Upper Tribunal
(Immigration and Asylum Chamber)

KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 00543 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 16 September 2015	
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Before

Upper Tribunal Judge Southern

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

K. M. O.

Respondent

Representation:

For the Appellant: Mr T. Wilding, Senior Home Office Presenting Officer
For the Respondent: Mr M. Harris, of counsel

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.

DECISION AND REASONS

1. The question of law that arises to be addressed in this appeal concerns the construction of the phrase "unduly harsh" in s117C of the Nationality, Immigration and Asylum Act 2002 (as amended) and para 399 of HC 395, as amended by HC 532. In particular, when carrying out an assessment as to whether the impact upon a qualifying child or partner will be unduly harsh, should that assessment be informed by the seriousness of the offence committed by the foreign criminal facing deportation or is that assessment focused entirely upon the impact upon the innocent family member, with no reference whatsoever to the seriousness of the offence?

2. The view taken by the Tribunal in *MAB (para 399; "unduly harsh")* USA [2015] UKUT 00435 (IAC) was 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 focus is solely upon an evaluation of the consequences and impact upon the individual concerned."

For the Secretary of State, Mr Wilding submits that the approach set out by the Tribunal in *MAB* is not correct. Before engaging with these issues it is necessary to set out the circumstances of the appeal now before the Tribunal. For present purposes the following summary will suffice.

3. The Secretary of State was granted permission to appeal against the decision of First-tier Tribunal Judge Stanford who, by a determination dated 3 January 2015, allowed the appeal against a deportation order made as a consequence of Mr KO, to whom I will refer as "the claimant", being a foreign criminal within the meaning of the UK Borders Act 2007 because of his conviction of an offence of conspiracy to dishonestly make false representations for which he was imprisoned for 20 months. His wife was a co-defendant in those proceedings although she is not a party to this appeal.

4. The judge allowed the appeal because he found that deportation would bring about a disproportionate interference with rights protected by Article 8 of the ECHR because the result would be that the family would be broken up. There are five children of the family, now aged 2, 4, 6, 10 and 17 years old respectively. The eldest is the claimant's step-daughter. The youngest child was born after he had served the prison term that led to the deportation order. The claimant's wife and step-daughter have indefinite leave to remain and the other four children are British citizens. In reaching that conclusion the judge found that it would be unduly harsh for the 17 year old step-daughter, who was treated in every respect as a child of the family, to move to Nigeria. Although, considered in isolation, the position of each of the other four young children was that it would not be unduly harsh for them to move to Nigeria, the judge accepted that, in reality, they would all remain in the United Kingdom so that the family life each enjoyed with their father would be severed.

5. The appeal was listed before the Upper Tribunal on 24 June 2015. By a decision dated 5 August 2015 the Tribunal found that in failing to make any finding as to whether it would be unduly harsh for the children and step daughter to remain in the United Kingdom without their father and in carrying out the proportionality assessment without proper reference to the immigration rules, the judge made an error of law such as to require the decision to be set aside and re-made. It is helpful to reproduce here the findings of fact made by the judge that have been described as "undisputed" and so have been preserved, references to "the respondent" being to the claimant. Mr Harris, who appeared also at the error of law hearing on behalf of the claimant, confirmed today that these finding of fact were indeed accepted before the earlier panel to be undisputed:

    i. The respondent has family life with his wife and children and has a genuine and subsisting parental relationship with all five children;
    ii. It would be unduly harsh to expect his step daughter to live in Nigeria;
    iii. It is accepted that it would be in the best interests of the children to remain in the United Kingdom with the respondent's wife and if they chose to leave that would be a matter for them;
    iv. It would not be in his eldest son's best interests to be separated from his father again but it would not be unduly harsh to require him to live in Nigeria;
    v. The respondent's daughter would suffer if her father were to be deported but it would not be unduly harsh to require her to live in Nigeria;
    vi. There is no evidence to suggest that it would be unduly harsh for the younger two children to live in Nigeria with their parents;

vii. The respondent is the person who cares for the children at home and organises the household while his wife works and she would have to discontinue her employment to care for the children if the respondent were to be deported;
viii. The relationship the respondent has with all the children is not one that could be maintained from abroad through modern means of communication;
ix. The respondent's presence within the family enables them to be financially independent within the meaning of section 117(B)(3) of the NIAA 2002;
x. It would be in the public interest not to take away the stability of the family and to allow them to remain financially independent.

