Upper Tribunal
(Immigration and Asylum Chamber)

MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 00223 (IAC)

THE IMMIGRATION ACTS

Heard at Field House, London On 19 December 2014. [Further Submissions: 20 January 2015]	**Determination Promulgated** ……

Before

The Hon. Mr Justice McCloskey, President of the Upper Tribunal
Upper Tribunal Judge Perkins

Between

MK

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Did not attend and was not represented.
Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

(i) Where it is contended that either of the duties enshrined in section 55 of the Borders, Citizenship and Immigration Act 2009 has been breached, the onus rests on the appellant and the civil standard of the balance of probabilities applies. There is no onus on the Secretary of State.

(ii) As regards the second of the statutory duties [the need to have regard to statutory guidance promulgated by the Secretary of State], it is not necessary for the decision letter to make specific reference to the statutory guidance.

(iii) *The statutory guidance prescribes a series of factors and principles which case workers and decision makers must consider.*

(iv) *Where the Tribunal finds that there has been a breach of either of the section 55 duties, one of the options available is remittal to the Secretary of State for reconsideration and fresh decision.*

(v) *In considering the appropriate order, Tribunals should have regard to their adjournment and case management powers, together with the overriding objective. They will also take into account the facilities available to the Secretary of State under the statutory guidance, the desirability of finality and the undesirability of undue delay. If deciding not to remit the Tribunal must be satisfied that it is sufficiently equipped to make an adequate assessment of the best interests of any affected child.*

DETERMINATION AND REASONS

ANONYMITY

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) the Upper Tribunal makes an Anonymity Order. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

Introduction

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (hereinafter the "*Secretary of State*"), dated 03 September 2013, whereby it was decided that the original Appellant, a national of Sierra Leone, aged 31 years, should be deported from the United Kingdom. The reason proffered for taking this action was expressed as the original Appellant's "*conviction for the following offences: four counts of robbery, three counts of having an imitation firearm with intent to commit indictable offences and handling, for which you were sentenced to five years imprisonment*". The Appellant's appeal against this decision was allowed by the First-tier Tribunal (the "*FtT*"). Pursuant to the grant of permission to appeal, this Tribunal, in its determination dated 23 October 2014, set aside the decision of the FtT.

2. It is uncontroversial that the Appellant has been in the United Kingdom since 1986, when he was aged three years. Although his mother made an unsuccessful asylum claim, both he and she were granted indefinite leave to remain in September 2000. His offences were committed two years later, when he was aged 18 years. Having served his sentence of imprisonment, he committed a further offence, namely using a motor vehicle while uninsured, which attracted the penalty of a conditional discharge. The reason proffered for the Secretary of State's dilatory conduct is formulated in the decision letter in the following terms :

> "*Your case was not referred to the Criminal Case Work Team whilst you were serving your custodial sentence. You were, therefore, released from prison without deportation consideration ……*
>
> *On 28 March 2013 you applied to the Home Office for a No Time Limit Stamp to be endorsed in your passport. Your criminality was subsequently identified …..*"

On behalf of the Secretary of State, it was concluded that the presumption that the public interest requires the Appellant to be deported from the United Kingdom had not been displaced.

The Two Tribunal Decisions to Date

3. The FtT made findings to the following effect: that the Appellant had taken advantage of his imprisonment to undergo appropriate courses, designed to address the reasons for his offending and to prevent reoffending; he has subsequently been in regular, steady employment; certain initial steps to establish his own business have been taken; he has secured a coaching qualification, with a view to working with those in the age bracket of 6 to 14 years; he is the father of two children, one of whom is aged six years and whom he sees at fortnightly intervals and supports with payments of £150 per month; he has been a member of a family unit consisting of the Appellant, his partner and her son for some three years; he plays a significant role in the lives of his younger brothers (the father being deceased); and there are no known remaining family members in his country of origin.

4. In his determination setting aside the decision of the FtT, Upper Tribunal Judge Perkins highlighted one of the stand out features of this case, in [3]:

> "*Although the deportation order was made in 2013 the convictions leading to the deportation order were recorded in 2002 and there is evidence that in the very long period between his coming out of custody and the deportation decision being made the claimant had sorted out his life. Although his private life was not beyond criticism he has established a regular relationship with his daughter, to whom he makes regular financial support and he has established another serious relationship with a partner.*"

Judge Perkins determined to set aside the decision of the FtT on the ground that it was vitiated by error of law constituted by the unsustainability of the reasons given for allowing the appeal. Succinctly, these were found to be lacking in logic and coherence. The case was then relisted for hearing before this Tribunal for the purpose of re-making the decision of the FtT.

5. As noted above, the Appellant did not attend the hearing which this Tribunal proceeded to conduct. This Tribunal explored, *inter alia*, the question of whether the decision of the Secretary of State was in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009. A written submission directed to this discrete issue was duly provided by the Secretary of State's representative. We shall consider this issue first.

Section 55 of the Borders, Citizenship and Immigration Act 2009

6. Section 55 of the Borders, Citizenship and Immigration Act 2009 (the "*2009 Act*") provides:

> "*(1) The Secretary of State must make arrangements for ensuring that –*
>
> *(a) the functions mentioned in sub-section (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom."*

This is what may be described as the umbrella, overarching duty. It obliges the Secretary of State to devise systems and structures for the purpose specified. This duty is formulated in unqualified terms. Subsection (2) elaborates:

> "*(2) The functions referred to in sub-section (1) are –*
>
> *(a) any function of the Secretary of State in relation to immigration, asylum or nationality;*
>
> *(a) any function conferred by or by virtue of the Immigration Acts on an Immigration Officer …*
>
> *(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of sub-section (1)".*

The latter is the crucial, case-by-case duty to be discharged by the Secretary of State's decision makers and caseworkers. It too is formulated in the language of an unqualified duty.

7. The genesis of section 55 is found in a provision of international law, Article 3(1) of the UN Convention on the Rights of the Child ("UNCRC", 1989):

> "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*"

In the field of immigration, therefore, the enactment of section 55 discharges an international law obligation of the UK Government. While section 55 and Article 3(1) of the UNCRC are couched in different terms, there may not be any major difference between them in substance, as the decided cases have shown. The final striking feature of section 55 is that it operates to protect all children who are in the United Kingdom: there is no qualification such as residence or nationality.

8. What is required of the Secretary of State's case workers and decision makers by section 55 of the 2009 Act, where it applies, was considered *in extenso* recently by this Tribunal in JO and Others (section 55 duty) Nigeria [2014] UKUT 00517 (IAC). This

case decided that, fundamentally, it is manifestly insufficient for a decision maker to pay mere lip service to the two, inter-related duties imposed by section 55. The substance of the primary duty must be properly acknowledged, the relevant children must be identified and their best interests must then be considered, to be followed by a considered balancing exercise. In assessing the best interests of each affected child, the decision maker must be properly informed. Furthermore, it must be apparent from the terms of the decision that the best interests of each affected child, as assessed, are ranked as a primary consideration and accorded a primacy of importance, as required by ZH (Tanzania) 2011 UKSC 4, at [26] and [33] especially. See [7] – [10] of JO (Nigeria) and, in particular, the following passage in [11]:

> "*I consider that, properly analysed, there are two guiding principles, each rooted in duty. The first is that the decision maker must be properly informed. The second is that, thus equipped, the decision maker must conduct a careful examination of all relevant information and factors …..*
>
> *Being adequately informed and conducting a scrupulous analysis are elementary pre-requisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations. This balancing exercise is the central feature of cases of the present type. It cannot realistically or sensibly be undertaken unless and until the scales are properly prepared.*"

This is how this Tribunal analysed the first of the two duties imposed on the Secretary of State by section 55 of the 2009 Act.

