



IAC-FH-AR-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00246/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 28th August, 2015**

**Decision & Reasons Promulgated
On 7th September, 2015**

Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**KERVINE KAVUALA
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the Appellant: Miss E Savage, Home Office Presenting Officer

For the Respondent: Mr E Kanu, League for Human Rights

DECISION AND REASONS

1. In this determination the Secretary of State for the Home Department is the appellant and to avoid confusion, I shall refer to her as “the claimant”.
2. The respondent is a citizen of the Democratic Republic of Congo who was born on 24th June, 1984, and is now 31 years of age.
3. On 29th April, 2013, the claimant decided to take a deportation order against the respondent by virtue of Section 5(1) of the Immigration Act 1971, as amended “the 1971 Act”. The respondent gave notice of appeal

and his appeal was heard by First-tier Tribunal Keane, at a hearing conducted at Taylor House on 14th June, 2015. Judge Keane's determination was promulgated on 19th June, 2015. Judge Keane concluded that the claimant had discharged the burden of proving to the balance of probabilities that the respondent's circumstances fall to be considered under paragraph 398(c) of Statement of Changes in Immigration Rules, HC 395, as amended ("the immigration rules"). He went on to find that the respondent had discharged burden of proving to the standard of "*probabilities*" (I believe he meant balance of probabilities) that paragraph 399(a) and (b) and paragraph 399A of the immigration rules applied to the appeal. He found that the claimant's decision to make a deportation order would be contrary to the immigration rules and allowed the respondent's appeal.

4. The claimant, dissatisfied with the judge's decision, sought to challenge the judge's decision and the grounds upon which the claimant relied are set out at Appendix A of this determination. Upper Tribunal Judge Deans granted permission to appeal on 18th July last. A copy of his grant of permission is set out in Appendix B of this determination.
5. In his determination, Judge Keane found that the claimant had discharged the burden of proving to the balance of probabilities that the gravamen of paragraph 398(c). He found that the respondent's offending had caused serious harm and that the respondent is a persistent offender who shows a particular disregard for the law. In paragraphs 17, 18, 19 and 20 of the determination he found that the four police officers who gave evidence to him were truthful. At paragraph 21 the judge made findings of fact, "*wholly in line with the witness statements and oral evidence of PC Yeung, SMPO Hasse, PS Braithwaite and DS Turner*". He also made findings of fact, "*wholly in line with the CRIS Reports to which PC Yeung referred after each case summary in his witness statement*".
6. The judge went on to find that the respondent did not tell the truth in respect of the same matters. He found that the respondent was not a refugee and did not have a profile or political profile in Congo and that nobody would remotely recall him upon his return to Congo. He found that the respondent had a generalised fear of conditions in the country of origin which he would rather not experience. However, the judge found that the respondent would be no more at risk of losing his life than any other member of the indigenous Congolese population. The judge dismissed both the refugee and Article 3 appeals. The judge went on to find at paragraph 22 of the determination, that paragraph 399A of the immigration rules applied to the appeal and he noted the concessions made by the Secretary of State which he recorded at paragraphs 22, 23 and 24 of the determination.
7. At paragraph 28 of the determination the judge found that it would be unduly harsh for the respondent's son to live in the Congo and noted that he was a British citizen by birth and had only ever lived in the United Kingdom. The judge also found that it would be unduly harsh for the

respondent's son to remain in the United Kingdom without the respondent. The respondent has had a continuous connection with his son since his birth and plays a role, "*and quite probably an important role*" in the everyday life of his son. The judge found that paragraph 399B applied to the appeal.