The legal framework

6. Sections 32 and 33 of the UK Borders Act 2007 provide, so far as material:

"32. *Automatic deportation*

(1) In this section "foreign criminal" means a person—

(a) who is not a British citizen,

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

(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that-

(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (serious criminal), and

(b) the person is sentenced to a period of imprisonment.

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33). ...'

33. *Exceptions*

(1) Section 32(4) and (5)—

(a) do not apply where an exception in this section applies (subject to subsection (7) below), and

…

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's Convention rights, or

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

7. Para 396 of the immigration rules provides the following presumption:

> 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.

And paras 397 and A398 make clear that the rules aim to encompass rights protected by the ECHR:

> 397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.
>
> A398. 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.

That ambition is reinforced by the heading that follows of "Deportation and Article 8" under which the framework of the rules is set out:

> 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

(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.

6. These rules must be seen in the context of the statutory framework now found at s117 of the Nationality, Immigration and Asylum Act 2002. S.117A sets out, in mandatory terms, what is expected of a court or Tribunal:

117A Application of this Part

. (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

. (a) breaches a person's right to respect for private and family life under Article 8, and

. (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

. (2) In considering the public interest question, the court or tribunal must (in particular) have regard—

. (a) in all cases, to the considerations listed in section 117B, and

. (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

. (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

. (1) The maintenance of effective immigration controls is in the public interest.

. (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

. (a) are less of a burden on taxpayers, and

. (b) are better able to integrate into society.

. (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter

or remain in the United Kingdom are financially independent, because such persons— (a) are not a burden on taxpayers, and (b) are better able to integrate into society.

. (4) Little weight should be given to— (a) a private life, or (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

. (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

. (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

. (a) the person has a genuine and subsisting parental relationship with a qualifying child, and

. (b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

. (1) The deportation of foreign criminals is in the public interest.

. (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

. (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 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.

Discussion

8. As is readily apparent, this framework provides a structured approach to the case advanced by a person facing deportation who claims that if he is removed there will be an impermissible infringement of rights protected by article 8 of the ECHR. Section 32 of the UK Borders Act 2007 provides that the deportation of a foreign criminal is conducive to the public good and that the Secretary of State must make a deportation order unless one of the exception of s33 applies. In this appeal we are concerned only with the exception that prevents deportation where removal would breach rights protected by the ECHR. In order to assess whether a person's Convention rights would be breached, the Secretary of State must first consider whether paragraphs 399 or 399A applies. For the purposes of this appeal, as was confirmed by Mr Harris in his oral submissions, we are concerned only with paragraph 399 and not with 399A. It is important to recognise, therefore, that the assessment as to whether para 399 applies is an assessment of whether deportation would result in an infringement of article 8 rights. Where paragraphs 399 or 399A do not apply, or where they are not available because the potential deportee was sentenced to more than 4 years' imprisonment, the final assessment of the article 8 claim takes place within the framework of para 398. Again, in the context of the discussion that follows, it is important to recognise that although this process takes place under the provisions of the rules, it is an assessment of a claim that removal would breach rights under article 8 of the ECHR.

9. The final initial observation concerns the role played in this process by the provisions of s117 of the 2002 Act. As those provisions apply where the Tribunal is required to consider whether a decision breaches article 8 rights, it is unambiguously clear that s117 must apply to an assessment carried out under the rules.

10. The immigration rules, in the context of deportation, represent a complete code so far as Article 8 of the ECHR is concerned: see *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192. Therefore, every aspect of Article 8 insofar as it is applicable to deportation, must inhabit the area within the rules. Thus, the concept of proportionality, involving a striking of a balance between the public interest matters in play and rights protected by article 8 of the ECHR, must be engaged at some point in the assessment under the rules.