9. In JO (Nigeria), this Tribunal also gave consideration to the second of the duties imposed by section 55, namely – per section 55(3) – to have regard to the statutory guidance promulgated by the Secretary of State. The statutory guidance is entitled "Every Children Matters – Change for Children" and was published in November 2009. It is described as "*Statutory Guidance to the UK Border Agency on Making Arrangements to Safeguard and Promote the Welfare of Children*". It prescribes a series of procedures and arrangements applicable to relevant decisions. It also deals with matters such as service development, the training of staff, effective inter-agency working and information sharing. The passages which apply most clearly to the context of immigration and asylum decisions are contained in paragraphs 1.14, 1.15, 1.16, 2.6, 2.7 and 2.8. These are reproduced in the second schedule to this judgment.

10. With specific reference to the separate duty imposed on the Secretary of State's case workers and decision makers by section 55(3) this Tribunal stated in JO (Nigeria), at [12]:

> "*In considering whether this discrete duty has been discharged in any given case, it will be necessary for the appellate or reviewing court or tribunal to take cognisance of the relevant guidance ……. juxtaposing this with the representations and information provided by the person or persons concerned and the ensuing decision.*"

This passage also draws attention to the obligatory nature of the requirement: the decision maker "***must***" have regard to the guidance, which itself enshrines a further

duty, per paragraph 2.7, which states that the Secretary of State's agents "***must ... .*** *act according to .....*" same [emphasis added]. Having referred to the guidance, the judgment continues:

> "*I consider that these provisions, considered in tandem with the principles enunciated by the Supreme Court and the public law duties rehearsed above, envisage a process of deliberation, assessment and final decision of some depth. The antithesis, namely something cursory, casual or superficial, will plainly not be in accordance with the specific duty imposed by section 55(3) or the overarching duty to have regard to the need to safeguard and promote the welfare of any children involved in, or affected by, the relevant factual matrix. Ditto cases where the decision making process and its product entail little more than giving lip service to the guidance.*"

As this passage makes clear, the two duties imposed on the Secretary of State by section 55 are inter-related. While the first may be regarded as the overarching, or umbrella, duty it cannot be viewed in isolation from the second. Moreover, the second of the two duties incorporates, through the statutory guidance, both substantive considerations and procedural mechanisms designed to facilitate and promote the due discharge of the first duty.

Relevant Immigration Rules

11. The legal framework within which the Secretary of State's decision was made includes certain provisions of the Immigration Rules, namely paragraphs 396, 398, 399 and 399A. We have, for convenience, reproduced these in a schedule to this judgment. In brief compass, the effect of these provisions of the Rules is that there is a presumption that the public interest requires deportation of the person concerned; where Article 8 ECHR is raised, the Secretary of State must consider whether paragraph 399 or 399A applies; and if neither applies, the public interest in deportation will be outweighed by other factors only in "*exceptional circumstances*". In paragraph 399, the focus is on (a) children, with attendant qualifying conditions and (b) sentimental partners, again with attendant qualifying conditions.

The Secretary of State's Case

12. As noted above, the Tribunal invited argument on the specific issue of whether, in making the impugned decision, the Secretary of State had discharged the duties imposed by section 55 of the 2009 Act. In response, Mr Jarvis drew attention to the Appellant's reply to the "Notice of Liability for Deportation and Questionnaire" (Form ICD.0350). It was argued, correctly, that this provides a mechanism for the recipient to bring relevant children to the attention of the Secretary of State. The pro-forma was duly completed by the Appellant, in June 2013. In doing so he detailed the relationship with his partner, which dates from 2011; various particulars relating to his daughter, then aged six years; similar particulars relating to his stepson, then aged almost eight years; the identities of their carers, his former partner and current partner; his contact with the two children; and the adverse impact on them by reason of his proposed removal from the United Kingdom. He asserted that his daughter would be "*devastated*" if this were to materialise. As regards his stepson, he stated:

> *"[XY] takes me as his father and I take him as my biological son. He always sits with me when I am home, falls asleep on my lap and tries to stay awake until I get home. His father left when he was born and I am all he has left as his father figure. He needs me. Also I love him so much. Don't take me from my family."*

Accompanying the completed pro-forma were the children's birth certificates and various letters, including one written by his partner.

13. In his submissions, Mr Jarvis criticised the adequacy of the information provided by the Appellant. We cannot agree. We are of the opinion that the Appellant presented the Secretary of State with a thoughtfully composed, articulate case containing adequate information relating to both children and his relationships with them. One discrete aspect of the submissions of Mr Jarvis entailed the following assertion:

> "*All of the documents and information submitted were carefully considered by the SSHD's decision maker.*"

We draw attention to this formulation since, within this assertion there is an implicit acknowledgement, which we consider correct, that there was a duty on the decision maker to give careful consideration to all available information. One of the questions which arises is whether this discrete duty was discharged. In answering this question, we consider it incumbent on the Tribunal to examine carefully the letter of decision. In doing so, we would observe that, in the fields of immigration and asylum decision making, the importance of the letter of decision cannot be overstated. In the great majority of cases, this is the only mechanism which conveys to the applicant – and, where challenged, the Tribunal – the substance of the Secretary of State's decision, the main factors considered, the underlying reasoning and the legal rules to which effect was purportedly given.

The Secretary of State's Decision Analysed

14. Having scrutinised those passages in the decision letter purporting to consider Article 8 ECHR, we consider the following analysis appropriate:

(a) No consideration is given to the Appellant's role in the lives of his younger brothers. There is simply a bare statement "*…. It is noted that you have two siblings and your mother residing in the UK*".

(b) There is no assessment or acknowledgement of the role of the Appellant in the life of his stepson, aged seven years.

(c) There are significant flaws in the passage relating to the Appellant's relationship with his daughter, who is now aged seven years:

> "…. *You have not submitted any substantial evidence to demonstrate that you are in a genuine and subsisting parental relationship with your daughter, or that you support her financially or otherwise.*"

This passage is clearly unsustainable, having regard to the information provided by the Appellant in his representations to the Secretary of State (*supra*) and the unchallenged findings of the FtT, rehearsed above.

(d) There is no clear finding, or assessment, of whether the deportation of the Appellant from the United Kingdom would interfere with the right to respect for private or family life of the other persons in the matrix whose Article 8 rights were engaged.

(e) The consideration given to the related issue of whether the Appellant has any enduring connections with his country of origin is confined to the following bare sentence:

> "*However, it is not considered that you have no ties to Sierra Leone, the country to which you would be deported.*"

This is strikingly unparticularised.

15. The consideration given specifically by the decision maker to section 55 of the 2009 Act also merits scrutiny. In [26] of the text, it is stated:

> "*Paragraph 399(a) of the Immigration Rules specifies the criteria which must be satisfied in order for a parental relationship with a child to out weigh the public interest in deportation in line with Article 8 of the ECHR. The criteria reflect the duty in section 55 of the* [2009 Act] *to have regard to the need to safeguard and promote the welfare of children who are in the United Kingdom as interpreted in recent case law, in particular ZH (Tanzania). In view of this, consideration has been given to the criteria in paragraph 399(a) and we have come to the following conclusions.*"

What "conclusions" follow? In the several succeeding paragraphs, the decision maker concluded that by reason of the proportions of the Appellant's sentence of imprisonment – five years – the "*criteria*" under all of paragraph 399(a), paragraph 399(b) and paragraph 399A "*will not be considered*". There is no analysis of the Appellant's relationship with his stepson or daughter and, as highlighted above, there are significant errors concerning this latter relationship. Most striking of all, there is no analysis or assessment of the welfare or best interests of either of these children. As regards the stepson, the consideration given to this issue is confined to identifying the possibility of continuing long distance communication. As regards the daughter, the consideration afforded to this issue is limited to the statement that she will remain in the case of her primary carer, namely her mother.