8. At paragraph 30 the judge found that it would be unduly harsh for Miss Simpson, the respondent's partner, to go and live in the Congo, because of compelling circumstances over and above those described in paragraph EX2 of Appendix FM. Miss Simpson was born in the United Kingdom, had lived continuously in the United Kingdom and was a British citizen. Her child was a British citizen, her ties and connections lie exclusively within the United Kingdom and she lives in a property in London with her mother and sister. She has never been to Congo and lacks ties with Congo.
9. At paragraph 31 of the determination the respondent found that paragraph 399A of the immigration rules applied and, despite his earlier findings, found that the respondent is socially and culturally integrated into the United Kingdom for reasons which he sets out.
10. At the hearing before me, Miss Savage relied on the grounds. She suggested that the reasons for the judge's findings were wholly inadequate. . She told me that there was no independent evidence at all to support the Tribunal's findings that it would be unduly harsh for the respondent's child to remain in the United Kingdom without him or for his child to leave the United Kingdom.
11. She suggested, the judge had simply not applied *BM and Others (Returnees - criminals and non-criminals)* CG [2015] UKUT 293 (IAC).
12. She also suggested that there were no findings as to the respondent's credibility and the judge had erred by failing to consider whether the respondent's partner could remain in the United Kingdom without him. Whilst the judge found that the respondent was not truthful about his offending, the judge has made no findings as to the respondent's overall credibility. The claimant believes that the respondent has misled the judge in respect of his involvement in the life of his son, but even if his involvement was as he claimed, then the respondent has simply failed to demonstrate that his removal would lead to unduly harsh consequences for his son. The child's mother has been the primary carer for the child since birth and the Tribunal have failed to identify what effects there would be on the respondent's child were he to remain in the United Kingdom with his mother. Similarly the Tribunal's findings as to whether or not it is unduly harsh for the child to leave the United Kingdom are inadequate. Even though the appellant's child is a British citizen, that fact would not prevent him from relocating to Congo. He is not yet of school age and the judge failed to adequately identify any factors that would meet the high threshold that would make it unduly harsh for his child to leave the United Kingdom.

13. Similarly, the judge erred in his assessment of paragraph 399(b) by failing to make any findings as to whether it would be unduly harsh on the respondent's partner to remain in the United Kingdom without him in accordance with paragraph 399(b)(iii). By failing to identify factors that would make it unduly harsh for Miss Simpson to remain in the United Kingdom the Tribunal had erred.
14. The Tribunal had further erred, she submitted, because the factors identified by the Tribunal at paragraph 31 of the determination do not meet the high threshold necessary to show that there would be significant obstacles to the respondent's integration in Congo in accordance with paragraph 399A(c). They failed to take into account the fact that the appellant speaks French, that he was 30 years of age at the time of the determination and that his family in the United Kingdom would be in a position to provide him with support and temporarily help him if they chose to do so. The respondent had failed to prove that there would be very significant obstacles to his integration.
15. Mr Khan, responding on behalf of the respondent, suggested that there was no material error and that the judge had very carefully looked at all the evidence. It was not in dispute that the respondent had a son and partner who were both British subjects. He submitted that the deportation order itself was illegal.
16. He submitted that the Secretary of State was wrong to make a deportation order because a deportation order may not be made under paragraph 3(5) against someone who has leave to remain in the United Kingdom. I pointed out that paragraph 3(5) applied to anyone who was not a British citizen.
17. Mr Khan suggested that the decision was illegal because the judge took into account matters where the appellant had been either not charged with any offence, or been acquitted of the offence. I drew his attention to paragraphs 16 to 21 inclusive.
18. Mr Khan suggested that at paragraph 32 of the determination the judge had found the respondent to be credible. So far as the allegations of the judge misconstrued the meaning of "unduly harsh" are concerned, he again referred me to paragraph 32.
19. Miss Savage referred me to paragraph 80 of *MAB (paragraph 399; "unduly harsh") USA [2015] UKUT 00435* where the Tribunal discussed the meaning of "unduly harsh":-

"In our judgment, Judge Holder erred in law by failing to give adequate reasons and in reaching an irrational conclusion that the impact upon the appellant's children of remaining in the UK was 'unduly harsh'. Further, in our judgment, the evidence did not establish that the consequence of his deportation for them remaining in the UK was 'unduly harsh'. Applying the meaning of 'unduly harsh' set out in *MK* that it does not equate with 'uncomfortable, inconvenient, undesirable or merely difficult' circumstances,

we have no doubt that the circumstances identified by the judge could not be equated to 'unduly harsh' consequences for the children. It could not properly be established that the effect on them of the appellant's deportation was excessive, inordinate or severe. The only proper finding, and one we make, is that the effect on the children has not been established to be 'unduly harsh'."