11. Next, it is important to recognise the architecture of s117C of the 2002 Act. S117C opens with two statements of principle. First, the deportation of foreign criminals is

in the public interest. Secondly, the more serious the offence committed by the foreign criminal, the greater is the public interest in his or deportation. Having set out those principles, s117 provides the framework in which they fall to be considered, this echoing, albeit in language that is not exactly similar, the provisions of the immigration rules. Since those statements of principle are considerations to which the Tribunal must (in particular) have regard, it is hard to see why no regard at all should be had to them when giving effect to provisions of the very section in which they appear.

12. There is no tension in the fact that there is an area of overlap between s117C(4)&(5) and para 399 of the rules. When s117 was brought into effect by the Commencement Order, the vocabulary of para 399 was different, speaking not of undue harshness but of reasonableness. The rule was amended to reflect the vocabulary of the statute and so the assessment now carried out under the rules is compliant with the requirements of the statutory provision.

13. The approach taken by the Tribunal in *MAB* was that there was a two stage approach, at least "potentially" (see para 45), so that the issue of proportionality arose only at the second stage, where a person subject to deportation failed to meet the requirements of 399 or 399A. Therefore:

> "In other words, Part 5A of the NIA Act 2002 only becomes relevant at Stage 2 when the court or tribunal is considering the issue of proportionality…"

If that were correct, the result would be somewhat remarkable in that a clear presumption enshrined in primary legislation would be displaced by an immigration rule. That approach seeks to disregard the unambiguous requirement of s.117A(2) that in considering the public interest question, the court or tribunal *must* (in particular) have regard to, *inter alia*, the statement of principle found in s117C(2) that the more serious the offence, the greater is the public interest in deportation.

14. It cannot be said that para 399 and 399A are not concerned with the public interest question because the overriding presumption of the rules, as recited at para 396, is that where a person is liable to deportation the presumption shall be that the public interest requires deportation. Therefore, the public interest question inhabits para 399 and 399A just as surely as it does in para 398.

15. One response to this difficulty might be thought to be as follows. As the rules themselves distinguish between levels of criminality by providing a different framework for those who have been sentenced to more than 4 years' imprisonment, is that sufficient to accommodate the requirements of s117C(2)? However, an example illustrates how that is not an adequate response. Imagine two persons, A and B, who are foreign criminals facing deportation. A has been sentenced to 12

months imprisonment for, say, making a fraudulent motor insurance claim. B has been sentenced 47 months imprisonment for a serious offence of possession class A drugs with intent to supply, a category of offence that the Secretary of State considers to be particularly serious in the context of immigration control. If the approach advocated in *MAB* were correct there would be no basis upon which to distinguish between those two foreign criminals, despite the demand of s117C(2) that the more serious the offence the greater is the public interest in deportation. Further, if B met the requirements of para 399(a) on the basis of the impact upon his child or partner considered in the manner advocated by MAB, it would mean that at no point in the assessment of his article 8 claim had there been any consideration of the seriousness of his offending, other than the fact of his falling within s117C(3) and para 398(b).

16. In *MAB* the Tribunal place reliance upon what was said in *MF (Nigeria) v SSHD* to support the conclusion that the assessment under para 399 was not informed by considerations of the seriousness of the offence committed. That was because the Court of Appeal spoke of the exercises under 399 and 398 as being "separate", although those separate exercises were not said to be different. The observation at para 44 of *MF* that:

> "We accordingly respectfully do not agree with the UT that the decision-maker is not "mandated or directed" to take all the relevant article 8 criteria into account."

is consistent with the assessment within para 399 being informed by the important matter of the seriousness of the offence. Returning to the hypothetical example of A and B above, on the *MAB* approach, B would be someone in respect of whom, if he otherwise met the requirements of the rules, all of the relevant article 8 criteria would not have been taken into account.

17. There is nothing in the rules, or the statute, to eliminate from an assessment of what is "unduly harsh" considerations of the seriousness of the offence committed. Put another way, it is not at all difficult to see that what may be an unduly harsh consequence in the context of a person who faces deportation because of imprisonment for 12 months for an offence that does not involve violence, drugs or sexual connotations may not be unduly harsh in the case of a person who, by reason of committing such an offence, plainly represents a serious risk to the public if allowed to remain.

18. That is reinforced by the fact that categorisation as a foreign criminal can also arise on the basis of persistent offending even if that offending represents a limited threat to the public at large, such as might be the case for a person persistently given to committing offences of stealing low value items from shops.