16. As the decision in JO (Nigeria) highlights, in all cases where section 55 applies, the spotlight will inevitably focus with particular penetration on the Secretary of State's letter of decision. In the present case, the decision letter consists of 57 numbered paragraphs filling almost seven pages of relatively dense type. The consideration

given by the decision maker to the children's' best interest is expressed in five paragraphs comprising a total of six sentences. Three of these sentences are anodyne. The other three are conclusionary. There is no analysis or identification of either child's best interests and no consideration thereof, with the exception of the bare statements that the Appellant could continue to communicate with his family from abroad and that his daughter would remain in the care of her primary carer. As noted in our analysis in [12] above, the decision maker's characterisation of the Appellant's relationship with his daughter is flawed and unsustainable. The conclusion reached in JO (Nigeria) was that there had been a breach of each of the inter-related statutory duties. The decision letter in that case was considered to be "*woefully inadequate*": see [15]. We consider that the decision letter in the present case is little better.

17. The analysis in [16] above does not impel inexorably to the conclusion that there has been a breach of the first of the duties enshrined in section 55 of the 2009 Act. We consider it appropriate to stand back and consider the evidential matrix as a whole. Furthermore, we are mindful of the dictum in Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, at [23], that the Secretary of State "….. *does not have to record and deal with every piece of evidence in her decision letter*". We do not suggest otherwise. In the fact sensitive context of Zoumbas, the Supreme Court was satisfied about the adequacy of the decision letter. In the quite different factual context of the present case, we are not thus satisfied, having regard to our analysis above. In thus concluding we do not intend to promulgate any general rule or principle. Every case will be intensively fact sensitive.

18. We turn to consider the separate question of whether the second of the duties enshrined in section 55 of the 2009 Act, which compels the decision maker to have regard to the Secretary of State's guidance, has been performed. We have examined the statutory guidance in [9] above and we refer also to the second schedule to this judgment. In considering whether the discrete duty imposed by section 55(3) has been discharged in any given case, the exercise to be performed by the Tribunal does not differ significantly from that undertaken in determining whether the first of the section 55 duties, namely that contained in subsection (1)(a), has been discharged. In both instances, the Tribunal is required to examine the evidence available. Where appropriate, reasonable inferences will be made. Moreover, where it is contended that either of the duties enshrined in section 55 has been breached, we consider that the onus rests on the Appellant and that the civil standard of the balance of probabilities applies. There is no onus on the Secretary of State.

19. On behalf of the Secretary of State, Mr Jarvis submitted that the decision letter does not have to make specific reference to the statutory guidance. We agree. While explicit reference to the guidance would plainly be preferable and should not rank as a counsel of perfection, we consider that this issue is one of substance and not form. So much is clear from the decision of the Court of Appeal in AJ (India) v Secretary of State for the Home Department [2011] EWCA Civ 1191, where the contrary argument was rejected: see especially [25], [43](b) and [44] – [45]. In that case, however, the conclusions of the Court of Appeal related mainly to the first of

the section 55 duties. While Counsel for the Appellant also formulated a submission relating to the duty to have regard to the statutory guidance: see [25]. This was not expressly addressed in either of the two judgments of the Court.

20. We consider it important to assess the effect of the relevant passages contained in the statutory guidance. In our judgment, the guidance prescribes a series of factors and principles which caseworkers and decision makers must consider and to which they should strive to give effect in every case. Its language is, in the main, open textured. It is an instrument which is somewhat detached and high level. It is designed to put officials on the right path when deciding individual cases. The only exhortation of a concrete and practical nature which it contains is that children should be consulted and their wishes and feelings taken into account "*wherever practicable*". This specific requirement is contained in Part 2 of the instrument, which is entitled "The Role of the UK Border Agency in relation to Safeguarding and Promoting the Welfare of Children". Having regard to the nature of this instrument and the language employed, we construe this requirement as an instruction to decision makers that they should consider the desirability of consulting affected children and ascertaining their wishes and feelings in any given case. In the relatively extensive combined experience of both members of the panel in section 55 cases, neither is aware of any case in which this requirement has actually been given effect.

21. Given that there is no mention, express or oblique, of the statutory guidance in the Secretary of State's decision, the question in the present case is whether it can be properly inferred that the decision maker had regard to the material parts of the statutory guidance. While the decision letter must be considered in conjunction with all other relevant evidence an intense focus on its terms is unavoidable. One searches in vain in the decision letter for clues or indications favouring an affirmative response to the question we have posed. There is no reference to or quotation from the statutory guidance. In the text, the relevant passages are nowhere reproduced, either verbatim or in substance. The possibility of consulting the affected children is nowhere mentioned. None of the obligatory principles enshrined in paragraph 2.7 of the guidance is given expression. Furthermore, there is no mention of the primary statutory provision, section 55(3), and no indication that the decision maker was alert to the discrete duty which this imposes. While we acknowledge that paragraphs 396 – 399A of the Immigration Rules must be considered in this context, we consider that their provisions do not provide a conclusive answer to the question we have formulated: and the contrary was not argued. Both the statutory duty and the relevant provisions of the guidance are framed in specific and exacting terms. The conclusion to be drawn from our analysis is that a breach of the duty imposed by section 55(3) of the 2009 Act has been established.

22. We take this opportunity to highlight that in all cases where section 55 of the 2009 Act applies, the requirement to perform the twofold statutory duties is unaffected by the statutory reforms made by the Immigration Act 2014 and, in particular, the insertion of the new Part 5A into the Nationality, Immigration and Asylum Act 2002. There has been no amendment of section 55 of the 2009 Act. It continues to

apply with full vigour. It has not been modified in any way by the most recent flurry of statutory activity. Given that "*qualifying*" children feature in Part 5A, per section 117B(6)(a) and section 117C(5), in the context of Article 8 ECHR, there is, of course, some overlap between the two statutory regimes: the section 55 exercise will be duplicated to some extent in the Article 8 exercise. In the present appeal, no specific issue concerning the relationship between these two statutory regimes falls to be determined. Both regimes will have to be given full effect by the Secretary of State in appropriate cases.

Remedy

23. Given our conclusion that there has been a breach of each of the duties enshrined in section 55 of the 2009 Act, what order should follow? We directed specific argument on this issue. In response, Mr Jarvis, on behalf of the Secretary of State, formulated the following submission:

> "*In respect of the Tribunal's duties and/or powers the Respondent firstly accepts that, in principle, where there has been a* ***total failure*** *to consider the best interests of the child (and where the SSHD was aware of the existence of that child at the date of the decision) the Tribunal should allow the appeal on the basis that the SSHD's decision is not in accordance with the law to the extent that it awaits a lawful decision by the SSHD acting as the primary decision maker ….*
>
> *In the alternative, where there has been engagement with a consideration of the best interests of the relevant children …. but the Tribunal considers that consideration flawed, the Respondent submits that the Tribunal should make its own findings on what section 55 requires through Article 8 ECHR.*"

It was further submitted that the present case belongs to the second of the two categories thus formulated.