20. She submitted that the judge had erred by failing to consider and apply the correct test.

21. As to the respondent's partner, the decision in *Agyarko v Secretary of State for the Home Department* [2015] EWCA Civ 440 provides assistance. At paragraphs 21 to 24 the Court of Appeal said this:-

"21. The phrase 'insurmountable obstacles' as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.

22. This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase "'insurmountable obstacles' has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under Article 8 exists for family members to be granted leave to remain or leave to enter a Contracting State: see e.g. *Rodrigues da Silva and Hoogkamer v Netherlands* (2007) 44 EHRR 34, para. [39] ('... whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them ...'). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by *Jeunesse v Netherlands* (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so).

23. For clarity, two points should be made about the 'insurmountable obstacles' criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way: see, e.g., the way in which the Grand Chamber approached that criterion in *Jeunesse v Netherlands* at para. [117]; also the observation by this court in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544, at [49] (although it should be noted that the passage in the judgment of the Upper Tribunal in *Izuazu v Secretary of State for the Home Department* [2013] UKUT 45 (IAC); [2013] Imm AR 453 there referred to, at paras. [53]-[59], was making a rather different point, namely that explained in para. [24] below regarding the significance of the criterion in the context of an Article 8 assessment).

24. Secondly, the 'insurmountable obstacles' criterion is used in the Rules to define one of the preconditions set out in section EX.1(b) which need to be satisfied before an applicant can claim to be entitled to be

granted leave to remain under the Rules. In that context, it is not simply a factor to be taken into account. However, in the context of making a wider Article 8 assessment outside the Rules, it is a factor to be taken into account, not an absolute requirement which has to be satisfied in every single case across the whole range of cases covered by Article 8: see paras. [29]-[30] below.”

22. The findings made by the judge do not, Miss Savage suggested, meet paragraph EX1 of Appendix FM.
23. Mr Kanu referred me to paragraphs 22, 23, 24 and 25 of the judge’s determination. He submitted that this undermined the claimant’s claims. The Secretary of State had plainly acted illegally by relying on evidence alleging criminal activity on the part of the respondent, without there being any criminal conviction and in one case an acquittal. The respondent’s child and partner could not possibly go to Congo. It would be unduly harsh for the respondent to go there in all the circumstances. He asked me to dismiss the appeal.
24. At paragraph 28 of the determination the judge noted that Chey’von, the respondent’s son, was born a British citizen and had only ever lived in the United Kingdom. He was born on 21st April, 2012 and resides with his mother, Miss Simpson, his grandmother and Miss Simpson’s sister, Chey’von’s aunt. The judge noted that the family unit was settled and if Chey’von were to be removed to Congo, he would be separated from a large part of it. At the age of 3 he does not know Congo and bearing in mind the evidence of his mother, the judge found that it would be unduly harsh for them to go and live in Congo. He also found that it would be unduly harsh for Chey’von to remain in the United Kingdom without the respondent because the respondent is the natural biological father of Chey’von and has had a continuous connection with him since his birth. The judge noted that the respondent played a role in the day-to-day life of Chey’von and as the judge put it, “quite probably an important role”.
25. Neither representative drew it to my attention the *MAB* was decided after this appeal was heard.
26. I have concluded that the First-tier Tribunal Judge did err in law in his determination. *IDI, Chapter 13: Criminality Guidance in Article 8 ECHR cases* at paragraph 2.5.2 and 2.5.3 says this:

“When considering the public interest statements, words must be given their ordinary meaning. The Oxford English Dictionary defines ‘unduly’ as ‘excessively’ and ‘harsh’ as ‘severe, cruel’”.
27. Paragraph 2.5.3 says this:

“The effect of deportation on a qualifying partner or 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 begin unduly harsh, depending on the extent of the public interest in deportation and of the family life affected.”

28. At paragraph 2.5.4 the IDI says this:-

“For example, it would usually be more difficult for a foreign criminal who has been sentenced more than once to a period of imprisonment for at least twelve months but less than four years to demonstrate that the effect of deportation would be unduly harsh than for a 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.”

29. And at paragraph 3.5.2 the IDI says:-

“When considering whether the effect on a child of deporting a foreign criminal is unduly harsh, the strength of the family life claim, including the best interests of the child, must be balanced against the public interest in deportation. As a general principle, the greater the public interest in deporting the foreign criminal, the more harsh the effect of deportation must be on the child before it is considered unduly harsh.”