19. The phrase "unduly harsh" plainly anticipates an evaluation being required. Mr Harris submitted that the evaluation required was of the nature and quality of the relationship. While it would be harsh to sever a relationship between a child and her biological parent, it may not be unduly harsh to do so if the nature of the relationship had grown to be superficial. But, as Mr Wilding pointed out in response, that cannot be the role of the qualifying adverb because para 399(a) itself requires that the relationship be a genuine and subsisting one before consideration is given to whether it would be unduly harsh to disturb it.

20. The Tribunal in *MAB* drew upon two further lines of reasoning to support its approach. At para 73:

> "… it is worth noting that in the context of refugee law the phrase "unduly harsh" focusses upon the circumstances of the individual concerned within their own country (see, e.g. Januzi v SSHD [2006] UKHL 5). There is no balancing exercise but rather an "evaluative" exercise as to whether an individual cannot be expected to move and live within their own country because of the impact upon him or her."

But there are two difficulties with that reasoning. First, unlike article 8 of the ECHR, which provides a qualified right to respect for private and family life in respect of which a balance is to be struck with the public interest arguments in play, the protection of the Refugee Convention and article 3 of the ECHR is unqualified and so calls for no such striking of a balance between competing interests.

Second, and in any event, at para 21 of *Januzi*, per Lord Bingham:

> "The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so"

From which it can be seen that the requirement is to take account of "all relevant circumstances". Importing that to the deportation context, it is clear from the provisions of s117C(2) that those include the seriousness of the offence giving rise to the decision to make the deportation order.

21. The second source of support identified in *MAB* were decisions of McCloskey J in *MK v SSHD* [2015] UKUT 223 (IAC) and *BM & ors v SSHD* [2015] UKUT 293 (IAC), observing that the President had, in *MK*:

> "… made no reference to the public interests and was clearly not engaged in a balancing exercise weighing the public interests against the consequences to the children of living in the appellant's own country but rather was simply focusing on the interests of the children"

And of the words of the President in *BM*:

> "Again, we detect no suggestion that the term "unduly" in itself incorporates a balancing exercise taking into account the public interest…"

However, in *MK* the Tribunal was concerned with a potential deportee who did not have access to para 399 or 399A because he had been sentenced to more than 4 years imprisonment. Although it is correct to say that the Tribunal did not have regard to the public interest in assessing whether the impact of deportation on the children would be unduly harsh, that appears to be because that was to be factored into the assessment that had to be carried out under paragraph 398.

In *BM*, at para 47, the President said, specifically, when assessing the question of whether it would be unduly harsh for a father of young children to be deported that:

> "… we view everything in the round…"

and a little later:

> "Balancing all 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."

It is impossible to see how such a balancing exercise could have been conducted unless the matters speaking in the appellant's favour were balanced against a competing interest, which can only have been the public interest in the deportation of foreign criminals, which necessarily included the factors that s117C(2) required the Tribunal to have regard to.

22. For all of these reasons I respectfully differ from the view taken by the Tribunal in *MAB*.

23. Although the Tribunal is concerned in this decision with the correct interpretation of 399(a), the same principles apply to the interpretation of the same phase that appears in 399(b).

24. 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.

25. It might be observed also that the Secretary of State's has published Immigration Directorate Instructions – Chapter 13: Criminality Guidance in Article 8 ECHR cases. Although such guidance to decision makers cannot be determinative in matters of statutory interpretation, since this has been published by the same government department that brought the Immigration Bill to Parliament that inserted s117 into the 2002 Act, it might be thought likely that the guidance at least gives a good idea of what the legislation was intended to achieve. At 2.5.3 the guidance says this:

> 2.5.3 The effect of deportation on a qualifying partner or a qualifying child must be considered in the context of the foreign criminal's immigration and criminal history. The greater the public interest in deportation, the stronger the countervailing factors need to be to succeed. The impact of deportation on a partner or child can be harsh, even very harsh, without being unduly harsh, depending on the extent of the public interest in deportation and of the family life affected
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> .
>
> 2.5.4 For example, it will usually be more difficult for a foreign criminal who has been sentenced more than once to a period of imprisonment of at least 12 months but less than four years to demonstrate that the effect of deportation would be unduly harsh than for a foreign criminal who has been convicted of a single offence, because repeat offending increases the public interest in deportation and so requires a stronger claim to respect for family life in order to outweigh it.