24. Immigration and asylum appeals are regulated by Part 5 of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*"). Appeals are brought under section 82. They are determined in accordance with section 86 which, so far as material, provides:

> "*(1) This section applies on an appeal under section 82(1) ….*
>
> *(3) The Tribunal must allow the appeal insofar as it thinks that -*
>
> *(a) A decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or*
>
> (a) *A discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently. ……*

(5) Insofar as subsection (3) does not apply, the Tribunal shall dismiss the appeal."

Appeals to the Upper Tribunal are governed by section 11 of the Tribunals, Courts and Enforcement Act 2007 (the "*2007 Act*"), whereby an appeal lies on any point of law arising from a decision of the First-tier Tribunal (the "*FtT*") with permission. Pursuant to section 12, where the Upper Tribunal finds that the decision of the FtT involved the making of an error of law, it is empowered to set aside such decision. Where it does so, the twofold options are (a) to remit the case to the FtT with directions for its reconsideration or (b) to re-make the decision.

25. In the present case, as noted in [2] above, this Tribunal has already ordered that the decision of the FtT be set aside. No remittal was ordered. The hearing which has been conducted was designed to operate as a re-making exercise. Mr Jarvis submits that a re-making by this Tribunal is appropriate and that the outcome should be a dismissal of the original appeal. Given the effect and constraints of the statutory regime, outlined above, we consider the correct approach to be the following. In every case where the Upper Tribunal concludes that the decision of the FtT is vitiated by an error of law constituted by a failure to find a breach of either of the duties contained in section 55 of the 2009 Act and sets aside the decision in consequence, three options arise. The first is to re-make the decision of the FtT. The second is to remit the case to the FtT for the same purpose. The third is to allow the appeal on the basis that the Secretary of State's decision was not in accordance with the law thereby requiring the Secretary of State, as primary decision maker, to make a fresh decision giving effect to the assessment and conclusions of the Upper Tribunal.

26. The following question arises: what course should the Upper Tribunal take if it considers itself insufficiently informed to make a proper assessment of the best interests of any affected child? We consider that the test which should be applied is the essentially prosaic one of whether the Upper Tribunal considers itself sufficiently equipped to re-make the decision of the FtT which has been set aside. If the application of this test yields a negative outcome, neither re-making by the Upper Tribunal nor remittal to the FtT will be appropriate. We are satisfied that this test accords with the decision of the Court of Appeal in AJ (India) (*supra*). There is no suggestion in AJ (India) that the FtT, in determining the initial appeal, or the Upper Tribunal, having set aside the decision of the FtT, is obliged to re-make the decision in every case. Re-making is discretionary, not obligatory.

27. We turn to consider whether there is anything in the jurisprudence of the Court of Appeal which precludes either the FtT or the Upper Tribunal from deciding an appeal such as the present in a manner which requires the Secretary of State to re-make the decision under challenge. The decision in AJ (India) (*supra*) is authority for the proposition that where the FtT decides that a decision of the Secretary of State is not in accordance with the law on account of a failure to discharge the first of the section 55 duties the Tribunal is not obliged to remit the case to the Secretary of State for a fresh decision. In thus deciding, the Court of Appeal rejected the contrary argument advanced by the Appellant. It stated:

"[21] *…. The duty of the Tribunal under section 86(3) is to determine the appeal. It must allow the appeal insofar as it thinks that the Secretary of State's decision 'was not in accordance with the law (including immigration rules)'……*

[22] *The Tribunal has power to hear evidence, make findings of fact and decide points of law.*"

In [24], Pill LJ added:

> "*Paragraph 24 of ZH does not assist the Appellant. Baroness Hale plainly contemplated that the Tribunal must consider section 55".*

Notably, the argument rejected was one that the FtT was obliged to remit: see [18] – [21] and [24]. Upon a careful reading, the decision is silent on the question of whether the FtT is empowered to remit in an appropriate case.

28. In AJ India, the Court of Appeal gave consideration to a recent decision of another division of that Court, DS (Afghanistan) v SSHD [2011] EWCA Civ 305. In that case, section 55 of the 2009 Act came into operation subsequent to the impugned decision of the Secretary of State but before the Tribunal's determination of the ensuing appeal. The Appellant appealed to the Court of Appeal, which delivered two judgments of substance. In the second of these, Lloyd LJ stated, at [71]:

> "*Nevertheless, it seems to me that the AIT ought to have borne this obligation in mind when deciding the appeal, because of the Tribunal's role as decision maker: see R (Razgar) v SSHD [2004] UKHL 27, at [15]. The position might have been different if the role of the Tribunal were not that of being a part of the decision making process. If its function were equivalent to that of deciding a conventional appeal or a conventional judicial review application, then the process might be limited by reference to material which had been before the decision maker and to the law as it stood at the time of that decision. But it has long been clear that the role of the AIT, now the First-tier Tribunal or the Upper Tribunal, as the case may be, is not constrained in this way. ….*"

Rimer LJ, the third member of the Court, agreed with Lloyd LJ. Neither DS nor AJ (India) expressly addressed the question of whether either the FtT or the Upper Tribunal, where it finds a breach of either, or both, of the duties imposed by section 55, is empowered to determine the appeal in a manner which requires the Secretary of State to reconsider the matter and make a lawful decision.

29. We turn to consider whether any guidance on this issue can be derived from the Court of Appeal's further contribution to the developing jurisprudence on this subject in SS (Nigeria) v SSHD [2013] UWCA Civ 550. This case concerned the deportation of a foreign criminal pursuant to section 32(5) of the UK Borders Act 2007. The ensuing challenge was based on the contention that this would infringe the Appellant's right to respect for private and family life under Article 8 ECHR was dismissed. Delivering the main judgment of the Court, Laws LJ noted that the

Appellant placed "*much reliance*" on section 55 of the 2009 Act: see [12]. Having recorded that the Appellant's argument invoked, *inter alia*, both section 55(1) and the statutory guidance, Laws LJ formulated the Appellant's submission thus, at [34]:

> "*…. In determining an Article 8 claim where a child's rights are affected, the child's best interests must be properly gone into: that is to say they must be treated as a primary consideration and the Court or Tribunal must be armed – if necessary by its own initiative – with the facts required for a careful examination of those interests and where in truth they lie.*"

The Court did not dissent from this proposition, as the next ensuing passage indicates, at [35]:

> "*While in very general terms I would not quarrel with this proposition (though I consider that the circumstances in which the Tribunal should exercise an inquisitorial function on its own initiative will be extremely rare), its practical bite must plainly depend on the nature of the case in hand. It is necessary to consider the deportation of foreign criminals as a particular class of case; and, of course, the circumstances of this case itself.*"

Neither section 55 nor the statutory guidance features in the remainder of the judgment. The third member of the Court, Mann J, added, at [62]:

> "*I agree with Laws LJ that the circumstances in which the Tribunal will require further enquiries to be made, or evidence to be obtained, are likely to be extremely rare. In the vast majority of cases the Tribunal will expect the relevant interests of the child to be drawn to the attention of the decision maker by the individual concerned. The decision maker would then make such additional enquiries as might appear to him or her to be appropriate. The scope for the Tribunal to require, much less indulge in, further enquiries of its own seems to me to be extremely limited, almost to the extent that I find it hard to imagine when, or how, it could do so.*"

30. We consider that from the perspective of section 55 of the 2009 Act, the main principle to be distilled from SS (Nigeria) is that in cases where the Tribunal is assessing the best interests of an affected child it should normally do so on the basis of the available evidence without more. The decision strongly discourages the Tribunal from conducting an inquisitorial exercise. But Laws LJ stated that the Tribunal must be "*armed … with the facts required for a careful examination*" of the affected child's best interests. This invites the following question: in cases where the Tribunal does not consider itself sufficiently equipped to conduct an adequate best interests assessment, what are its options? In particular, is one of the available alternatives a disposal order the effect whereof is that the Secretary of State must make a fresh, lawful decision, rectifying the failure to perform the section 55 duties in the first place? Furthermore, if an order of this kind is an available option, what is the test or criterion to be applied by the Tribunal in deciding whether to invoke it?

