Upper Tribunal
(Immigration and Asylum Chamber)

AB (para 399(a)) Algeria [2015] UKUT 00657 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 19 October 2015	
	…………………………………

Before:

Upper Tribunal Judge Gill

Between

Secretary of State for the Home Department Appellant

And

A B Respondent
(Anonymity Order Made)

Representation:

For the Appellant: Mr C Avery, Senior Home Office Presenting Officer.
For the Respondent: Mr F Farhat, of Gulbenkian Andonian Solicitors.

Head note 3 of the Upper Tribunal's decision in Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC) applies to the version of para 399(a) of the Immigration Rules that was in force as at 27 July 2014. It does not apply to the current version of para 399(a) of the Immigration Rules which came into force on 28 July 2014. This is because the current version does not have the requirement that "there is no other family member who is able to care for the child in the UK" which concerned the Upper Tribunal in Ogundimu.

DECISION AND DIRECTIONS

1. The Secretary of State has appealed with permission granted by the Upper Tribunal on 8 June 2015 against the decision of a Judge of the First-tier Tribunal (Immigration and

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Asylum Chamber) (hereafter the "judge" unless otherwise stated) promulgated on 30 January 2015, following a hearing on 15 December 2014, by which he allowed the appeal of Mr A B (hereafter the "claimant") under the Immigration Rules (hereafter the "IRs") against a decision of the Secretary of State of 15 May 2014 (served on 21 May 2014) to make a deportation order by virtue of s.3(5)(a) of the Immigration Act 1971. The decision followed the claimant's conviction at Snaresbrook Crown Court on 10 July 2006 of three counts of having a false instrument with intent and one count of handling of stolen goods in respect of which he was sentenced on 8 September 2006 to 12 month's imprisonment for each count, to run concurrently.

2. The claimant has other convictions as described at [6]-[8] below and a caution for the offence described at [17] below.

Immigration history and background facts

3. The claimant is a national of Algeria. He first arrived in the UK on 23 May 1997 from France with his brother who had leave to remain in the UK. The claimant used a false French passport. He was interviewed. He said he had in his possession a visa to enter Italy which he had obtained personally by attending the Italian Embassy in Algeria. He also said he held a Turkish visa to travel to Istanbul which was also obtained in Algeria. He said that his brother and sister had financed his travel to London. During the interview he stated that he did not claim asylum in Italy as he thought that London was better than Italy. Following the interview he was refused entry to the UK and returned to Genoa.

4. The claimant arrived for the second time in the UK on 25 August 1997. He did not claim asylum until 10 November 1998. His asylum claim was refused on 29 August 2001. His appeal against the refusal was dismissed on 7 March 2003 and his appeal rights were exhausted on 26 March 2003.

5. The claimant claims to have met his partner, Ms L P (hereafter "Ms P"), a Colombian national, in 2002. She entered the UK on a student visa valid until 30 November 2003. They married on 17 December 2003 at a time when neither had any valid leave to remain in the UK. The marriage certificate gives the claimant's false French name and identity.

6. On 18 July 2003 at City of London Magistrates' Court, the claimant was convicted of fraudulently using a vehicle licence and using a vehicle whilst uninsured. He also failed to surrender to custody at the appointed time. His licence was endorsed with six points and he was fined a total of £335 plus costs.

7. On 28 October 2003 at Cambridge Magistrates' Court he was convicted of shoplifting for which he received a twelve month conditional discharge and ordered to pay costs.

8. On 19 December 2003 at Highbury Corner Magistrates' Court he was convicted of driving an unlicensed taxi and using a vehicle whilst uninsured for which he was fined £250, disqualified from driving for nine months and his licence was endorsed.

9. On 7 June 2004, the claimant and his wife had a daughter (hereafter "S"). S was 9 years old at the date of refusal letter dated 15 May 2014 and 10 ½ years old at the date of the hearing before the judge. In line with her mother, she is a Colombian national. She has

since been naturalised as a British citizen (the judge's decision inconsistently states both that she is a British citizen and that she is not). S's name on her birth certificate is that of the claimant's alias.

10. It is not known at what date the claimant and his wife left the UK but they both re-entered from Spain on 18 September 2005. The French passport that the claimant used on arrival at Heathrow was found to be forged. He and his wife were both stopped by Immigration Officers. They were both refused leave to enter. They were removed to Spain the same day. At the time it was unclear where S was living.

11. It is known that the claimant left Spain alone. He travelled to France. He obtained a false document for his wife. He subsequently mailed it to her in Spain. His wife then re-entered the UK on 20 October 2005 travelling on a false French passport. They were both arrested on 3 February 2006 for handling stolen goods. As a result of the forged documents the leave that Ms P had fraudulently obtained as the spouse of a claimed EEA national was cancelled and she was served with illegal entry papers. During the interview the wife stated that she and the claimant had parted ways when the claimant returned to Spain and claimed that the claimant left Spain for France. It is not known on what date the claimant re-entered the UK.

12. On 10 July 2006 at Snaresbrook Crown Court the claimant was convicted of offences described at [1] above in respect of which, on 8 September 2006, he received the sentence of twelve months' imprisonment referred to at [1] above.

