearance which had been granted based on his genuine and subsisting relationship with his spouse. When in the UK he was here pursuant to leave and had been granted ILR based on the relationship with his spouse in April 2013. Thus there were no countervailing aspects of his immigration history.

54. At paragraph [63] the judge stated the following:-

> "[63] The Tribunal regards it as axiomatic that the heavier the sentence imposed upon any foreign national, the greater the public interest there will be in their deportation. If this is correct, then it must be relevant that the Appellant received a medium sentence of imprisonment of twelve months."

The judge went on to find at paragraph [64] that the criminal offending of the Appellant was his responsibility alone and that the judge agreed with the Presenting Officer's submission that he was the "author of his own stated misfortunes".

55. It had been submitted that the Appellant's offending had been at the "bottom end" (see paragraph [52] reciting the submissions made on behalf of the Appellant). Mr

Slatter submitted that this properly reflected Section 117C(2) as emphasised in **MM (Uganda)** of a relevance of the fact that the sentence imposed was at the bottom end of the spectrum between twelve months and less than four years. That seems to me to be reflected in the analysis of the judge at paragraph [63] and was a proper consideration to place in the balance.

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 at paragraphs [65] and [66] when assessing whether the exceptions in Section 117C(5) of the 2002 Act had been met and did so in accordance with the decision of **MM (Uganda)**.

57. The next issue relates to whether the judge properly applied the threshold test in the light of the particular factual matrix that was before the First-tier Tribunal.

58. There is no dispute as to the formulation of the "threshold" necessary. It is set out in the decision of **KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 00534** which reaffirmed the definition of "unduly harsh" from the earlier decision of **MAB** at paragraph [26], stating as follows:-

> "Whether the consequences of deportation will be 'unduly harsh' for an individual involves more than 'uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging' consequences and imposes a considerably more elevated or higher threshold.
>
> The consequences for an individual will be 'harsh' if they are 'severe' or 'bleak' and they will be 'unduly' so if they are 'inordinately' or 'excessively' harsh taking into account all of the circumstances of the individual." Although I would add, of course, that 'all of the circumstances' include the criminal history of the person facing deportation."

Thus the question is whether the First-tier Tribunal applied that in the context of the factual matrix of this particular Appellant and the family's circumstances.

59. In this case there was no challenge to the evidence advanced on behalf of the Appellant. At paragraph [43] the judge records the position of the Presenting Officer at the hearing who, despite the large number of witnesses all of whom had been present save for one, chose not to cross-examine any of those witnesses and therefore their evidence which was adopted-in-chief was unchallenged. The court therefore heard no oral evidence but proceeded by way of submissions.

60. I observe that whilst the judge recorded this, he also recorded the Presenting Officer's position that the Respondent did not accept some of the assertions made from those witnesses but that no useful purpose would be served by cross-examining the witnesses. However there does not appear to have been any schedule or record of any of the assertions made which were not accepted. I therefore proceed, as did the judge that the factual matrix upon which the analysis was undertaken is that set out in the accompanying evidence which was not challenged.

61. The evidence before the First-tier Tribunal had been set out at paragraphs [22]-[41] of the decision and is a summarised note of that evidence. On the basis of the evidence the judge reached his conclusions on the issue of undue harshness at paragraphs [65] and [66]. In summary he found that it would be unduly harsh to expect the Appellant's wife and two children to relocate to Nigeria. In my judgment, the judge gave adequate and sustainable reasons which were evidence based which supported that conclusion, when seen in the light of the evidence and the earlier paragraphs relating to the Appellant's criminal history, his immigration status and the public interest. The judge identified that all three were UK citizens with no cultural links to Nigeria. There were strong family ties in the UK [the judge having read the evidence of other family members before him]. The judge was also entitled to take into account the individual difficulties of the two children concerned which was evidenced in the material. Those difficulties were identified in relation to K who had been developing a relationship with her biological father following the process of mediation. The outcome of this was set out at page 71 and was further evidenced by messages (see page 74). In this regard the judge was entitled to place weight upon the impact upon K and not only the loss that there would be of being unable to re-establish her relationship with her biological father but also the impact of the loss of the Appellant whom she had known as her father since a very young age. The judge had evidence of the impact upon K from the evidence of her mother (in the witness statement of the Appellant's wife).