31. We consider that the unspoken premise in the SS (Nigeria) principle is in truth something of an assumption, namely, that in the typical case the Tribunal will be sufficiently armed and equipped to properly assess the child's best interests. This is expressed most strongly in the judgment of Mann LJ. It entails an expectation that, in the great majority of appeals, the Tribunal will have sufficient evidence to enable it to conduct this exercise properly. The most obvious source of this evidence, in the usual case, will be the material laid before the decision maker by the Appellant. There is a very broad spectrum in this respect. At one end thereof the Appellant, who may have no representation, composes some brief and possibly confusing or incoherent sentences which are transmitted to the decision maker for consideration and form part of the evidence before the Tribunal. At the other end of the spectrum, the Appellant's case is compiled by competent and experienced practitioners and consists of coherent and impressively composed representations, supplemented by materials such as birth certificates, school records, character testimonials and expert reports, whether medical or otherwise. Between these two extremes there may, potentially, be many different permutations. Furthermore, in some cases, the evidence will be clarified and amplified by well planned and presented oral testimony. We suggest that the SS (Nigeria) principle must be considered in this light.

32. The SS (Nigeria) principle must also be balanced with what the Supreme Court has pronounced in its two landmark decisions and, indeed, what the Court of Appeal said in SS itself. As we have highlighted, one of the striking features of the decision in SS is the Court's acceptance of the argument that the child's best interests "*must be properly gone into*" and the Court or Tribunal must be "*… armed … with the facts required for a careful examination of those interests …*": see [34]. We consider that this chimes with what this Tribunal said more recently in JO (Nigeria) [2014] UKUT 00517 (IAC). First, it distilled from the opinion of Baroness Hale in ZH (Tanzania) [2011] UKSC 4 the principle that the decision maker must be properly informed (see [8]), highlighting the importance accorded to "*the quality of the initial decision*" at [36]. Second, this Tribunal acknowledged the stress in Zoumbas v SSHD [2013] 1 WLR 3690 on the importance of having "*a clear idea of a child's circumstances*" and the necessity for "*a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment*": per Lord Hodge, at [10]. Third, this Tribunal drew attention to the Tameside principle and the Padfield principle, at [10]. It stated:

> "*These principles also give sustenance to the proposition that the duties enshrined in section 55 cannot be properly performed by decision makers in an uninformed vacuum. Rather, the decision maker must be properly equipped by possession of a sufficiency of relevant information.*"

Continuing, this Tribunal identified two guiding principles, each rooted in duty, at [11]:

> "*The first is that the decision maker must be properly informed. The second is that, thus equipped, the decision maker must conduct a careful examination of all relevant information and factors. These principles have a simple logical attraction, since it is difficult to conceive how a decision maker could properly have regard to the need to*

safeguard and promote the welfare of the child or children concerned otherwise. Furthermore, they reflect long recognised standards of public law. Being adequately informed and conducting a scrupulous analysis are elementary pre-requisites to the inter-related tasks of identifying the child's best interests and then balancing them with other material considerations."

We consider that there is no disharmony between the decision of the Tribunal in JO (Nigeria) and the relevant decisions of the Supreme Court and the Court of Appeal. Furthermore, the contrary was not argued.

33. The full context within which these issues arise must, of course, be appreciated. In this respect, the central theme of SS (Nigeria) is the powerful weight to be attributed to the factor of Parliamentary intervention in the field of the deportation of foreign national offenders through the provisions of the UK Borders Act 2007. These provisions must now be considered in conjunction with the new Part 5A of the Nationality, Immigration and Asylum Act 2002 inserted by section 19 of the Immigration Act 2014 (the "*2014 Act*"), the effect whereof is that the public interest expressed by Parliament is probably stronger than before. In SS (Nigeria) Laws LJ, summarising, stated in [55]:

> "*Proportionality, the absence of an 'exceptionality' rule and the meaning of 'a primary consideration' are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision maker's margin of discretion: the policies source and the policies nature and in particular to* ***the great weight which the 2007 Act attributes to the deportation of foreign criminals.***"
>
> [Our emphasis.]

In a later passage, Laws LJ refers to "*the extremely pressing public interest in the Appellant's deportation*": see [58]. Accordingly, in cases of this kind, in the proportionality scales, the factor of the best interests of any affected child, while a matter of undeniable importance**,** is to be balanced with a public interest of unmistakable potency. This must be borne in mind in every case where, having found a breach of either of the two duties imposed by section 55 of the 2009 Act, the Tribunal is considering the appropriate consequential course.

34. We consider that there are four significant aspects of section 55 of the 2009 Act which do not feature with any prominence in the jurisprudence of the Court of Appeal. The first is that the Secretary of State is the primary decision maker. The second is that the two duties enshrined in section 55 are imposed on the Secretary of State and no one else. The third is the guidance made under section 55(3) and the related statutory duty imposed on decision makers to have regard thereto: this has received at best scant attention, coupled with the fact that there is no meaningful way in which tribunals can give effect to certain aspects thereof. The fourth, as we have highlighted above, is that in the trilogy of decisions examined, the Court of Appeal has not decided the question of whether one of the options available to the Tribunal, where a breach of either or both of the duties imposed by section 55 is found, is to make an order the effect whereof is to require the Secretary of State to make fresh,

lawful decision. Thus the fetters imposed on this Tribunal by binding precedent are limited.

35. We would highlight that where either the FtT or the Upper Tribunal finds that there has been a breach by the Secretary of State of either, or both, of the duties imposed by section 55 of the 2009 Act, a further assessment of and decision concerning the best interests of any affected child must be made. The author of such decision will be either the relevant Tribunal or the Secretary of State. There is no other candidate decision maker. We have raised the question of what test or criterion the Tribunal should apply in deciding which of the two candidate agencies should make the fresh decision. We turn to consider this discrete issue further.

36. In examining these issues, we consider it appropriate to reflect on the realities of the scenario of an appeal in which either the FtT or the Upper Tribunal decides that the impugned decision of the Secretary of State is unlawful by virtue of a failure to perform either or both of the duties imposed by section 55 of the 2009 Act. The following are typically recurring scenarios in practice:

    (a) In some cases (such as the present) the Appellant is neither present nor represented. In this category of appeals, no further evidence bearing on the best interests of any affected child, nor any elucidation or amplification of extant relevant evidence, will be adduced by or on behalf of the Appellant.

    (b) In other cases, the Tribunal might be informed by the Appellant or his representative that further relevant evidence can be adduced, giving rise to an application to adjourn the final determination of the appeal. In some instances of this kind, the source of such further evidence not infrequently includes an expert in the field of medicine or psychiatry or psychology or social care.

    (c) A third, and different, scenario is one where it is evident to the experienced member/s of the Tribunal that the Secretary of State has failed to assemble relevant and available evidence in making the impugned decision. Such evidence may include a sentencing transcript, a criminal record, a pre-sentence report, a post-sentence prison or probation report or extant social services reports or records. As a general rule, evidence of this kind is in the custody of other public authorities and can be obtained by the Secretary of State on request.