30. In *MK (Section 55 - Tribunal options) Sierra Leone* [2015] UKUT 223 (IAC) the Tribunal said in relation to “unduly harsh”:-

“The determination of the two questions which we have posed in [44](d) above requires an evaluative assessment on the part of the Tribunal. This is to be contrasted with a fact finding exercise. By way of self-direction, we are mindful that ‘unduly harsh’ does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. ‘Harsh’ in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb ‘unduly’ raises an already elevated standard still higher.”

31. Whilst the judge could not have been referred to the decision of the Tribunal in *MAB* since it had not been promulgated at the date of the hearing before the First-tier Tribunal, I believe he did err by failing to appreciate properly its meaning.

32. I believe that the judge also erred in paragraph 31 by failing to show that there were “very significant obstacles” under paragraph 399A to the appellant's integration in Congo. The judge notes that it was not suggested to him that he has any family in Congo who might assist or support him on his return but fails to recognise that there was no evidence that he did not have any family members still in Congo. He also erred by failing to consider whether family members in the United Kingdom might be in a position to provide, at least temporary assistance while the appellant finds accommodation and employment on his return to Congo. The judge fails to take account of the fact that the appellant is a 30 year old male who is fit and healthy.

33. Bearing in mind paragraph 7 of the Senior President's Practice Direction I have concluded that I must remit this appeal to be heard by a First-tier Tribunal Judge other than Judge Keane.
34. The findings at paragraphs 16 to 25 are to stand. The issues for the Tribunal are whether, given the correct meaning of the "unduly harsh" test it would be unduly harsh for the appellant's partner and child were the appellant to be removed while they remain in the United Kingdom and to decide whether there are very significant obstacles under paragraph 399A(c) to the appellant's integration in Congo were he to be removed.

Richard Chalkley

Upper Tribunal Judge Chalkley

3rd September, 2015

Appendix A referred to DA/00246/2014 K1220945 Kervine Kavuala

GROUNDS OF APPEAL

It is respectfully submitted that the First-tier Tribunal has made a material error of law in the Determination in the following ways.

Ground one: Making a material misdirection of law

i) Paragraph 399 (a) unduly harsh effects on his child

1. It is respectfully submitted that the Tribunal has erred in law in their findings at paragraphs 22-28 that the appellant meets the exceptions to deportation under Paragraph 399 (a) as it will be unduly harsh on his child to remain in the UK without him, or for his child to leave the UK. It is submitted that there is no independent evidence whatsoever to either support the Tribunal's findings, nor any to suggest that the unduly harsh threshold, which is a high threshold to meet, is in fact met. Neither does the self serving evidence given by the appellant and his partner regarding his involvement in his child's life suggest anything that would meet the unduly harsh threshold either. Given the Tribunal's findings at paragraph 16-21, that the evidence from the Police demonstrates that the appellant's offending has caused serious harm and that he is a persistent offender who shows a particular disregard for the law in accordance with Paragraph 398(c) and that he is a leading gang member and was involved in a murder, it would take an extremely strong claim to outweigh all of these findings which the Tribunal has failed to factor into their assessment at all.
2. It is respectfully submitted that the caselaw of **BM and Others (returnees - criminal and non-criminal) (CG) [2015] UKUT 293 (IAC)** has recently defined what is unduly harsh in which it was found that, "*Given the invocation of "Exception 2", we must assess the likely impact of the Appellant's deportation on his spouse. In order for the exception to apply, the impact must qualify as "unduly harsh". We consider that this does not equate with uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging. Rather, it poses a considerably more elevated threshold. "Harsh", in this context, denotes something severe, or bleak, the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher. The members of the family unit in question are but two.*"
3. The evidence given by the appellant and his partner suggests that the appellant's role in his child's life is no more than one which can be described as extremely limited in nature. The

appellant does not live with his child and is not their primary carer. Whilst the appellant has claimed to play a role in his child's life, he has failed to provide any independent evidence of the nature or extent of that involvement which would be expected if his claims were credible. The fact that he has not suggests his involvement in his child's life is extremely limited and that any involvement he does play is not significant.