13. On 14 January 2008, the claimant's second daughter (hereafter "A") was born. At the date of the refusal letter, she was 6 years old and, at the date of the hearing before the judge, she was nearly 7 years old. She is a Colombian national. She has no leave or status to remain in the UK. A's name on her birth certificate is that of the claimant's alias.

14. On 17 August 2009, the claimant applied for leave under the Secretary of State's so-called "legacy programme". His case was subject to investigation by the Case Resolution Directorate. The Home Office was alerted to the claimant's previous criminal convictions and his case was transferred to the Criminal Casework in Liverpool where deportation was considered.

15. On 13 June 2012, the claimant was informed of his liability for deportation. In a letter dated 28 June 2012 reference was made to the reasons why he should not be deported from the UK. A decision to make a deportation order was made on 18 August 2012. The appellant appealed against that decision. Due to deficiencies in the refusal letter the claimant's case was withdrawn at appeal for reconsideration by the Home Office.

16. In a letter dated 30 April 2013, the claimant's representatives submitted a further letter stating reasons why he should not be deported from the UK. As part of the temporary admission he was required to report monthly to Becket House Reporting Centre. The records indicate that he failed to report on 12 December 2013.

17. On 22 December 2013 the claimant was arrested by Kent Police for shoplifting. He had removed all the tags but the stolen items were recovered. He was cautioned. When arrested he provided false details stating that he was known by another name with

another date of birth and another nationality (French). It was only after Livescan results were received that his true identity came to light.

Relevant legal provisions

18. The relevant legal provisions are ss.117B-D of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") and paras 398, 399 and 399A of the IRs.

19. Ss.117A-D of the 2002 Act, which came into effect on 28 July 2014, provide as follows:

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) …

(3) …

(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) …

(6) …

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 1 or Exception 2 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 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (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 section 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 12 months,
  (ii) has been convicted of an offence that has caused serious harm, or
  (iii) is a persistent offender.

20. Given that an issue which arises in this case is whether the judge applied the correct version of the IRs, it is necessary to note that HC 352 amended paras 398, 399 and 399A of the IRs with effect from 28 July 2014. The words added by HC 352 are in bold below and the words deleted are crossed and in square brackets. As at the date of the Secretary of

State's decision on 15 May 2014, the rules that applied were the same as those in force on 27 July 2014, i.e. immediately prior to HC 352 coming into effect.

A.398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under *Article 8* of the Human Rights Convention;

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

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

(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 four 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 [**~~it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors~~**].**

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 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 [**~~it would not be reasonable to expect the child to leave the UK~~**];** and

(b) **it would be unduly harsh for the child to remain in the UK without the person who is to be deported** ~~[there is no other family member who is able to care for the child in the UK~~**];**

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 [~~or in the UK with refugee leave or humanitarian protection~~], 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.**

[~~(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and~~
~~(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK]~~

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.**

[~~(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or~~
~~(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.]~~

The decision of the judge

21. The judge did not consider para 399A in terms, although he said (at [73]) that Exception 1 referred to at s.117C(4) does not apply because (he said) *"It cannot be said that "very significant obstacles" exist to the integration of the [claimant] in Algeria*". Given that he did not make any reference to para 399A in his decision, it is not known whether, if he had considered para 399A, he would have applied the version of para 399A that was in force as at 27 July 2014 which provided for the requirement that the individual "*has no ties (including social cultural or family) with the country to which he would have to go if required to leave the UK*" or the "*very significant obstacles*" criterion in the version of para 399A that came into force on 28 July 2014. The significance of this will become apparent from my assessment later on in this decision.

22. As for para 399(a), the judge did not carry out an assessment of whether it was unduly harsh for the children to leave the UK or remain in the UK without the claimant, although he considered whether it would be unreasonable to expect the claimant's children to leave the UK. At [69], the judge said that he was satisfied that "[*Ms P] can remain to look after the two girls but the damage to the family life of the two girls with the [claimant] and the [claimant] with the two girl [sic] satisfie[d] [him] that the claimant's right to family life outweighs the public*

interest in seeing him deported". In his concluding paragraph ([74]), he said that he found that *"it would be unduly harsh on the two children to deport the [claimant]"*.

23. As for para 399(b), the judge said (at [70]) that he considered whether there would be insurmountable obstacles to family life between the claimant and his wife continuing outside the UK. He did not make a clear finding in this respect and did not carry out an assessment as to whether it would be unduly harsh for Ms P to leave the UK or remain in the UK without the claimant. However, in his concluding paragraph ([74]), he said that he found that *"it would be unduly harsh on [Ms P] if [the claimant] was to be deported"*.

24. I shall now quote [61]-[74] of the judge's decision:

Findings

61. Paragraph 398 of the Immigration Rules lays down that "where a person claims that their deportation would be contrary to the obligation of the UK under Article 8 of the ECHR the deportation is regarded as being conducive to the public good where he/she has 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". On 8 September 2006 at Snaresbrook Crown Court the appellant was sentenced to 12 months imprisonment. The deportation of the appellant is therefore conducive to the public good. The respondent is under an obligation to consider whether paragraph 399 or 399A applies and further to assess whether exceptional circumstances apply that outweigh the public interest in deportation. I also bear in mind the new public interest considerations set down in the Immigration Act 2014.