    (d) There is another realistic scenario, namely one wherein it may appear to the Tribunal that the impugned decision of the Secretary of State was undermined and impoverished by a failure to give effect to the requirement in Part 2 of the statutory guidance that, in appropriate cases, children should be consulted and their wishes and feelings should be taken into account "*wherever practicable*": see [19] above. This is most likely to occur in cases where it appears to the Tribunal that the information and representations put forward on behalf of the Appellant invited further enquiries or elucidation or evidence gathering of this kind on the part of the Secretary of State.

These scenarios are not designed to be exhaustive. They are, rather, typical of the realities of immigration and asylum appeals in contemporary litigation. Furthermore, none of them is self-sealed: depending on the context of the individual case, some may partake of the ingredients of others.

37. In the scenarios outlined above, in the wake of a finding by either Tribunal that the Secretary of State has breached either of the duties enshrined in section 55 of the 2009 Act the possibility of the exercise of case management powers by either of the two Tribunals arises. In the case of the FtT, the procedural regime is contained in the Tribunal procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, in operation from 20 October 2014. Rule 4(2) establishes an umbrella power to give a direction "*in relation to the conduct or disposal of proceedings at any time*". Rule 4(3), without prejudice to the generality of the aforementioned power, empowers the FtT to, *inter alia* –

> "…… *permit or require a party or another person to provide documents, information, evidence or submissions to the Tribunal or a party.*"

There is also a power of adjournment or postponement. Equivalent powers are conferred on the Upper Tribunal by rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Furthermore, in both Tribunals, the overriding objective includes a specific provision that the parties must help the Tribunal to further such objective and co-operate with the Tribunal generally. We consider that the powers highlighted above could, in principle, be exercised by either Tribunal in the wake of a finding of a breach by the Secretary of State of either, or both, of the duties enshrined in section 55 of the 2009 Act. The context of the individual case would be determinative of the Tribunal's decision whether to have resort to any of these powers.

38. We consider that there can be no objection in principle to an order of the Tribunal the effect whereof is to require the Secretary of State, rather than the Tribunal, to perform the two duties imposed by section 55. There is no jurisdictional bar of which we are aware. It has long been recognised that there is a category of cases in which it is open to both tiers to allow the appeal on the basis that the Secretary of State's decision was not in accordance with the law without further order, thereby obliging the Secretary of State, as primary decision maker, to re-make the decision, giving effect to and educated and guided by such correction and guidance as may be contained in the Tribunal's determination. This is not contested on behalf of the Secretary of State. In this context, we draw attention to the decision of the Upper Tribunal in T (Section 55 BCIA 2009 – Entry Clearance) (Jamaica) [2011] UKUT 00483 (IAC). In [24] of this decision, one finds echoes of what was said by Lloyd LJ in DS (Afghanistan), at [71] (*supra*). In that case, the vitiating factor in the impugned decision, as found by the FtT, was a failure to apply section 55 of the 2009 Act: see [14]. The Upper Tribunal allowed the appeal on the main ground that section 55 did not apply to the child in question, who was outside the United Kingdom. In an *obiter* passage, the President added, at [25]:

> *"Where an immigration decision is flawed for failure to have regard to an applicable policy outside the Immigration Rules, then immigration Judges of both Tribunals have no appellate function to review the merits of the exercise of discretion or a judgment that is required to be made. Except in most unusual circumstances, the most that can be done is for the appellate decision to record that the decision making process is flawed and incomplete and so the application or decision in question remains outstanding and not yet properly determined (see AG and Others Kosovo [2007] UKAIT 00082)."*

This is one illustration of an appeal context in which the effect of the Tribunal's order determining the appeal is to require the Respondent to make a fresh, lawful decision. We are conscious that such an order was not made in T (Jamaica). However, the President observed, in [32]:

> *"The scheme of the Tribunals, Courts and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal."*

The order made was one of remittal to the FtT. Notably, the Upper Tribunal's directions in [34] – [38] directly required the Respondent to undertake further specific enquiries and, echoing the terms of the statutory guidance and the observations of Baroness Hale in ZH (Tanzania), to interview the affected child.

39. Our survey of the relevant jurisprudence, governing principles and statutory framework yields the following conclusions:

(a) Where either the FtT or the Upper Tribunal decides that there has been a breach by the Secretary of State of either of the duties imposed by section 55 of the 2009 Act, both Tribunals are empowered, in their final determination of the appeal, to assess the best interests of any affected child and determine the appeal accordingly. This exercise will be appropriate in cases where the evidence is sufficient to enable the Tribunal to conduct a properly informed assessment of the child's best interests.

(b) However, there may be cases where the Tribunal forms the view that the assembled evidence is insufficient for this purpose. In such cases, two options arise. The first is to consider such further relevant evidence as the Appellant can muster and/or to exercise case management powers in an attempt to augment the available evidence. The second is to determine the appeal in a manner which requires the Secretary of State to make a fresh decision. While eschewing prescription, we observe that this course may well be appropriate in cases where it appears to the appellate tribunal that a thorough best interests assessment may require interview of an affected child or children in accordance with Part 2 of the Secretary of State's statutory guidance.

(c) In choosing between the two options identified above, Judges will be guided by their assessment of the realities of the litigation in the particular case and the basis on which the Secretary of State has been found to have acted in breach of either or both of the section 55 duties. It will also be appropriate to take into account the desirability of finality and the undesirability of undue delay.

Conclusions

40. Giving effect to the approach outlined above we decide as follows. A fuller and more considered assessment of the best interests of the two children in question is indubitably required in this case. This follows from our analysis of the Secretary of State's decision in [14] - [16] above and our identification of the various deficiencies and shortcomings therein. We take into account that inquisition by the Tribunal has been strongly discouraged by the Court of Appeal in SS (Nigeria). Furthermore, given that this Appellant is unrepresented and did not attend the appeal hearing, the prospects for efficacious judicial inquisition are, realistically remote. In the particular circumstances of this case, and not without some misgivings, we conclude that this Tribunal should proceed to make its assessment of the best interests of the children concerned.

41. In conducting this exercise, we remind ourselves of, without repeating, the information summarised in [1] – [2] and [12] above, together with [14] – [16]. In summary, the Appellant is the biological father of a daughter now aged seven years who lives a separate life. As found by the FtT, he has a regular relationship with his daughter, which entails joint activities fortnightly and he supports her with payments of £150.00 per month. We readily infer that this not insignificant payment enhances the quality of his daughter's life and contributes to her upkeep and maintenance. As regards the Appellant's step son, who is now aged seven years, the Appellant has been the father figure in the family unit in question for some four years. The other member of this unit is the boy's mother, the Appellant's partner. We note the finding of the FtT that this is a "*serious relationship*". We accept the Appellant's written assertion that his step son views him as his biological father and vice-versa. The step son has had no father in his life since birth. We further accept the Appellant's claim that he loves his step son and that his step son needs him. These two children are at a critical stage of their development. We also take into account the highly positive findings of the FtT relating to the Appellant's conduct and lifestyle since the commission of the index offences some 13 years ago and his youth when he committed them. Weighing all of these factors, we conclude that the best interests of both children will undoubtedly be served and promoted if the *status quo* is preserved.

42. The next step in the exercise of re-making the decision of the FtT is to consider this appeal within the framework of Article 8 ECHR. With the advent of the Immigration Act 2014, we are mandated by Parliament to give effect to the new Part 5A of the Nationality, Immigration and Asylum Act 2002 (the "*2002 Act*"). We do so in the following structured way:

(i) Section 117A:

This is the first provision in the new Part 5A of the 2002 Act. It is engaged in the present case since the Tribunal is required to decide whether the impugned deportation order would breach the right to respect for private and family life under Article 8 ECHR enjoyed by the Appellant and the other three persons

concerned, thereby contravening section 6 of the Human Rights Act 1998. Under the new statutory provisions, the "*public interest question*" is defined as "*the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)*". In determining this question, we are enjoined, in the present case, to "*have regard to*" the considerations specified in section 117B and section 117C.