26. Although, for these reasons, I respectfully depart from the approach advocated by the Tribunal in *MAB* I do adopt the other guidance offered by that decision:

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

Although I would add, of course, that "all of the circumstances" includes the criminal history of the person facing deportation.

Remaking decision on appeal

27. At the beginning of the hearing before the Upper Tribunal today, Mr Harris made an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to admit fresh evidence not submitted to the First-tier Tribunal. This evidence was a report by Dr Oboho providing his opinion upon the effect upon the children of being separated from their father. This report was produced at the hearing and I provided Mr Wilding with a short period of time to consider its content. When the hearing resumed Mr Wilding objected to the admission of the evidence.

28. Rule 15(2A) provides as follows:

> In an asylum or an immigration case-
>
> (a) If a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party-
> (i) indicating the nature of the of the evidence; and
> (ii) explaining why it was not submitted to the First-tier Tribunal; and
>
> (b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing the evidence.

29. As the report was produced for the first time at the beginning of the hearing, it would be a generous interpretation of the rule to accept the footnote in Mr Harris's skeleton argument, itself produced at the beginning of the hearing, as complying with the notice requirement of rule 15(2)(a). In any event, permission to appeal was granted 4 months ago in May 2015 and accompanying that grant of permission were directions reminding the parties of the requirements of rule 15(2A). There was no mention at the error of law hearing on 24 June of any intention to commission such a report and further directions in the error of law decision again reminded the parties of what was required to comply with rule 15(2A). Mr Wilding has had no proper opportunity to consider and respond to the report, which the Tribunal itself has not received, and in all those circumstances the application to admit it was refused.

30. Recently, in *CG (Jamaica) v SSHD* [2015] EWCA Civ 194, Laws LJ reaffirmed that the correct approach in a case such as this was as set out in *MF (Nigeria)*. Thus, in *MF*, Lord Dyson said this:

> "It is common ground that the first step that has to be undertaken under the new rules is to decide whether deportation would be contrary to an individual's article 8 rights on the grounds that (i) the case falls within para 398(b) or (c) and (ii) one or more of the conditions set out in para 399(a) or (b) or para 399A(a) or (b) applies. If the case falls within para 398(b) or (c) and one or more of those conditions applies, then the new rules implicitly provide that deportation would be contrary to article 8."

Continuing:

> "36. What is the position where paras 399 and 399A do not apply either because the case falls within para 398(a) or because, although it falls within para 398(b) or (c), none of the conditions set out in para 399(a) or (b) or para 399A(a) or (b) applies? The new rules provide that in that event, 'it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors'.
>
> 43. The word 'exceptional' is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the 'exceptional circumstances'. .
>
> 44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence."

31. In his submissions today, Mr Harris made clear that in seeking to establish the claimant's claim under article 8 of the ECHR he relies upon the relationship he now enjoys with his 5 children. He does not suggest that the claimant's relationship with his wife, who was convicted together with him of the conspiracy for which he was sentenced to imprisonment, nor any obstacle to his integration into Nigeria, is a basis upon which his article 8 claim could succeed.

32. I have set out above the key findings of fact preserved by the panel of the Upper Tribunal who found that Judge Stanford had made an error of law and set aside his decision. In brief, there is a strong family life established between the claimant and his wife and family. Although the judge recognised that the claimant's wife and four children may prefer to remain in the United Kingdom if he were deported, it would not be unduly harsh to expect each of them to move to Nigeria to continue to enjoy family life together there, although the judge accepted that, in reality, they would remain in the United Kingdom with their mother. Today, nothing has been offered to justify any departure from those findings of fact. However, the finding of Judge Stanford that it would be unduly harsh to expect the claimant's step daughter to move to Nigeria has also been preserved. His reasons for so concluding were as follows:

> "The oldest child has lived with her mother and the appellant since 2003. She is close to adulthood but is still dependant on and has her home with the family. She has not visited Nigeria since her arrival in the United Kingdom as a baby and expresses her view in a letter to the tribunal that she does not want to go to Nigeria because of the story she heard about her late father who was killed there…
>
> This oldest child has leave to remain and is settled in the United Kingdom. She has attended all her schooling in the United Kingdom and her personal life and social life is based here as well as her family life. It is understandable that she expresses a wish not to go to Nigeria and her wish must be respected as an important factor in coming to my conclusion. Given her personal circumstances I find that it would be unduly harsh to require this child to live in Nigeria."