62. Paragraph 399(a) lays down the criteria which must be satisfied in order for a parental relationship with a child to outweigh the public interest in seeing the parent deported. The criteria reflect the duty in Section 55 of the Borders, Citizenship and Immigration Act 2009 to have regard to the need to safeguard and promote the welfare of children who are in the UK. The appellant has two daughters – [S] and [A] – and the duty to safeguard and promote their welfare is now considered.

63. The respondent accepts that the appellant is in a genuine and subsisting relationship with [S]. She is not a British citizen but she has been living in the UK continuously for at least seven years preceding the deportation decision. The respondent concludes that it would be reasonable to expect [S] to leave the UK.

64. [S] was born on 7 June 2004. She is now aged ten years. She has lived in the UK since birth. She has attended [X] Primary School since September 2008. I have read a Progress and Achievement Report for the academic year 2013-2014. Aside from an encouragement from her teachers to think more about the feelings of other pupils the Report speaks well of her progress. There is nothing to suggest that she is not integrated within the daily life of the School. She participates in sports and shows good teamwork. The Report states that "she has good friends within the class and likes to support them if she feels there is a problem". The Head Teacher concludes "Well done [S] on your academic progress this year. Please be mindful of other's feelings. Have a good summer."

65. Bearing in mind that [S] is a UK citizen; that she has lived all her life in the UK; that she is at an age where the focus of relationships is more her contemporaries and less her parents; that she has been at the same school for six years; that her culture and

language is consistent with her nationality I find that it would not be reasonable to expect [S] to leave the UK.

66. I reach a similar conclusion with regard to [A] despite being four years younger than [S] and therefore more focused on relationships with her parents than with her contemporaries. I note in [A's] school report – also from [X] Primary School – that she communicates well with adults and children. She is growing in confidence and "contributes more regularly to class discussions". She has made "excellent progress" with her reading. As regards her personal and social development "her behaviour is excellent and she always does the right thing". The Head Teacher records her satisfaction with the [A's] progress with the words "Well done [A] on your pleasing end of year report".

67. It is accepted that [A] is not a UK citizen and that in line with her mother she is a Columbian citizen but she was born in the UK and has lived all her life in the UK. She has grown up in the culture of British society and has made progress as an integrated member of the school that she attends. She is at the age where school friends become an important part of her life and the evidence from the school is that she is "learning to manage her friendships well and she now plays with a wider group of friends." I find that it would not be reasonable to expect [A] to leave the UK.

68. I also bear in mind that both children would struggle with the either [sic] languages of Algeria or Columbia. The long period of presence in the UK would make more difficult the process of adjustment in the country in which they would settle if deported. That is not to say that adjustment is not possible. It does happen that children are uprooted and required to live in an unfamiliar country but it is a question of what is in the best interests of the two children and I am satisfied and so find that their best interests are to remain in the UK and to pursue their personal and social development.

69. I am satisfied that the appellant and his wife would be able to settle in a third country. They have been able to adapt to past changes in location and they could do so again but having found that the two children should remain in the UK I am satisfied that the mother can remain to look after the two girls but the damage to the family life of the two girls with the appellant and the appellant with the two girls satisfies me that the appellant's right to family life outweighs the public interest in seeing him deported. In reaching this conclusion I bear in mind as per **Ogundimu v SSHD** that little weight should be attached to paragraph 399(a) if there exists a clear conflict with the consideration of the best interests of the two children.

70. As regards paragraph 399(b) I consider that there are insurmountable obstacles to family life between the appellant and his wife being continued outside the UK. The respondent accepts that the appellant and his wife are in a genuine and subsisting relationship. If the appellant was to be deported and the children were to remain because it is in the best interests of the children to remain in the UK there would be a disruption of family life. The family would be separated. Whilst it is possible for the appellant to maintain contact with his wife using modern forms of communication it remains the case that the absence of the father from the family home because of the need for the mother to remain in the UK to look after the two children and the separation that would involve leads me to find that the continuance of the genuine and subsisting relationship between the appellant and his wife outweighs the public interest in deportation.

71. In reaching these conclusions I have borne in mind the extent to which it is conducive to the public good to deport the appellant. I note the remarks of the sentencing Judge. Whilst people do use a false identity to engage in criminal activity the Judge accepted that in the appellant's case "there is no evidence that you have behaved in any other form of criminal activity". Whilst accepting that a prison sentence was inevitable the Judge said "I am therefore going to pass a sentence of imprisonment but it will be the shortest which in my opinion matches the seriousness of your offence and takes into account the mitigating factors in your case". The sentence of 12 months imprisonment is also at the lowest end of the range of sentencing periods which makes the deportation of the appellant conducive to the public good.

72. I also take into account that the appellant was convicted in July 2006 and sentenced on 8 September 2006 – five years and nine months before any deportation proceedings were commenced. There is, quite properly, a balance to be struck between the right of government to pursue the implementation of its deportation policy and the right of the individual to have the benefit of certainty about his status in the UK. However a delay of more than five years tips the scales unreasonably against the individual. It has to be noted that the appellant is not free of criticism because on 23 December 2013 he was arrested by Kent Police for shoplifting and giving false details to the police. He was not cautioned. He was not charged. The date on which the appellant carried out the offences that gave rise to his sentence on 8 September 2006 are not revealed in the papers but the point is made that from the date of his committal for trial in May 2006 to the date of hearing the appellant has the one blemish on his record – the caution referred to above.