4. At paragraph 21 the Tribunal has found the appellant has not told the truth about his offending and yet fail to make any findings about his credibility overall. Given the appellant has sought to deceive the Tribunal regarding his offending it is entirely possible that he may be seeking to deceive the Tribunal about the nature of his relationship with his child, which the Tribunal have not even taken into account when making their findings.
5. Even if it is accepted that the appellant's involvement in his child's life is as he claims, then he has failed to demonstrate in anyway how the effects on his child would lead to unduly harsh consequences. If the appellant's child remains in the UK without him then his child would merely be remaining in the UK with his mother who has been his primary carer since birth. Neither the appellant, nor his partner has indicated in anyway that his partner has, or would have any difficulties in caring for their child if the appellant is deported. If his partner does require any support she can seek assistance from her family, friends or social assistance. Given the Tribunal's findings at paragraphs 16-21, it is submitted that it may in fact be in his child's best interests to not have direct contact with his child given he is clearly not a good role model for them.
6. Given the evidence suggests his role is nothing more than a limited role, it is submitted that it is highly speculative of the Tribunal to find at paragraph 28 that, "*The appellant plays a role, and quite probably an important role, in the day to day life of Chey'von.*" The evidence clearly does not support this finding by the Tribunal and given the Tribunal has found that he "probably" plays an important role, it suggests that even they are not entirely certain and that the evidence is not definitive to show he does. Whilst the Tribunal find that the effects would be unduly harsh for his child to remain here without him, the Tribunal fail to identify as to what effects there would be on his child if they remained without him. This failure to do so is wholly inadequate when no unduly harsh consequences have actually been identified.
7. In regards to it being unduly harsh on his child to leave the UK, the Tribunal's findings are wholly inadequate. Whilst the Tribunal has found that he would not have developed any ties or interest to Congo due to his age, they then fail to adequately explain how the appellant at his young age would then be able to develop ties or an interest to the UK. Whilst the appellant's child may be a British citizen this in itself does not prevent them from relocating to Congo, as per the Court of Appeal judgement of **LC (China) [2014] EWCA Civ 1310** the fact that his child is British is neither a "trump card", nor does it amount to being very compelling circumstances. His child can maintain contact with any family he has here via modern methods of communication and visits. His child is also not yet of school age, so there would be no disruption to his education which could be completed in Congo. It is submitted that the Tribunal have failed to adequately identify any factors that would meet the high threshold that would make it unduly harsh for his child to leave the UK. It is a choice for the appellant and his partner to make as to whether they wish for his child to relocate

with him. If they choose not to then the appellant can maintain contact with his child via modern methods of communication and visits.

8. It is submitted that the caselaw of **AD Lee** applies in that it states that, *‘The tragic consequence is that this family, short-lived as it has been, would be broken up forever because of the appellant’s bad behaviour. That is what deportation does’*. It is submitted that the factors identified by the Tribunal are no more than the ordinary consequences of deportation and there are no factors which set it apart from an ordinary family life claim. It is submitted that their circumstances are not very strong to outweigh the public interest in line with the caselaw of **SS (Nigeria)[2013]EWCA Civ 550**.
9. It is therefore submitted that none of the factors identified by the Tribunal can be said to meet the high threshold of amounting to being unduly harsh on his child, whilst there may be inconvenient and difficult factors for the appellant and his child to face, these factors are nothing that cannot be overcome and do not amount to being unduly harsh on his child to either remain in the UK without him, or leave the UK in order to meet the exceptions under Paragraph 399 (a).

Ground two: Making a material misdirection of law

i) Paragraph 399 (b) unduly harsh effects on his partner

10. It is respectfully submitted that the Tribunal has erred in law in their findings at paragraphs 29-30 that the appellant meets the exceptions to deportation under Paragraph 399 (b) as it will be unduly harsh on his partner to leave the UK.
11. It is submitted that the Tribunal have erred in law in their assessment of Paragraph 399 (b) as firstly, in accordance with this, the appellant is required to demonstrate that not only would it be unduly harsh for his partner to leave the UK under Paragraph 399 (b) (ii), but that it would also be unduly harsh on his partner to remain in the UK without him in accordance with Paragraph 399 (b) (iii). The Tribunal has failed to make any findings as to the effects on his partner should she remain in the UK without him and therefore the Tribunal’s assessment of Paragraph 399 (b) is flawed.
12. Secondly, it is submitted that the Tribunal’s findings fail to adequately identify factors that can be said to amount to being unduly harsh on his partner. It is submitted that whilst the Tribunal have found at paragraph 29 that he and his partner are in a “quasi-marital relationship” and one that can be defined as being of a “settled” nature, this is simply not supported by either any independent evidence, or by the self serving evidence given by the appellant and his partner regarding their relationship. Furthermore, given the Tribunal’s findings at paragraph 16-21 that the evidence from the Police demonstrates that the appellant’s offending has caused serious harm and that he is a persistent offender who shows a particular disregard for the law in accordance with Paragraph 398(c) and that he is a leading gang member and was involved in a murder, it would take an extremely strong claim to outweigh all of these findings which the Tribunal has failed to factor into their assessment at all.

13. It is respectfully submitted that the appellant and his partner do not live together and have provided no reasonable explanation as to why they do not. The fact that they do not live together despite their claims to have been in a relationship for some five and a half years does not in anyway suggest that their relationship is a "settled" one, or is a "quasi-marital" relationship, neither does their claims as to their future plans, which is nothing more than self serving evidence not supported by any independent evidence and their history suggest it is not meaningful plans.
14. It is submitted that there is nothing identified by the Tribunal about the appellant's partner's circumstances which suggest in anyway that it would amount to the high threshold of being unduly harsh on his partner to either leave the UK, or remain here without the appellant. With regard to his partner leaving the UK, whilst she may have ties to the UK, any ties she does have can be continued via modern methods of communication and visits. There is no reason his partner could not learn the language of the Congo and integrate and obtain employment there.
15. With regard to the appellant's partner remaining in the UK without him, there have been no issues identified by the Tribunal that would amount to it being unduly harsh on his partner to remain without the appellant. There is no evidence that the appellant's partner relies on the appellant in anyway or that she could not cope without him. It is submitted that it is the appellant's partner's choice as to whether she leaves the UK to join the appellant in Congo, or remains in the UK without him and this is a choice for her to make.
16. It is therefore submitted that the Tribunal has failed to identify any factors that would make it unduly harsh on his partner to either remain in the UK without him, or leave the UK in order to meet the exceptions under Paragraph 399 (b).

Ground three: Making a material misdirection of law

ii) Paragraph 399A

17. It is respectfully submitted that the Tribunal has erred in law in their findings at paragraph 31 that the appellant meets the exceptions to deportation under Paragraph 399A.
18. Firstly, it is submitted that in order to meet the exceptions to deportation under Paragraph 399A (b) the appellant needs to demonstrate that he is socially and culturally integrated in the UK. It is submitted that the Tribunal has failed to place sufficient weight upon the appellant's offending and criminal activities when making their assessment. Whilst the Tribunal do note that his *'prolific criminal history and wanton disregard for the criminal law of the United Kingdom rest uneasily with any claim to have socially and culturally integrated in the United Kingdom'*, the Tribunal's reasons for why his circumstances outweigh this is wholly inadequate.
19. Whilst the appellant may have resided in the United Kingdom for the greater part of his life, there is nothing at all about his residence which suggests he has made any meaningful integration into the UK way of life, other than with a criminal element here. Whilst the

Tribunal relies on the fact that the appellant has been educated in the UK and has at one time been in employment, these factors do not show any meaningful social and cultural integration at all. The appellant has not used his education or limited employment to support himself and has instead relied upon criminal activity to fund his lifestyle. The fact that the appellant speaks English is not a factor in itself that demonstrates he has socially and culturally integrated in the UK. Nothing about his behaviour during his residence in the UK suggests he has any meaningful social and cultural integration whatsoever and certainly none that would outweigh the significant evidence as provided by the Police which clearly demonstrates a lengthy anti social behaviour that is against the values and principles held amongst UK life.

20. Secondly, it is respectfully submitted that the factors identified by the Tribunal at paragraph 31, do not meet the high threshold that there would be very significant obstacles to the appellant's integration into Congo in accordance with Paragraph 399A (c) and are therefore wholly inadequate. Whilst the appellant may have some initial difficulties upon returning to Congo the factors identified by the Tribunal cannot be said to amount to being very significant obstacles to integration that cannot be overcome. The appellant speaks French, the language spoken in Congo so there would be no language barriers for him upon return. The fact that he speaks the language will assist him greatly, enabling him to integrate and obtain accommodation and employment. His family in the UK can provide him with support and could return with him temporarily to assist him if they so choose. The fact that he speaks both French and English and has qualifications and employment experience from his time in the UK will place him in a beneficial position compared to others in the job market in Congo. The onus is on the appellant to prove there would be very significant obstacles to his integration and he has failed to do so.
21. It is therefore submitted that the Tribunal has failed to adequately identify any factors that would meet the exceptions to deportation under Paragraph 399A.

Conclusion

22. It is submitted that had the Tribunal taken these issues into consideration they would have found that his deportation is proportionate.
23. Permission to appeal is respectfully sought.

D Neale

D Application for Permission to Appeal to the Upper Tribunal

I apply for permission to appeal to the Upper Tribunal

I authorise my representative named in **Part A** above to act on my behalf in all proceedings before the First-tier Tribunal.*

(* Delete if you have no representative or you are a solicitor filling in this form on behalf of a client)

Applicant's/Solicitor's signature

D Neale

Date

03 July 2015

After you have filled in the form, please send it to:

First-tier Tribunal (Immigration and Asylum Chamber)
PO Box 7866
Loughborough
United Kingdom
LE11 2XZ

Or by Fax: 01509 221550

If the case is a fast track, completed application should be sent or faxed to:

First-tier Tribunal (Immigration and Asylum Chamber)
IA Harmondsworth
Colnbrook By Pass
Harmondsworth
Middlesex
UB7 0HD

Or by Fax : 0870 761 7721

First-tier Tribunal (Immigration and Asylum Chamber)
IA Yarlswood
Hearing Centre A
Twinwoods Business Park
Thurleigh Road
Bedfordshire
MK41 6AE

Or by Fax: 01234 224411

Once your application is received, it will be considered by the Tribunal Judge and you will be informed of the outcome and the next steps to take.

If you have any enquiries, please contact the Tribunals Customer Service Centre on +44 (0)300 123 1711 or by email Customer.Service@hmcts.gsi.gov.uk. Please quote your appeal number when you call.



In the First-tier Tribunal
(Immigration and Asylum Chamber)

Appendix B referred to

Case No: DA/00246/2014

Decision by: Upper Tribunal Judge Deans

In the matter of an application for permission to appeal

Appellant's name: Mr Kervine Kavuala

Application by Respondent

Permission to appeal is granted

REASONS FOR DECISION (including any decision on extending time)

1. Judge of the First-tier Tribunal Keane allowed this appeal under paras 399 and 399A of the Immigration Rules. The appellant was appealing against a decision to deport him under para 398(c).

2. The application for permission to appeal, which was made in time, contends that the judge materially misdirected himself as to the law on the following grounds:-

- The judge misconstrued the meaning of "unduly harsh", as defined in *BM* [2015] UKUT 293.
- The judge made unsustainable findings on the appellant's relationship with his partner and child. This ground is not arguable. The respondent conceded that at the date of decision the appellant had genuine and subsisting relationships with the child and with his partner and the judge made careful findings with regard to these matters.
- The judge did not make sustainable findings on why it would be unduly harsh for the child and partner to leave the UK and live in DRC. Again the judge made careful findings on these points and this ground is not arguable.
- The judge erred in considering para 399A by failing to place sufficient weight on the appellant's "prolific criminal history and wanton disregard for the law". This ground is not arguable as it amounts to no more than a disagreement with the judge's reasoning as to the weight to be accorded to this factor.
- The judge failed to show there were "very significant obstacles" under para 399A to the appellant's integration into DRC.

3. It is arguable that (i) the judge misconstrued the meaning of "unduly harsh" in the context of whether it would be unduly harsh for the appellant's partner and child were he to be removed while they remained in the UK, and (ii) failed to give adequate reasons for finding there were very significant obstacles under para 399A.

Upper Tribunal Judge Deans
sitting as a
Judge of the First-tier Tribunal
Date: 15th July 2015

Richard Chalkley
Upper Tribunal Judge Chalkley

3rd September, 2015