33. The first question, therefore, is whether it would be unduly harsh for the children to remain in the United Kingdom without their father. That question must be addressed in the light of the circumstances as a whole, paying regard in particular to the factors the Tribunal must take into account as a consequence of s117 of the 2002 Act.

34. The claimant's immigration history is not a good one. He arrived in the United Kingdom in March 1986, then aged 17, without leave to enter or remain and has remained unlawfully ever since. He first came to notice in May 2003 when served with notice of his liability to be removed as a person unlawfully present in the United Kingdom. He then claimed asylum. His appeal against the immigration decision that accompanied refusal was dismissed in February 2004. He has subsequently accepted that his claim was a false one, founded upon an untruthful account fabricated in order to manufacture a basis upon which he might secure leave to remain.

35. The claimant and his wife have lived together since 2003. The step daughter has always lived with them and the marriage produced four children born in 2005, 2009, 2011 and 2013. The four children are British citizens. The claimant's wife and his step daughter have indefinite leave to remain.

36. The offence for which the claimant was imprisoned was a serious one. He entered a very late plea of guilty, the case having been listed for trial in December 2011. In his sentencing remarks, HHJ Barker, the Common Serjeant of London, said that the family home had been "the centre of a considerable fraudulent activity" and that a search had disclosed "everything necessary for this web of deceit to be manufactured, including bank cards, chequebooks and printing sets". Police officers found details of "hundreds of different cards" and "evidence of a chatline log where the defendant had been in contact with others in relation to furthering fraudulent activities off this sort". 188 accounts had been manipulated or used to produce some £98,000 worth of transactions, either completed or attempted. The

judge described the conspiracy, which involved the claimant's wife and brother also, as "a professionally planned operation over a significant period with multiple frauds; therefore it is in the highest category" presumably for the purpose of sentencing guidelines. The judge added this:

> "The fact is these are and were serious antisocial offences. It causes considerable disruption to both the financial community and to the individuals involved…"

37. As we have already seen, there is both a statutory presumption and a presumption set out in the immigration rules that the deportation of foreign criminals is in the public interest.

38. Mr Harris submits that when embarking upon the assessment as to whether para 399 applies, on the basis that it would be unduly harsh for the children to remain in the United Kingdom without their father, the best interest of those children are a primary consideration. It is plain, and I accept it to be the case, that it is in the best interests of the children, all of them, if they are able to maintain a full parental relationship with both parents and so it is not in their best interests for the claimant to be removed while they remain here. That, however, is not a complete answer to the question to be addressed because a balance has to be struck between that important consideration and the powerful public interest considerations in play, including the statutory presumption that deportation of foreign criminals is in the public interest and the more serious the offence the greater is the public interest in the deportation. The sentencing judge plainly regarded the claimant's offending as serious.

39. I accept also that there is no evidence to indicate that the claimant now represents a risk of committing further offences. But that is just one aspect of the public interest in seeing that foreign criminals are deported. That has been made clear, consistently, in guidance given by the superior courts. In *N (Kenya) v SSHD [2004] EWCA Civ* Judge LJ said at para 83:

> "83. The "public good" and the "public interest" are wide ranging but undefined concepts. In my judgment (whether expressly referred to in any decision letter or not), broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged. They include an element of deterrence, to non-British citizens who are already here, even if they are genuine refugees and to those minded to come, so as to ensure that they clearly understand that whatever the circumstances, one of the consequences of serious crime may well be deportation …"

40. More recently, in *AM v SSHD [2012] EWCA Civ 1634*, Pitchford LJ said at paragraph 24:

> "Deportation in pursuit of the legitimate aim of preventing crime and disorder is not, therefore, 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. Furthermore, deportation of foreign criminals preserves public confidence in a system of control whose loss would itself tend towards crime and disorder."