73. In reaching my conclusions in this appeal I have taken into account section 117C of the Immigration Act 2014. The deportation of a foreign criminal is in the public interest and the more serious the offence committed by a foreign criminal the greater is the public interest in deportation. The public interest requires deportation unless either Exception 1 or Exception 2. Exception 1 does not apply in this case because it cannot be said that "very significant obstacles" exist to the integration of the appellant in Algeria.

74. Exception 2 applies because the appellant is in a genuine and subsisting relationship with his wife and his two daughters. The issue is whether the effect of the appellant's deportation on his wife or his daughters is unduly harsh. I am satisfied for reasons I have stated in paragraphs 63-68 that it is in the best interests of the children for the appellant to remain in the UK. On the same facts I also find it would be unduly harsh on the two children to deport the appellant. Again on the same facts I also find it would be unduly harsh on the wife of the appellant if he was to be deported.

Notice of decision

The appeal is allowed under the Immigration Rules.

The grounds

25. There are three grounds. At the commencement of the hearing before me, the parties agreed that ground 3 commences at para 8 of the grounds, not para 13.

26. The three grounds may be summarised as follows:

i) Ground 1 raises the following points:

a) The judge considered the IRs that were in force as at the date of the Secretary of State's decision, as opposed to those that were in force as at the date of the hearing, contrary to the guidance in YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292.

b) Although the judge went on to consider the IRs "now in force", he gave the IRs only brief consideration.

c) The judge erred in allowing the appeal outside the IRs.

ii) Ground 2 is that the judge gave inadequate reasons for finding that the claimant met the exceptions in para 399(a) and (b). Detailed reasons are given at [4]-[6] of the grounds, which I do not need to summarise.

iii) Ground 3 contends that the judge made errors in relation to the public interest which may be summarised as follows:

a) He failed to consider that "*the starting point in any assessment of paras 398-399A is the recognition that the public interest in deportation is so great that only in exceptional circumstances will it be outweighed by other factors, including the effect of deportation on children*": LC (China) [2014] EWCA Civ 1310 at [24] and that it is necessary for the Tribunal to take account of Convention rights "*through the lens of the IRs*" (AJ (Angola) [2014] EWCA Civ 1636, at [39].

b) The judge failed to recognise that the scales were "*very heavily weighted in favour of deportation*" and that something *"very compelling"* was required to outweigh the public interest in deportation: HA (Iraq) v SSHD [2014] EWCA Civ 1304. The judge approached the appeal from a neutral starting point, instead of one heavily weighed in favour of deportation.

c) The judge gave scant consideration to the Secretary of State's public interest policies given the severity of the offence committed. Deportation is not to be seen as one-dimensional in its effect. It has the effect not only of removing the risk of re-offending by the deportee himself but also of deterring other foreign nationals in a similar position and it preserves public confidence in a system of control whose loss itself tends towards crime and disorder.

d) The judge failed to take into account the following factors: The claimant has demonstrated a propensity to re-offend. There has been an escalation in seriousness of his offences. He has shown a blatant disregard for the law. His sentences have not acted as any deterrent. His family has demonstrated an inability or unwillingness to exert sufficient influence over him. He has been motivated to offend for financial benefit. His evidence as recorded at [40] of the judge's decision, that he shoplifted in 2013 because he could not work, shows that he was making excuses for his offending rather than taking responsibility for his actions. He has been convicted of fraud offences and he has demonstrated through his immigration history that he is not a trustworthy character and will use deception to benefit himself. He has been a burden to the state through his convictions and the cost of prosecuting him and imprisoning him.

e) There was therefore a strong public interest in deportation which has not been taken into account.

f) To the extent that the judge allowed the appeal because of the delay that has taken place in taking deportation action against the claimant, the judge failed to address the issue correctly. Whilst the Secretary of State accepts that the delay allowed the claimant to develop stronger Article 8 rights, he knew that his immigration remained precarious. Furthermore, there was no evidence that the Secretary of State was aware of the claimant's conviction until 2010 when checks were made following his request to be considered under the Secretary of State's "legacy programme" in 2009.

The grant of permission and the ambit of the grounds before me

27. Mr Farhat submitted that, given that the First-tier Tribunal ("FtT") had refused permission, the grounds before me were limited to those specifically mentioned in the decision of Upper Tribunal Judge McWilliam dated 8 June 2015 granting permission. Accordingly, he submitted that ground 3 was not before me.

28. Judge McWilliam's decision reads as follows:

> 1. The grounds seek leave to appeal against the decision of [the judge] to allow the appeal against the decision of the [Secretary of State] to make a deportation order against the [claimant].
>
> 2. It is arguable that the judge inadequately reasoned the finding that the effect of deportation on the [claimant's] partner and children would be unduly harsh (whether in the context of the rules or the 2014 regime) because arguably inadequate consideration is given to the possibility of the children remaining here in the UK without the [claimant].

29. I ruled that, as Judge McWilliam had not said that she refused permission on those grounds that were not referred to at [2] of her decision, all of the grounds were before me. My reasons are as follows:

i) If Judge McWilliam had intended to refuse permission on ground 3, she would no doubt have said so. Any such refusal would have entitled the Secretary of State to renew her application for permission.

ii) Furthermore, it is misconceived to suggest, as Mr Farhat did, that the refusal of permission by the FtT restricts the grounds that are before the Upper Tribunal to those specifically mentioned in the Upper Tribunal's decision to grant permission. The application to the Upper Tribunal for permission is an entirely new application for permission which can be made on the same or additional or entirely different grounds. A party who applies to the Upper Tribunal for permission cannot be in a worse position by relying upon the same grounds than a party who submits entirely different grounds.

Accordingly, the refusal by the FtT of permission is irrelevant in deciding what grounds are before the Upper Tribunal.

Assessment

30. Mr Avery relied upon the grounds and addressed me briefly to elaborate them. Mr Farhat submitted a skeleton argument at the commencement of his submissions in reply. I took issue with the fact that the skeleton argument was submitted so late, the important point being that Mr Avery had completed his opening submissions but had not had the opportunity to even see the skeleton argument. It was not possible for me, without putting at risk my ability to complete my list, for me adjourn the hearing for a short while in order to enable Mr Avery and me to read the skeleton argument. If the skeleton argument had been handed to Mr Avery and to my clerk before the time listed for the hearing to begin (10 am), the difficulty could have been avoided. As I did not consider it fair to the appellants in the other cases to risk my not being able to reach their cases, I informed Mr Farhat that if, upon my reading his skeleton argument in my own time, I find I have questions on the basis of the material before me, I will resolve those issues on such material as is before me and bearing in mind the potential prejudice to Mr Avery who had not had an opportunity to see the skeleton argument.

31. I shall first deal with ground 1 beginning with the argument summarised at 26.i) c) above which I can dispose of in brief terms. The judge did not allow the appeal outside the IRs. He made it clear in the single sentence under the heading "*Notice of Decision*" at the end of [74] of his decision that the appeal was allowed under the IRs. Accordingly, ground 1 c) is misconceived.

32. The remainder of ground 1, in particular ground 1.a) is important. Mr Farhat's skeleton argument does not deal with it, as the position taken in the skeleton argument is that the grounds before me were limited to those specifically mentioned by Judge McWilliam, a submission which I rejected at the hearing, as stated above. Nor did Mr Farhat address me on ground 1 at the hearing. Nevertheless, the claimant has had ample notice of the Secretary of State's grounds.

33. Before turning to deal with ground 1.a), it is appropriate to deal with head note 3 of Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC) upon which Mr Farhat relied albeit in the context of ground 2. Head note 3 of Ogundimu reads:

> 3. Paragraph 399(a) of the Immigration Rules conflicts with the Secretary of State's duties under Article 3 of the UN Convention on the Rights of the Child 1989 and section 55 of the Borders, Citizenship and Immigration Act 2009. Little weight should be attached to this Rule when consideration is being given to the assessment of proportionality under Article 8 of the Human Rights Convention.

34. Mr Farhat submitted that the judge did not err in his consideration of para 399(a). He was entitled to place little weight on para 399(a) given the guidance in head note 3 of Ogundimu to which he specifically referred.

35. However, it is clear from [80] of the determination in Ogundimu that the Tribunal in that case was considering the version of para 399(a) that was in force prior to 28 July 2014. There are two paragraphs in the determination in Ogundimu which provide the context in which the head note 3 of Ogundimu was formulated. These are [95]-[96] which read (the emphasis is mine):

95. Although there is no dispute that the appellant's child, JT, is a British citizen, or that the appellant has a genuine and subsisting relationship with this child, Ms Hooper accepted that the appellant could not meet the requirements of paragraph 399(a) of the Rules as a consequence of the fact that CT 'is able to care for the child'. We were concerned as to whether the new rules should be read literally so as to exclude any appellant from being granted leave to remain on Article 8 grounds under this rule if there was any person able to care for the child, irrespective of whether the child's welfare and best interests required regular contact with the parent who faced removal. We accordingly asked for written assistance on this issue from the Secretary of State; a summary of the question asked and answer received being set out in paragraphs 76 and 77 above.

96. Having done so we agree that the terms of paragraph 399(a) of the Rules do not provide for a consideration of where the best interests of a child lies, and Ms Hooper was correct to concede that the appellant could not succeed under this limb. However, when we come below to make our overall Article 8 assessment of the proportionality of the interference with the family life of the remaining family members we propose to attach little weight to this aspect of the rules, as we consider that its terms are in clear conflict with the respondent's duty under Article 3 UN Convention on the Rights of the Child 1989 to make the child's welfare and best interest a primary, albeit not the paramount, consideration. As is well known this duty has been imported into Article 8 considerations by case law, notably ZH Tanzania [2011] UKSC 4, as well as section 55 of the Borders, Citizenship and Immigration Act 2009. We doubt whether it is in any child's best interests to lose the contact and support with a caring and devoted parent simply because someone else can be found to care for them.

36. The underlined text, in particular, the final sentence of [96] of Ogundimu, shows that head note 3 arose from the Tribunal's concern about the requirement in the now deleted para 399(a)(b), that "*there is no other family member who is able to care for the child in the UK*". Head note 3 of Ogundimu cannot apply to the current version of paragraph 399(a) given not only that this criterion was deleted with effect from 28 July 2014 but also that the phrase "*unduly harsh*" in the version of para 399(a) that came into effect from 28 July 2014 can accommodate consideration of the best interests of a child pursuant to the Secretary of State's duty under Article 3 of the UN Convention on the Rights of the Child 1989.

37. As stated above, the amendments to the IRs that are shown at [20] above came into effect on 28 July 2014, i.e. between the date of the Secretary of State's decision of 15 May 2014 and the date of the hearing on 15 December 2015. The judge should therefore have applied the version of the IRs that came into force on 28 July 2014.

38. However, an analysis of the judge's reasoning from [61]-[74] of his decision shows that he in fact applied the wrong version of para 399. My reasons are given at [39]-[46] below.

39. The only paragraph in which the judge mentioned the phrase "*unduly harsh*" is at [74] where he said that Exception 2 in s.117C(5) applies. It is clear therefore that he was aware that Exception 2 required consideration of the issue of undue hardship as regards the impact on the claimant's wife and on his children of his being deported. However, there is no mention of the phrase "*unduly harsh*" at [61]-[72] where he assessed whether the claimant's could meet the requirements of paras 399(a) and (b). One would have expected specific engagement with the criteria of "undue hardship" if the judge had considered the correct version of para 399(a) and (b) at [61]-[72].

40. Instead, in his assessment of paras 399(a) and (b), the judge considered:

    i) in relation to para 399(a), whether it would be unreasonable to expect the claimant's children to leave the UK, in respect of which he considered the best interests of the children (at [62]-[68]) and whether Ms P can remain to look after the children (at [69]);

    ii) in relation to para 399 (b), the judge said (at [70]) that he considered whether there would be insurmountable obstacles to family life between the claimant and his wife continuing outside the UK.

41. These are the requirements in the previous version of the IRs. The criteria of whether it is reasonable for children to leave the UK and whether there are insurmountable obstacles to family life continuing between a claimant and his/her partner do not apply in the version of para 399(a) and (b) that came into force on 28 July 2014.

42. Accordingly, read as a whole, it is abundantly clear that the judge applied the version of para 399(a) and (b) that was in force as at 27 July 2014 and not the version of para 399(a) and (b) that came into force on 28 July 2014. This explains why he considered the reasonableness of S and A leaving the UK, whether Ms P could remain in the UK to look after the children and whether there were insurmountable obstacles to family life between the claimant and his wife continuing outside the UK. It explains why he applied head note 3 of Ogundimu.

43. Although the judge was aware that Exception 2 of s.117C required consideration of whether the effect of deportation on the claimant's wife and the two children would be unduly harsh, he was completely unaware of the fact that the new para 399(a) and (b) dovetails with Exception 2 of s.117C(5) by providing that undue hardship is to be decided by considering whether it would be unduly harsh for the partner/child or children to live in the country to which the deportee is to be deported and whether it would be unduly harsh for the partner/child or children to live in the UK without the deportee. This explains why he failed to consider the specific questions of whether it was unduly harsh for the claimant's children and his wife to remain in the UK without him, questions that he would have had to engage with if he had applied the correct version of para 399(a) and (b).

44. The only paragraphs in which the judge considered the possibility of the claimant's wife and children remaining in the UK without the claimant are [69]-[70]. However, it is clear that he did not contemplate at all the possibility of the family being separated. It is plain that he considered that separation was sufficient *in itself* to outweigh the state's interests. This was because he applied head note 3 of Ogundimu. He referred to this guidance in Ogundimu in terms at [69].

45. Finally, I noted that the judge failed to consider whether the claimant satisfied the requirement in para 399(b)(i), i.e. whether the relationship between the claimant and Ms P was formed at a time when the deportee was in the UK lawfully and their immigration status was not precarious. If the judge had applied the correct version of para 399(b), he would have had to engage with para 399(b)(i). If he had done so, he would have had to have found that the claimant could not satisfy para 399(b)(i) and therefore that he could not satisfy para 399(b) because the requirements in para 399(b) are conjunctive and the relationship between the claimant and Ms P was plainly formed at a time when their immigration status was not only precarious but unlawful.

46. Such were the number and nature of difficulties with the judge's assessment of para 399, as explained above, that I am driven to the conclusion that he did apply the wrong version of para 399.

47. I am fortified in my view that the judge applied the wrong version of para 399 by reason of the fact that he referred to the guidance in head note 3 of Ogundimu not only at [69] of his decision but also, in summarising the submissions made on behalf of the claimant at [51] where he said:

> Skeleton argument
>
> 51. The [Secretary of State's] assessment of the [claimant's] circumstances is fundamentally flawed. The public interest does not require the claimant's deportation. when considering para 399 (a) it was said in Ogundimu v SSHD that little weight would be attached to paragraph 399(a) if there was as a clear conflict with the consideration of the best interests to [six] the child. The court considered it unlikely that it was in the best interests to be separated from a parent just because someone else could care for them….

48. It is plain that head note 3 of Ogundimu can only apply to the version of para 399(a) that was in force as at 27 July 2014. It cannot apply to the version of para 399(a) that was in force from 28 July 2014 because para 399(a)(b) was amended in a way as to make the guidance in head note 3 inapplicable. If the judge had applied the version of para 399(a) that came into force on 28 July 2014, as he should have done, he would have realised that head note 3 of Ogundimu could not apply.

