Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01172/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 16 June 2016	**On 07 July 2016**

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

TW
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Karnick
For the Respondent: Mr Harrison

DECISION AND REASONS

1. The appellant, TW, was born in November 1993. He appealed to the First-tier Tribunal (Judge McClure) against a decision of the respondent dated 10 June 2014 to make a deportation order against him under Section 32(5) of the UK Borders Act 2007. The First-tier Tribunal, in a decision

promulgated on 21 August 2015 dismissed the appeal on all grounds. The appellant now appeals, with permission, to the Upper Tribunal.

2. Granting permission Judge Shaerf noted that the sole ground of challenge is the judge's application of the "'unduly harsh' criterion referred to in paragraph 399 of the Immigration Rules". Judge Shaerf observed that, between the date of the hearing of the First-tier Tribunal and the promulgation of Judge McClure's decision, the Upper Tribunal had promulgated its decision in *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 (IAC). In that appeal, the Upper Tribunal held that, when determining whether the consequences of deportation would be "unduly harsh" the Tribunal should concentrate solely upon a valuation of the consequences and impact upon the individual concerned: that is to say, without reference to the gravity of the index offence. It was on the basis that Judge McClure had arguably misapplied the principle enunciated in *MAB* that permission was granted.

3. Since the hearing before the First-tier Tribunal and with grant of permission, the tension between *KMO* (Section 117 – unduly harsh) [2015] UKUT 543 (IAC) and *MAB* (para 399; "unduly harsh") [2015] UKUT 435 (IAC) has been substantially resolved by the Court of Appeal in the judgment handed down on 20 April 2016 (*MM* (Uganda) [2016] EWCA Civ 450). At [23-24] the Court of Appeal held:

> "23. The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights. In my judgment, with respect, the approach of the Upper Tribunal in MAB ignores this combination of factors. The first of them, the public interest in the removal of foreign criminals, is expressly vouched by Parliament in section 117C(1). Section 117C(2) then provides (I repeat the provision for convenience):
>
> "The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal."
>
> 24. This steers the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the "unduly harsh" provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term "unduly" is mistaken for "excessive" which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history."

4. In the circumstances, the basis upon which permission has been granted in this appeal (a failure to the following principles enunciated in *MAB*) has now evaporated. Mr Karnick, for the appellant, acknowledged that fact but maintained his challenge to the First-tier Tribunal decision. He submitted

that the question of undue harshness should be considered in the context of all the circumstances. The appellant had committed the index offence when he was 18 years old and Judge McClure had given no or insufficient weight to the age of the appellant. He further submitted that the judge failed to stress the seriousness of the effect of deportation upon the relationship between the child and the appellant [64]. Judge McClure wrote that "to a significant degree the relationship between the appellant and his child would be severed ..." Mr Carnick submitted that the severance would be more than "severe"; it would, in all practical terms, be total. Finally, the judge had failed to acknowledge that since release from the index offence the appellant had not committed any further offences and now has a job. Mr Carnick also submitted that it was not clear from the decision how the judge had applied the Immigration Rules before reaching his decision.

5. I am not satisfied that the judge has erred in law as submitted by the appellant or at all. The judge has provided a detailed and even-handed decision. He has described the difficult background against which the index offence occurred [27] and has carefully considered the nature of the various relationships arising in this appeal. On the other hand, he has considered the aggravating features of the index offence (a street robbery) and the use of violence [54]. In the light of *MM*, those were matters which were clearly of relevance in the analysis. On the other hand, the judge accepted that the appellant was serious in his intent to rehabilitate himself [58]. The judge found that the best interests of the child was to remain with his mother in the family unit which he currently enjoys [60] whilst accepting that the appellant had a "substantial input" into the life of the child. The judge correctly identified the test which he needed to apply in considering the effect of deportation of the appellant on the relationship [61]. The judge found that the child would continue to live with his natural mother in a secure family unit [64]. I agree with Mr Karnick that the use of the expression "significant degree" to describe the disruption to the relationship between the appellant and the child is possibly euphemistic. However, it is no more than that and does not represent an unrealistic or inaccurate assessment of the effects of deportation upon the relationship. The judge was fully aware that the appellant and the child will be separated and that the prospects of the child making visits to Sierra Leone is so remote as to be non-existent. There is nothing to suggest that he has founded his analysis on a baseless assumption that meaningful contact is likely to continue post-removal.

6. As regards the Immigration Rules, the judge has set these out *in extenso* in the earlier part of the decision. I have no reason to believe they were not uppermost in his mind when he conducted the analysis. Most importantly, the judge has considered all the circumstances and has dealt with all the evidence. In doing so, the judge has been aware of factors such as the age of the appellant at the date of the index offence; it is not, in my opinion, an error of law for the judge to fail to refer to age specifically in the analysis. The judge's consideration is detailed, careful and fair. As Mr Karnick acknowledged at the Upper Tribunal hearing, the

dismissal of the appellant's appeal on the facts before the First-tier Tribunal cannot be described as irrational or perverse. It follows from that acknowledgement that any error of law may only lie in the process by which that outcome was achieved. I am satisfied that the judge has considered all the evidence and that he has also applied the law in a manner which is free from legal error. In the circumstances, the appeal is dismissed.

Notice of Decision

This appeal is dismissed

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 4 July 2016

Upper Tribunal Judge Clive Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 4 July 2016

Upper Tribunal Judge Clive Lane