41. The same approach was taken by a Presidential panel of the Upper Tribunal in the reported decision of *Masih (deportation-public interest-basic principles) Pakistan [2012] UKUT 46 (IAC)*. The guidance is summarised in the head note as follows:

> "The following basic principles can be derived from the present case law concerning the issue of the public interest in relation to the deportation of foreign criminals:
>
> (a) In a case of automatic deportation, full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place.
>
> (b) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them.
>
> (c) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge. .

42. Finally, in this regard, further emphasis was provided by Laws LJ in *SS (Nigeria) v SSHD* [2013] EWCA Civ 550 at para 54:

> "… The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgement only be justified by a very strong claim indeed."

43. I have examined carefully Mr Harris' skeleton argument and my note of his oral submissions to ensure that I have identified all he points to in support of his submission that the effect upon the children of remaining here while the claimant is deported will be unduly harsh. There is undoubtedly a close relationship between this father and his children, as one would expect in any family living together as does this one. The preserved finding of fact is that, although it would not be unduly harsh for the four younger children to move to Nigeria, the reality of the situation is that they will remain here and, as the family relationships cannot be maintained by modern means of communication, there will be a complete fracture of these family relationships. The claimant is not authorised to work and so has been unable to provide financial support for his family but his role within the household has

meant that his wife has been able to work, which she would find hard or impossible if she had to care on a daily basis for the children without her husband's assistance. Thus it is said that if the claimant is removed, the main household income will be lost and the children would be subject to economic disadvantage. But, again, that is not an experience that can, in my judgment, be categorised as severe or bleak or excessively harsh as, like any other person lawfully settled in the United Kingdom, the claimant's wife and family will have access to welfare benefits should they be needed.

44. Nor do I have any difficulty in accepting the submission that the children, who have enjoyed a close and loving relationship with their father, will find his absence distressing and difficult to accept. But it is hard to see how that would be any different from any disruption of a genuine and subsisting parental relationship arising from deportation. As was observed by Sedley LJ in *AD Lee v SSHD* [2011] EWCA Civ 248:

> "The tragic consequence is that this family, short-lived as it has been, would be broken up for ever, because of the appellant's bad behaviour. That is what deportation does."

This family relationship was not, of course, short lived but the point is the same. Nothing out of the ordinary has been identified to demonstrate that in the case of this particular family, when balanced against the powerful public interest considerations in play, although the children will find separation from their father to be harsh, it will not be, in all of the circumstances, unduly harsh for them each to remain in the United Kingdom after their father is removed to Nigeria.

45. I should make clear, in case I am wrong to adopt the approach I do to the applicable legal framework, what the outcome would have been if the appeal had been determined in accordance with the *MAB* approach. The difference is a stark one. It will be recalled that the *MAB* approach has been summarised as follows:

> "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 focus is solely upon an evaluation of the consequences and impact upon the individual concerned."

In this appeal if there is to be no balancing exercise requiring the public interest to be weighed and if the focus is solely upon an evaluation of the consequences and impact upon the claimant's children, it is clear that the application of para 399(a) can deliver only one answer, that being that it would be unduly harsh for the claimant's children to remain in the United Kingdom without their father, given

that there is a close parental relationship which cannot be continued should their father be deported.

46. That aside, the position, ultimately, is this. As I do not adopt the *MAB* approach, the claimant has not established that the impact of deportation upon his children would be unduly harsh and so paragraph 399 does not apply. It has not been suggested that para 399A applies. Therefore, the public interest in his deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described on para 399. The only such matter identified that has not already been had regard to is that the claimant has now lived in the United Kingdom for a very long time, some 28 years. But that period of stay has been unlawful from start to finish and so little weight can be given to any private life established and there is nothing that comes even close to displacing the public interest arguments.

Summary of decision

47. For the reasons given in the error of law decision annexed to this decision, the First-tier Tribunal made an error of law and its decision has been set aside.

48. I substitute a fresh decision to dismiss the appeal.

Signed

Date: 16 September 2015

Upper Tribunal Judge Southern