(ii) Section 117B:

We begin by acknowledging the uncompromising statement of the legislature that the maintenance of effective immigration controls is in the public interest. Further, Parliament has enunciated unequivocally that it is in the public interest that those seeking to enter or remain in the United Kingdom are able to speak English. We find that the Appellant is such a person. We note the further public interest that those seeking to enter or remain in the United Kingdom are financially independent and we infer from all the available evidence that the Appellant is such a person. The requirement enshrined in section 117B(4) to attribute little weight to a private life or a relationship formed with a qualifying partner established at a time when the person is in the United Kingdom unlawfully does not arise, since the Appellant was at all material times lawfully present in the United Kingdom**,** having been granted indefinite leave to remain in September 2000. The same assessment applies to the requirement to give little weight to a private life established when a person's immigration status was precarious. The deportation order was not made until 13 years after the Appellant had been granted indefinite leave to remain.

(iii) Section 117C:

We begin by acknowledging Parliament's unambiguous declaration that the deportation of foreign criminals is in the public interest, the more so according to the seriousness of the offence committed. In this respect, we consider that the Appellant's offending occupies a position of moderate gravity in the notional scale of criminality. We find that "Exception 1" does not apply as the Appellant has not been lawfully resident in the United Kingdom for most of his life and there is no evidence warranting a finding that there would be very significant obstacles to his reintegration into his country of origin. As regards "Exception 2", we find, as did the FtT, that the Appellant has a genuine and subsisting relationship with a British citizen who is, hence, a "*qualifying partner*". We further find that the Appellant has a genuine and subsisting parental relationship with the two seven year old children concerned who, as the birth certificates demonstrate, are British citizens and, hence, each is a "*qualifying child*".

(iv) Section 117C(5): Unduly harsh – the partner

This leaves the question of whether, per section 117C(5) of the 2002 Act, the effect of the Appellant's deportation on his partner or either child would be "*unduly harsh*". Given the statutory language, the impact on each of the three

persons concerned is to be considered separately. As regards the Appellant's partner, we consider that the separation caused by deportation and the natural consequences thereof would undoubtedly be harsh as it would abruptly sever emotional ties and support, terminate a genuine and serious relationship of some four years vintage and remove the only father figure from the family unit and, hence, the life of the partner's seven year old son. However, we are obliged to recognise that these are normal and typical effects of deportation, in circumstances where the statutory criterion of "*unduly harsh*" requires something over and above the usual consequences. We are required to act on the evidence and conclude that there is nothing in the available evidence which would warrant a finding that this criterion is satisfied.

(v) Section 117C(5): Unduly harsh – the two children

We turn to consider the question of whether the Appellant's deportation would have an unduly harsh effect on either of the two children concerned, namely his biological daughter and his step son, both aged seven years. Both children are at a critical stage of their development. The Appellant is a father figure in the life of his biological daughter. We readily infer that there is emotional dependency bilaterally. Furthermore, there is clear financial dependency to a not insubstantial degree. There is no evidence of any other father figure in this child's life. The Appellant's role has evidently been ever present, since her birth. Children do not have the resilience, maturity or fortitude of adults. We find that the abrupt removal of the Appellant from his biological daughter's life would not merely damage this child. It would, rather, cause a gaping chasm in her life to her serious detriment. We consider that the impact on the Appellant's step son would be at least as serious. Having regard to the evidence available and based on findings already made, we conclude that the effect of the Appellant's deportation on both children would be unduly harsh. Accordingly, within the matrix of section 117C of the 2002 Act, "Exception 2" applies.

(vi) Section 117C(6):

The next, and final, step in this staged exercise is to give effect to section 117C(6). This is engaged in the present case since the Appellant's sentence of imprisonment in 2002 exceeded four years. He was sentenced to five years imprisonment. Thus the Tribunal must determine the question of whether "*there are very compelling circumstances, over and above those described in* [Exception 2]". We consider that, having regard to the statutory language and especially the words in parenthesis, "*in particular*", the two sections do not contain an exhaustive list of the factors to be considered and weighed in deciding whether the deportation of the Appellant would be a disproportionate interference with the right to respect for family life enjoyed by all four persons concerned under Article 8(1) ECHR. Thus we also take into account the following additional considerations**.** The Appellant has spent much of his life, including all of his adult life, in the United Kingdom. The evidence warrants the findings that he is a reformed, rehabilitated member of society; a responsible parent who takes his duties seriously; a supportive partner; a person of some industry; and someone

who is fully integrated into United Kingdom life. He has been lawfully present in the United Kingdom throughout the entirety of his 13 years sojourn. Having obtained his coaching qualification he is equipped to make a significant contribution to the lives of many children. If his case had been considered timeously by the Secretary of State he would have been the beneficiary of a more benign statutory deportation regime. If, notwithstanding this consideration, he had been deported following completion of his incarceration, he would have been eligible for re-admission to the United Kingdom following the elapse of ten years. Being the beneficiary of indefinite leave to remain since September 2000, the Appellant would, reasonably, have believed at this remove that deportation for his offending would not eventuate. The Appellant has taken advantage of the administrative oversight on the part of the Secretary of State to demonstrate that he is a responsible, law abiding, reformed, integrated and industrious member of United Kingdom society, a trusted partner and a responsible father. We take into account also the public interest which is served by stable family units whose membership includes a father and a mother.

(vii) Section 117C: Conclusion

43. Finally, we balance all of the findings and considerations highlighted above with the potent public interest in the deportation of foreign criminals. We remind ourselves that in this case the deportation of the Appellant will be proportionate unless there are very compelling circumstances exceeding those enshrined within Exception 2. The court, or tribunal, is the ultimate arbiter of proportionality. We have identified above a range of facts and factors which we now balance in the round. Under the new statutory regime, Parliament has recognised that the public interest does not require the deportation of certain foreign criminals. Blanket exile for the entire cohort has not been decreed. Furthermore, under the Human Rights Act 1998, Parliament has entrusted the courts with the power and responsibility of deciding whether the deportation of a person would be disproportionate. It is the court which conducts the balancing exercise and is the ultimate arbiter. Our conclusion is that, in a case which is undoubtedly challenging and marginal, unusual and highly fact specific, the deportation of this Appellant would interfere disproportionately with the family life rights of the four persons concerned. All of the circumstances, considered as a whole, have the quality of "*very compelling*", that is to say, a case that is not merely strong or persuasive but irresistibly so.

THE NEW IMMIGRATION RULES

44. Having first considered the primary legislation, we turn to consider the new provisions of the Immigration Rules which were introduced in tandem with the new foreign national offender deportation regime in the 2002 Act. We have decided to proceed in this sequence as this seems logical, given the primacy of primary legislation. The Immigration Rules were amended simultaneously by HC532 which took effect on 28 July 2014. They are contained in Appendix FM. As we are re-making the decision of the FtT we are obliged to give effect to both the new statutory regime and the new provisions of the Rules: YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292. Paragraph A362 makes clear that in

criminal deportation cases a claim under Article 8 ECHR "*will only succeed*" where the provisions of the new Rules are satisfied. There is no linkage with, indeed no mention of, the primary legislation. The critical provisions are contained in paragraphs A398 – 399A.

45. We give effect to the new provisions of the Immigration Rules in the following way:

(a) The starting point is paragraph 398(a), the effect whereof is that the deportation of the Appellant from the United Kingdom is deemed to be conducive to the public good and in the public interest because the offence of which he was convicted in 2002 attracted a sentence of imprisonment exceeding four years.