62. In relation to T, there was a psychological report and speech and language reports. The judge placed weight and reliance upon that unchallenged evidence within the determination. T was the subject of an individual educational plan as a result of learning difficulties which is evidenced by the continuing support required to meet his developmental needs. The judge made reference to this at [38] and [51]. As the judge recorded, the effect upon T set out in the psychologist's report was evidenced by T's comments about his father and the "sudden loss of a significant carer". The point made by Mr Slatter was that the effect of the Appellant's deportation upon T was "unduly harsh" because the deportation of A placed the onus upon the very skills that he had a deficit of in order to maintain and develop his relationship with his father. The Appellant's involvement with T's education was documented in the evidence (see school reports) and it was open to find that the physical presence of his father in the UK was likely to improve or support the progress in his developmental needs.

63. It was against this background that the judge's conclusions in my view, were open to him to reach that the effect of relocation of both T and K was such that it would cross the threshold of being "unduly harsh". The difficulties that the judge made reference to and were evidence before the First-tier Tribunal were not "commonplace" incidents of family life (see paragraph [33] of **NA (Pakistan)**). The judge had found that it was in the best interests of both children to remain in the UK with both their mother and father (see paragraphs [65] and [66]) and whilst they were a primary consideration this was a factor of some weight.

64. Mr Norton relied upon the grounds in which the decisions of **Lee v the SSHD [2011] EWCA Civ 348** and **PF (Nigeria) v the SSHD [2015] EWCA Civ 251** are cited. These

decisions make reference to the common consequences of deportation which necessarily result in a separation of children from their parents. However this is a case in which the judge was entitled to reach the conclusion that fell outside the ordinary circumstances of separation for the reasons given.

65. Furthermore as Mr Slatter submits in this case the First-tier Tribunal decision was based on the evidence as to actual experience of the Appellant's wife and children following the removal of the Appellant pending the appeal and was therefore less speculative than might otherwise have been.

66. The second point raised on behalf of the Secretary of State is that the judge failed to consider whether it would be unduly harsh for the Appellant's partner and/or children to remain in the UK without him.

67. The grounds assert that the contact could and was maintained following deportation and that the children could rely upon the modern methods of communication. Whilst the grounds refer to there being no "special dependency" upon the A, this was not the position from the unchallenged evidence before the First-tier Tribunal who was entitled to place weight upon the support and assistance given to T in particular a result of his learning difficulties and his developmental progress. In my judgment, paragraphs [65] and [66] should be read together as the conclusions reached by the First-tier Tribunal as to both limbs of the "unduly harsh" test. The factual assessment of the judge was that the parental relationship was such to deliver the conclusion that it would be unduly harsh for the children to leave the UK and also for the children to be in the UK without their father. The judge did look at whether it would be unduly harsh for them to remain in the UK without their father at paragraph [66] relying principally on the same evidence that supported the first limb; the strength of the relationship, the impact of separation and the consequences of such upon both the children.

68. I would observe that it would have been better for the judge to specifically have directed himself to the elevated test of "unduly harsh" and to make it unambiguously clear that he had applied it. However looking at paragraphs [65] and [66] and in the context of the determination and the unchallenged evidence it is difficult in my judgment to say that he applied the lower test. 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.

69. It is plain that the decision was finely balanced as reflected in the First-tier Tribunal's decision at paragraph [66] 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.

70. I should also deal with the point made by Mr Norton relating to paragraphs [67] and [68] in which he submitted disclosed an error of law. In those paragraphs the judge made reference to the Appellant being given "one last chance" (paragraph [67]) and at

[68] made reference to the Appellant understanding unequivocally that if he committed any further offending then the same outcome would not be favourable.

71. Mr Norton submits that this has no binding effect and that the judge's reference to "last chance" had nothing to do with the public interest.

72. I have considered those submissions but I do not consider that those paragraphs identified demonstrate an error of law. In my judgment they are simply observations made by the judge directed towards the Appellant. I agree with Mr Norton that it cannot be binding upon the Tribunal but in the event of an Appellant, having succeeded in a deportation appeal who then goes on to reoffend, it is likely that the Secretary of State in those circumstances would commence deportation provisions. It is not unknown for judges to make such observations. In the decision of **Akinyemi v the SSHD [2017] EWCA Civ 236** at paragraph [53], the Tribunal in that case had given an explicit warning to the Appellant as to the consequences of continuing to offend. The court considered that this was a factor which the Tribunal would be entitled to give considerable weight to.

73. This was, as both advocates have submitted, a finely balanced decision made by the First-tier Tribunal. 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, even if properly characterised as ones which might be thought to be generous, 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 Date 1/6/2017

Upper Tribunal Judge Reeds