49. I am therefore satisfied that the judge erred in law by applying the wrong version of para 399(a) and (b) of the IRs, as contended in ground 1.a).

50. I am further satisfied that this error is material even taken on its own. The judge's application of the wrong version of para 399(a) and (b) is sufficient in itself for his decision on the claimant's appeal to be set aside in its entirety, whatever may be said about grounds 2 and 3. This is because of the clear and material differences between the requirements as set out in the versions of paras 399(a) and (b) that were in force as at 27 July 2014 and the versions that came into force on 28 July 2014.

51. Although ground 1.b) appears to suggest that the Secretary of State detracted from her earlier argument that the judge had applied an incorrect version of the IRs, I am satisfied that this is not the case. Properly examined, I am satisfied that ground 1.b was advanced in the alternative to ground 1.a). My treatment of ground 1.b) is subsumed within my treatment of ground 3.

52. Before turning to grounds 2 and 3, it is necessary to deal with the Upper Tribunal's conflicting guidance on the interpretation of the phrase "*unduly harsh*" in the version of para 399(a) and (b) that came into force on 28 July 2014. This may be summarised as follows:

    i) In MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 (IAC), the Upper Tribunal (Upper Tribunal Judge Grubb and Deputy Upper Tribunal Judge Phillips) held that the phrase "*unduly harsh*" in para 399 of the Rules and s.117C(5) of the 2002 Act does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee).

The Tribunal held that the focus is solely upon an evaluation of the consequences and impact upon the individual concerned.

ii) However, Upper Tribunal Judge Southern took a different view in KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 00543 (IAC). The head note of KMO reads:

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

53. In reaching his decision, Judge Southern considered and dealt with (at [8]-[25]) the reasoning of the panel in MAB in reaching its conclusion.

54. Neither MAB nor KMO is binding upon me. Although of course I take account of the need for judicial comity, this is not necessarily determinative. In any event, given the clear conflict between the two decisions, it is not possible for me to follow both.

55. Mr Farhat mentioned MAB at the hearing in response to which I mentioned KMO. He did not address me on which of the two decisions I should follow and why. His skeleton argument refers to MAB. It is noticeable for its complete failure to mention KMO.

56. I take into account the fact that, whilst the decision in MAB was reached by a panel, the decision in KMO was made by a single Upper Tribunal Judge. Nevertheless, I am entirely persuaded by the reasoning at [8]-[25] of KMO. I prefer to follow KMO.

57. I will now deal with ground 3 before turning to ground 2.

58. At [69] of his decision, the judge said that, in reaching his conclusion that "*the damage to the family life of the two girls with [the claimant] and [the claimant] with the two girls satisfies [him] that the [claimant's] right to family life outweighs the public interest in seeing him deported*", he had borne in mind "*as per Ogundimu v SSHD that little weight should be attached to paragraph 399(a) if there exists a clear conflict with the consideration of the best interests of the two children*". Given that head note 3 of Ogundimu did not apply to the version of para 399(a) that the judge should have applied, I am satisfied that he took into account an irrelevant consideration in reaching his conclusion that the public interest was outweighed. It also shows that he effectively discounted the public interest.

59. Pursuant to KMO, the judge was obliged to take into account the weight that should be given to the public interest in deportation in reaching his findings on para 399(a) and (b).

The judge's failure to apply the correct version of para 399 (a) and (b) may be part of the reason why he failed to attach any, or sufficient, weight to the public interest in deportation.

60. However, the fact is that the judge failed to recognise that the scales were very heavily weighted in favour of deportation. I agree with Mr Avery that he approached the appeal from a neutral starting point.

61. I am also satisfied that the judge failed to consider the different facets of the public interest, namely, the deterrence of others, the expression of society's revulsion at such offences and the need to maintain public confidence in the system.

62. I agree that the judge also erred in failing to take into account all of the factors summarised at my [26.iii)d)] and which I do not need to repeat here. Even after the decision that was the subject of the appeal before the judge, the claimant committed another offence when, again, he gave false identity details. This should have led the judge to increase the weight to be attached to the public interest. Instead, he impermissibly minimised its significance, by referring to this subsequent offence as "*one blemish*" on his record for the period following his committal for trial in May 2006, saying that "[*he] was not free of criticism*". Instead of this increasing the weight to be attached to the public interest, he minimised the public interest. He was wrong to say at [72] that the claimant was not cautioned for the offence in December 2013. As he said at [16] of his decision, the claimant *was* cautioned for this offence. He would not have had a caution administered to him if he had not accepted the offence.

63. The judge mentioned the public interest in the final sentence of [70] and at [71] and [72]. In the final sentence of [70], it is clear, as I have said above, that the judge simply considered that the mere fact of separation was sufficient in itself to outweigh the public interest. That is clearly an incorrect approach. The mere fact that deportation of an individual will effectively lead to permanent separation does not automatically mean that the deportation will be disproportionate, as the judge appeared to assume.

64. I agree with Mr Avery that, at [71], the judge was selective in what he quoted from the sentencing remarks. He chose to focus on comments by the sentencing judge which minimised the seriousness of the offence without also taking into account what the sentencing judge had said about the seriousness of the offences themselves.

65. In relation to [72] of the judge's decision, the grounds state (see [26.f] above) that there is no evidence that the Secretary of State was aware of the claimant until 2010 when checks were made following his request to be considered under the legacy programme. I am satisfied that the judge erred when he took into account, against the public interest in deportation, a delay of 5 years 9 months. The period of 5 years 9 months is the period from the date of the sentence (8 September 2006) until 13 June 2012, the date on which the claimant was informed of his liability to deport. However, it is clear from the sentencing remarks of the sentencing judge that the claimant was charged of the offences for which he was sentenced on that occasion in his false identity. This fact supports the Secretary of State's contention that she was not aware of the claimant until checks were made following his application made on 17 August 2009 for leave under the legacy programme. Given that the claimant's immigration history showed that he was an individual who had used a false identity on more than one occasion, the judge ought to have given reasons why he

considered that, notwithstanding the use by the claimant of such false identities and notwithstanding the fact that he was charged in his false identity in relation to the offences for which he was sentenced on 8 September 2006, the Secretary of State could nevertheless be reasonably expected to have become aware of the claimant and commenced deportation proceedings as early as September 2006. In the absence of such an explanation, he was not entitled to take this period of 5 year 9 months into account against the public interest. In doing so, he erred by assuming that the Secretary of State was aware of the claimant to enable her to commence deportation action as early as September 2006.

66. Indeed, when [70]-[72] are read as a whole, it is plain not only that the judge paid lip service to the public interest but he mentioned it not as a means to explain the weight that he considered should be attached to the public interest but as a means to minimise the public interest and tip the scales in the claimant's favour.

67. Mr Farhat drew my attention to the fact that the first decision to make a deportation order of 18 August 2012 was withdrawn due to deficiencies in the refusal letter. This is irrelevant. The period the judge took into account was from the date of the sentence being imposed on 8 September 2006 to the date that deportation proceedings were commenced on 13 June 2012. Given that deportation proceedings had commenced, he rightly did not take into account the period between the making of the first decision to deport and the decision that was the subject of the appeal before him.

68. For all of these reasons, I am satisfied that ground 3 is also established. I am satisfied that this is also, in itself a material error of law.

69. I turn to ground 2.

70. I am satisfied that the judge failed to give adequate reasons for finding that the claimant satisfied the requirements in paragraph 399(a) and (b), in that, for the reasons given above:

    i) He failed to consider whether it would be *unduly harsh* for the claimant's children to leave the UK, as opposed to whether it is *reasonable* for them to do so.

    ii) He failed to consider whether it would be unduly harsh from the children to remain in the UK without the claimant.

    iii) He failed to consider whether the claimant satisfied the requirements of para 399(b)(i) in relation to his relationship with his wife.

    iv) In any event, he failed to consider whether it would be unduly harsh for her to remain in the UK without the claimant.

    v) He failed to take into account the public interest and give due weight to it. He failed to carry out a proper balancing exercise, recognising that the scales are weighted in favour of deportation.

71. Ground 2 is therefore also established. Again, this error is also material, even taken on its own. Indeed, the judge’s failure to consider whether it would be unduly harsh for the claimant’s wife and children to remain in the UK without the claimant was itself material, even leaving aside the other failings at [69] above.

72. Finally, I should say that Mr Farhat submitted, in reliance upon head note 3 of Ogundimu, that, if a course of action is not in a child's best interests, then it *would be* unduly harsh to follow that course of action. In other words, if deportation of the parent of a child is not in the child's best interests, then the impact of the deportation on the child *would be* unduly harsh. Although he did not accept that this meant that the child's best interests were to be regarded as a trump card, the reality is that his submission, if accepted, would mean exactly that. I have no hesitation in rejecting his submission. Depending on the seriousness of the offences in question and the circumstances of the case, deportation can be proportionate even if it effectively results in the permanent separation of a child from one of its parents.

73. I have found that, with the exception of the argument described at [26.i)c)] above, all three grounds are established. Except for this argument, the judge materially erred in law as contended in *each* of the grounds. Each error justifies my setting aside the judge's decision. I set aside his decision in its entirety. None of his findings stand.

74. Mr Farhat drew my attention to the fact that the claimant's convictions of July 2006 have been spent. My attention was not drawn to any evidence to show that those convictions have been spent. In any event, even if the convictions are spent, it is plain that the judge did not rely upon that fact and, furthermore, I cannot see how that fact is capable of rendering the errors of law I have identified immaterial on any legitimate view.

75. Given that the claimant succeeded in the appeal before the FFT and that there are children involved in this appeal and having regard to para 7 of the Practice Statements and the Court of Appeal's judgment in JD (Congo) & Others [2012] EWCA Civ 327, I am of the view that in this case Practice Statement 7.2(b) applies. I therefore remit this case to the FtT with the direction that it be heard by another judge of the FtT.

Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision. The case is remitted to the First-tier Tribunal with the direction that it be heard by another judge of the First-tier Tribunal.

Anonymity – variation of anonymity order

The FtT made an anonymity order which applied to the claimant and members of his family. I vary that order so that it prohibits the disclosure or publication of any matter likely to lead members of the public to identify the claimant's children. No report of these proceedings shall directly or indirectly identify them. This direction applies to both the claimant and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed
Upper Tribunal Judge Gill

Date: 3 November 2015