(b) The next step is to consider whether paragraph 399 or 399A applies. If neither of these provisions applies, 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.*"

(c) We consider that paragraph 399(a)(i) applies since, as appears from our findings above, we are satisfied that the Appellant has a genuine and subsisting parental relationship with two British citizen children who are aged under 18 years and are in the United Kingdom.

(d) In accordance with the remaining provisions of paragraph 399, we must decide two further questions. First, would it be unduly harsh for either child to go to live in the Appellant's country of origin? Second, would it be unduly harsh for either child to remain in the United Kingdom without the Appellant? In order for the Article 8 ECHR claim to succeed, both questions require an affirmative answer. The second of these tests replicates Section 117C(5) of the 2002 Act. The first belongs exclusively to the Rules.

(e) In giving effect to the new statutory regime we have already supplied an affirmative answer to the second question: see [44] above. In considering the first question, we find no reason to make any distinction between the two children concerned. Both are aged seven years. Inevitably, their age and current circumstances generally are factors of major significance. As we have observed, both children are at a critical stage of their development. They have spent the entirety of their lives in the United Kingdom. They are, in consequence, fully absorbed in the language, culture, norms, practices and lifestyle of United Kingdom society. The next factor of obvious significance is the foreign country concerned, Sierra Leone. A basic comparative exercise juxtaposing the two countries being considered will almost invariably be required in answering the question posed by paragraph 399(a)(i)(a) of the Rules. In conducting this exercise, it will normally be appropriate for the Court or Tribunal to make some basic assumptions relating to, and to take judicial notice of, elementary and general matters pertaining to United Kingdom society, subject of course to any evidence to the contrary. As regards Sierra Leone, we take judicial notice of the facts that this is a third world west African state whose recent history has featured a lengthy war and military coup. It has

a severely depressed economy which is predominantly agricultural. Life expectancy, income and standard of living bear no comparison with their counterparts in the United Kingdom. While English is the official language, it is only nominally so. The effects of the ten year civil war were ruinous. Life expectancy remains at 40 years, one of the lowest globally. Much of the grave destruction of infrastructure during the civil war has not been restored and, most recently, the country has been afflicted by the terrible Ebola outbreak.

46. The determination of the two questions which we have posed in [44](d) above requires an evaluative assessment on the part of the Tribunal. This is to be contrasted with a fact finding exercise. By way of self-direction, we are mindful that "*unduly harsh*" does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "*unduly*" raises an already elevated standard still higher. Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less than cruel.

47. The final question is whether it would be unduly harsh for either child to remain in the United Kingdom without the Appellant. This is a different question from that considered in [46] above. We have identified a range of facts and considerations bearing on this issue. Once again, an evaluative judgment on the part of the Tribunal is required. In performing this exercise we view everything in the round. The Appellant plays an important role in the lives of both children concerned particularly that of his step son. He is the provider of stability, security, emotional support and financial support to both children. We have rehearsed above the various benefits and advantages which he brings to the lives of both children, coupled with his personal attributes and merits. We remind ourselves of section 55 of the 2009 Act. We acknowledge the distinction between harsh and unduly harsh. We remind ourselves again of the potency of the main public interest in play, emphasised most recently by the Court of Appeal in SSHD v MA (Somalia) [2015] EWCA Civ 1192. The outcome of our careful reflections in this difficult and borderline case and in an exercise bereft of bright luminous lines is as follows. Balancing all of the facts and factors, our conclusion is that the severity of the impact on the children's lives of the Appellant's abrupt exit with all that would flow therefrom would be of such proportions as to be unduly harsh.

The Immigration Rules: Conclusion

48. Accordingly, giving effect to paragraph A362 of the Rules, we conclude that the case made under Article 8 ECHR succeeds under this regime.

49. In considering and giving effect to the new provisions of the Immigration Rules, we have not found it necessary to attempt to resolve any of the interesting and potentially complex issues relating to the interplay between the 2002 Act, as amended and the Rules. Furthermore, we are mindful that we have not received argument on any of these issues. The consideration that a significant regime has been introduced by primary legislation and how this is to interact with a different species of legal regulation, namely the Immigration Rules, raises a number of questions. The Rules, per section 1(4) of the Immigration Act 1971, are designed to give expression to "*the practice to be followed in the administration of this Act for regulating the entry into and stay in the United Kingdom of persons not having the right of abode*". Is there any disharmony between the primary legislation and the Immigration Rules? What is the starting point for Tribunals? What is the correct sequence in the analysis? Are any of the new provisions of the Rules *ultra vires* the parent legislation? And are the new Rules a complete Article 8 code? If so, how are Tribunals to give effect to the provisions of primary legislation? Are Tribunals not the arbiter of what considerations other than those specified in sections 117B and 117C can permissibly be taken into account, having regard to the language of section 117A(2)? The Tribunal is, after all, the ultimate arbiter of proportionality. The new statutory provisions are replete with exercises in fact finding and evaluative judgment to be performed by tribunals. Furthermore, there may be conflicting definitions of "*foreign criminal*": see section 117D(2), paragraph 378 of the Immigration Rules and section 32 of the UK Borders Act 2007. And what is to be done if a person "succeeds" under the 2002 Act, but not the Rules, or vice versa? We would add that this is not intended to be an exhaustive menu.

50. In this judgment, we have confined ourselves to pronouncing on one discrete aspect of the new legal regime, in our observation in [22] above that the duties imposed by section 55 of the 2009 Act are undiluted and unmodified. As regards the host of other intriguing issues, further jurisprudential developments and, hopefully, high quality advocacy are awaited with interest. For our part:

> "*[We] have stirred these points, which wiser heads in time may settle*."

These are the words of Holt CJ, quoted by Lord Denning in Rahimtoola v The Nizan of Hyderabad [1958] AC 379.

DISPOSAL AND ORDER

51. Giving effect to our analysis, findings and conclusions above, we re-make the decision of the FtT by allowing the Appellant's appeal.

Signed:

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 19 March 2015

APPENDIX 1

Paragraphs 396, 398, 399 and 399A, Immigration Rules

396. 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.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

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

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 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.

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

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

APPENDIX 2

Every Child Matters – Change for Children

Statutory Guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children

Issued under section 55 of the Borders, Citizenship and Immigration Act 2009 (November 2009)

Paragraphs 2.6 – 2.8

Making Arrangements to Safeguard and Promote Welfare in the UK Border Agency

2.6.
The UK Border Agency acknowledges the status and importance of the following: the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the EU Reception Conditions Directive, the Council of Europe Convention on Action Against Trafficking in Human Beings, and the UN Convention on the Rights of the Child. The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies.

2.7.
The UK Border Agency must also act according to the following principles:
- Every child matters even if they are someone subject to immigration control.
- In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children[1].
- Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.

[1] Cf. UNHCR Guidelines on Determining the Best Interests of the Child, pages 14 -15 section entitled "The Use of the Term 'Best Interests' in the CRC" (CRC = Convention on the Rights of the Child).

•Children should be consulted and the wishes and feelings of children taken into account wherever practicable when decisions affecting them are made, even though it will not always be possible to reach decisions with which the child will agree. In instances where parents and carers are present they will have primary responsibility for the children's concerns.
•Children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience.

2.8.
When speaking to a child or dealing with a case involving their welfare, staff must be sensitive to each child's needs. Staff must respond to them in a way that communicates respect, taking into account their needs, and their responsibilities to safeguard and promote their welfare

……

The full text of the document can be viewed here:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf