Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01101/2014

THE IMMIGRATION ACTS

Heard at UT(IAC)Birmingham
On 8th September and 9th November 2015

Decision and Reasons Promulgated
On 9th December 2015

Before

UPPER TRIBUNAL JUDGE COKER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

FM

Respondent

Representation:

For the Appellant: Mr I Richards (on 8th September) and Mr D Mills (on 9th November) Senior Home Office Presenting Officer

For the Respondent: Mr A Pipe, instructed by TRP solicitors

DECISION AND REASONS

I make an order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of anything that might lead members of the public to identify the parties identified in this decision as FM (Mr M), Ms A or S. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. The respondent made a decision that s32 (5) UK Borders Act 2007 applied to Mr M following his conviction for numerous offences for which he received lengthy prison sentences. A deportation order was signed on 29th May 2014. Mr M

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appealed the decision and by a decision promulgated on 18th June 2014 a panel of the First-tier Tribunal allowed the appeal on the basis that the removal of Mr M would be a breach of his human rights.

2. The Secretary of State for the Home Department (hereafter the SSHD) sought and was granted permission to appeal the decision of the First-tier Tribunal. Following a hearing on 8th September 2015 I found, for the reasons that follow, that the First-tier Tribunal had made an error of law such as to require that its decision be set aside so that the Upper Tribunal would substitute a fresh decision to allow or to dismiss the appeal against the deportation decision.

Background

3. Mr M, a Jamaican citizen, arrived in the UK on 20th July 2001; he claimed asylum on 14th March 2002 such claim being refused on 5th June 2002. He did not appeal the immigration decision that accompanied the refusal of his asylum claim at that time and remained in the UK unlawfully. He submitted an out of time appeal against that decision which was refused on 6th May 2005 although whether it was rejected as being out of time or refused on its merits is not made clear in the papers before me. In the meantime he had been arrested for motoring offences and detained under Immigration powers.

4. On 22nd November 2004 he applied for leave to remain as the spouse of a person present and settled in the UK, outside the Rules, such application being refused with no right of appeal on 2nd February 2006. He then voluntarily left the UK on 14th February 2006.

5. An application for entry clearance as a spouse was made on 7th April 2006 and refused on 11th May 2006. His appeal was successful in a decision dated 11th June 2007 and on 25th September 2007 he was granted entry clearance until 25th September 2009, arriving in the UK on 20th October 2007.

6. An application for indefinite leave to remain as a spouse of Ms A, a British citizen, was made on 18th November 2009. According to the reasons set out in the decision which led to the instant appeal, that application (which was made when Mr M had no leave to remain in the UK) remains outstanding. It was not submitted to me that the decision was subsumed within the deportation decision and so far as I am aware no decision has yet been made on that application.

7. On 20th September 2010 Mr M was convicted of (and sentenced to):

- Conspiracy to commit robbery (9 years imprisonment)
- Having a firearm with intent to commit an indictable offence (5 years imprisonment to run concurrent)
- Having an imitation firearm with intent to commit indictable offence (30 months imprisonment to run concurrent)
- Possessing prohibited weapon (54 months imprisonment to run concurrent)
- Possessing a firearm without a certificate (54 months imprisonment to run concurrent)
- Possessing ammunition without a certificate (33 months imprisonment to run concurrent)

8. S117D(2) Nationality, Immigration and Asylum Act 2002 defines a foreign criminal as, *inter alia*, a person who is not a British citizen who has been convicted of an offence and sentenced to a period of imprisonment of at least 12 months. S117D(4)(b) further states that reference to a person who has been sentenced to a period of imprisonment "does not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time". Plainly this appellant is a foreign criminal who has been sentenced to a period of imprisonment of at least 12 months (and more than 4 years – see s117C (6)). Mr M had been detained since September 2009; in April 2014 Mr M was released from custody on bail and he, his wife (Ms A) and their son S (date of birth 11th September 2002) lived as a family unit since then.

9. The SSHD accepts that it is not in the best interests of the child or Ms A to live in Jamaica; the child S has been diagnosed with Autism Spectrum Disorder; Ms A runs a successful nursery business; the couple were expecting a second child (which has now been born although it was not argued before the First-tier Tribunal that that child had any rights as an 'unborn child').

The law

10. The Immigration Rules, in so far as relevant to Mr M, are as follows:

> '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.
>
> 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.
>
> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> > (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
> >
> > (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

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

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

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

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision;

and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

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

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

(b) he is socially and culturally integrated in the UK; and (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.'

11. The Nationality, Immigration and Asylum Act 2002 (as amended by the Immigration Act 2014) in so far as relevant to Mr M reads as follows:

‘PART 5A

Article 8 of the ECHR: public interest considerations

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.'

12. S55 Borders, Citizenship and Immigration Act 2009 reads as follows:

'Duty regarding the welfare of children

(1) The Secretary of State must make arrangements for ensuring that -

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

(b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2) The functions referred to in subsection (1) are -

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

…'

13. S71 of the Immigration Act 2014 states

'For the avoidance of doubt, this Act does not limit any duty imposed on the Secretary of State or any other person by section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children).'

14. It is plain that the implementation of the Immigration Act 2014 has not limited or changed the manner of assessment of the best interest of children; nor has it shifted the importance to be given to those interests or the children's welfare.

15. These are the reasons, arrived at and communicated to the parties following the hearing on 8th September 2015, why the First-tier Tribunal made an error of law:

"1. There is no question but that Mr M is a foreign criminal and that he has a genuine and subsisting relationship with a qualifying partner and a genuine and subsisting parental relationship with a qualifying child. Although his relationship with Ms A was formed at a time when he was unlawfully in the UK it is clear that the respondent and the First-tier Tribunal (correctly) placed no weight upon that given in particular that he had left the UK, applied for and been granted entry clearance to return as a spouse and thereafter his residence in the UK was lawful. It was accepted by the respondent before the First-tier Tribunal that it was in S's best interests to remain in the UK and that he and Ms A would remain in the UK if Mr M were deported; this was a 'family splitting' case.

2. The SSHD in her grounds of appeal relies upon her IDIs, Chapter 13 and refers to:

6.4 A foreign criminal sentenced to at least four years imprisonment must be able to show that there are very compelling circumstances over and above the circumstances described in the exceptions to deportation. This is because Parliament has expressly excluded those sentenced to at least four years imprisonment from the exceptions to deportation. Missing out on the exceptions by a small margin, or a series of near misses taken cumulatively, will not in itself be compelling enough to outweigh the public interest in deportation. The best interest of any child in the UK who will be affected by the decision are **a** but not **the** primary consideration and must be not only compelling, but very compelling, to outweigh the public interest.

3. She relies upon *Danso* [2015] EWCA Civ 596 in particular that rehabilitation "cannot …contribute greatly to the existence of the very compelling circumstances required to outweigh the public interest in deportation" [20] *Danso.* In submissions Mr Richards referred to *MAB (para 399; "unduly harsh") USA* [2015] UKUT 435 (IAC) and submitted that the decision of the First-tier Tribunal fell far short of providing adequate reasons for reaching the conclusion that in the particular circumstances of the case, there were very compelling circumstances such that Mr M met paragraph 398 of the Immigration Rules and that this removal would be a disproportionate interference with his Article 8 rights.

4. Mr Pipe submitted that the structure of the First-tier Tribunal decision, when read as a whole and cumulatively clearly identified and gave adequate reasons for the conclusions reached. He referred to the self directions given by the panel – (paragraphs [5]. [12], [13], [14], [15] and [17]) - and drew attention to the different elements of the First-tier Tribunal decision which, he submitted, had been cumulatively assessed:

   - risk of re-offending was very low ([17], [21], [22]);
   - in this particular case rehabilitation is an important factor ([23]);
   - the impact of Mr M's deportation on S would be very significant and damaging; would have a significant detrimental effect on S's well being both in the short and long term ([24]; [32]);
   - Ms A and the child would highly probably not move to Jamaica ([33]);
   - S cannot be expected to move to Jamaica to live with his father there ([33]);
   - S's best interest are a primary consideration; it is highly important for S's welfare that Mr M remains in the UK ([34]);
   - Ms A has a business and her parents in the UK; if Mr M is deported she will have to look after two children and her business ([35]);
   - There is strong public interest in his deportation tempered by the factors in relation to his rehabilitation ([36]).

5. Mr Pipe argued that the references in [35] to factors not amounting to compelling circumstances did not refer to the family circumstances overall but merely to the particular elements set out in that paragraph namely, in essence, the additional difficulties Ms A would have in running her business, providing care for the children and the lack of availability of assistance from Mr M. He argued that [36] should not be seen in isolation from the rest of the determination and the reference to rehabilitation should not be seen as the issue that amounted to 'very compelling circumstances'.

6. In [34] the reference by the First-tier Tribunal to the interest of S being a primary consideration is of course correct. The First-tier Tribunal then held that "it is highly important for S's welfare that his father remains in the UK". This does not equate with 'very compelling circumstances'. There has been no assessment by the First-tier Tribunal of whether the deportation of Mr M from the UK would be unduly harsh on the child, even if it is highly important for Mr M to remain in the UK for the welfare of S. The First-tier Tribunal has simply not applied the correct test to the information before them.

7. Furthermore the First-tier Tribunal has failed to consider the circumstances in accordance with the Rules. There has been no assessment of the circumstances to the extent that they amount to very compelling circumstances *over and above* paragraphs 399 and 399A.

8. I am satisfied that the First-tier Tribunal erred in law in failing to make adequate findings, or at all, in accordance with the Immigration Rules."

Remade decision

16. I made directions on findings that were to be preserved and that both parties were to file skeleton arguments addressing the specific requirements of s55 Borders, Citizenship and Immigration Act 2009 and its relevance and impact as regards paragraph 398 Immigration Rules and s117C(6) Nationality Immigration and Asylum Act 2002; no further documentary evidence and no oral evidence. Mr Pipe filed a skeleton argument as directed; the respondent did not and apologised, citing change of personnel.

17. I preserved the following findings of the First-tier Tribunal (the [ ] are references to the paragraph numbers in the decision of the First-tier Tribunal decision):

On 20th September 2010 Mr M was convicted of:

Conspiracy to commit robbery (9 years imprisonment)
Having a firearm with intent to commit an indictable offence (5 years imprisonment to run concurrent)
Having an imitation firearm with intent to commit indictable offence (30 months imprisonment to run concurrent)
Possessing prohibited weapon (54 months imprisonment to run concurrent)
Possessing a firearm without a certificate 54 months imprisonment to run concurrent)
Possessing ammunition without a certificate (33 months imprisonment to run concurrent)

Mr M's overall sentence included at least four years for four of the offences of which he was convicted. He had been detained since September 2009; in April 2014 Mr M was released from custody on bail and he, his wife (Ms A) and their son S (date of birth 11th September 2002) lived as a family unit since then.

The SSHD accepts that it is not in the best interests of the child or Ms A to live in Jamaica; the child S has been diagnosed with Autism Spectrum Disorder; Ms A runs a successful nursery business; the couple were expecting a second child (which has now been born although it was not argued before the First-tier Tribunal that that child had any rights as an 'unborn child').

The risk of re-offending was very low ([17], [21], [22]); in this particular case rehabilitation is an important factor ([23]); the impact of Mr M's deportation on S would be very significant and damaging; deportation would have a significant detrimental effect on S's well being both in the short and long term ([24]; [32]); Ms A and the child would highly probably not move to Jamaica [33]; S cannot be expected to move to Jamaica to live with his father there ([33]); S's best interest are a primary consideration; it is highly important for S's welfare that Mr M remains in the UK ([34]); Ms A has a business and her parents in the UK; if Mr M is deported she will have to look after two children

and her business([35]); There is strong public interest in his deportation tempered by the factors in relation to his rehabilitation ([36]).

18. Mr Mills submitted, in relation to rehabilitation, that [21] per Lord Justice Moore-Bick in *Velasquez Taylor* [2015] EWCA Civ 845 was relevant:

> "I would certainly not wish to diminish the importance of rehabilitation in itself, but the cases in which it can make a significant contribution to establishing compelling reasons sufficient to outweigh the public interest in deportation are likely to be rare. The fact that rehabilitation has begun but is as yet incomplete has been held in general not to be a relevant factor: see *SE (Zimbabwe) v Secretary of State for the Home Department* [2014] EWCA Civ 256 and *PF (Nigeria) v Secretary of State for the Home Department* [2015] EWCA Civ 596. Moreover, as was recognised in *SU (Bangladesh) v Secretary of State for the Home Department* [2013] EWCA Civ 427, rehabilitation is relevant primarily to the reduction in the risk of re-offending. It is less relevant to the other factors which contribute to the public interest in deportation. In any event the tribunal in this case was clearly aware of the extent to which the appellant had rehabilitated herself. It was for the Tribunal to decide how much weight should be attached to that."

19. Mr Mills further submitted that the report of the social worker Christine Brown did little more than "state the obvious" – the separation of the child S from his father was inevitably going to cause distress and have a significant impact upon him; there was no suggestion that Mr M had not been a good father or that it was not in the child's (now both children's) best interests for Mr M to remain in the UK with them as a family. He referred to the comments on Christine Brown's report in *ZZ (Tanzania)* [2014] EWCA Civ 596. He referred to S's school reports which indicated that he had good computer literacy skills and this would enable him to communicate with his father and that the evidence whilst Mr M had been in prison was that Ms A had been able to look after the child adequately and the evidence was that where Mr M had been absent the necessary additional support from extended family had been available. Ms A was plainly a caring and competent mother and there would be support available from a range of public services including education, social services and health. He submitted that overall the evidence simply failed to establish either that deportation of Mr M would be unduly harsh on the child or that there were very compelling circumstances over and above this. He referred and relied upon *KMO (section 117 - unduly harsh) Nigeria* [2015] UKUT 543 (IAC) and in particular *"... 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."*

20. Mr Mills submitted that in essence the statutory requirement under s55 Borders, Citizenship and Immigration Act 2009 was of similar import to the "best interests of the child" as referred to in established jurisprudence (for example *ZH (Tanzania)* [2011] UKSC 4*, Zoumbas* [2013] UKSC 74); the circumstances and factual matrix of this case did not, even if the test were slightly different given one was a statutory requirement and the other a policy consideration that arose out of that requirement, reach the very compelling circumstances threshold.

21. Mr Pipe acknowledged that there was no real difference between him and Mr Mills as to the high threshold to be met. He submitted that the terms of 'welfare of the child', 'best interests' and the test as set out in s55 were synonymous but that s55 is a statutory duty. The consideration of the best interests of the child is through the lens of the statutory duty and this was underlined by s71 of the 2014 Act. He was anxious not to appear to be submitting that the oldest child was a "trump card" or that the two children together amounted to that although in terms of the factual matrix to be taken into account and assessed he submitted that the arrival of the baby generated additional pressure upon Ms A and added additional difficulties for S whose routine would be significantly disrupted; this was of particular significance because of his age (13) and the combined need he has for stability, closeness to his father, routine and communication. He accepted that the second child had been conceived at a time when Mr M had been aware of possible deportation. He submitted that the welfare of the children was a significant matter and, with the other elements in this case, the public interest in deportation was outweighed.

22. Although S's school report comments very favourably upon S being a confident and competent computer user, Mr Pipe submitted that this was not the same as being able to communicate – the evidence was that S needed physical and face to face contact with his father. He drew attention to the evidence of the psychiatrist Dr Newth who prepared an unchallenged report and referred to the child's need for physical contact for example play wrestling before they have a serious talk and to S's difficulties speaking over the phone. Dr Newth refers to S being at a crucial stage in his development – just starting secondary school and that her experience of working with autistic spectrum children was that puberty and adolescence are particularly difficult for them. She considered there would be a high risk of S suffering from depression if his father were deported; although he was able to cope with previous separations (after problems lasting over many months) he was younger then and the separations were known to be temporary. This time it would be permanent and S would have no hope to sustain him. She drew the analogy of the deportation of Mr M with bereavement, and said that it is known that bereavement in childhood can result in a higher incidence of depression. She added that children on the autistic spectrum have a higher incidence of psychiatric disorders in any event, so that S is at a 'much greater risk of developing problems' if Mr M were deported. Mr Pipe submitted that these factors of the increased possibility of harm to the child elevated the seriousness to a level above other cases involving children. This is particularly so given that the usual methods that could be utilised of attempting to ameliorate that harm (for example facetime, skype, WhatsApp) were a real problem for S.

23. Mr Pipe did not accept that Christine Brown's report was saying substantially what was self evident. He drew attention in particular to her specific assessment of the effects of autism on the child: the contact the child had been able to maintain whilst Mr M was in prison compared to when he was in Jamaica awaiting entry clearance; the 'triad' of impairments due to autism – difficulty with communication, difficulty with social interaction and difficulty with social imagination; that the child was more settled and content; the importance of consistency, routine and familiarity; the immediate effects on S when Mr M went into prison including bed wetting, headaches and profound manifestation of distress; that when he could see his father rather than talk on the telephone he started to settle although this

took some considerable time. Although a large part of the report by Ms Brown is of the generalist nature referred to in *ZZ (Tanzania)* and could be termed as 'self evident' – all children are likely to suffer when separated from a parent who plays a significant part in their life - she has drawn specific attention to the additional problems suffered by S as an autistic child and the role played by Mr M ameliorating these and assisting the child in coping with social structures around him. Mr Pipe submitted these add to the serious impact on the child's best interests and the need for that child to have his father close by.

24. Mr Pipe relied upon Mr M's rehabilitation, not because it was of itself highly relevant but because, he submitted, when combined with the other factors it resulted in the very high threshold being met. The probation officer's report referred to Mr M's risk of re-offending being 'very low indeed' and the report concludes that she has "rarely supervised someone with such a high level of motivation or ability to sustain positive change."

25. Mr Pipe relied upon the publication "Every Child Matters" issued in November 2009 that is the statutory guidance to the UK Border agency on making arrangements to safeguard and promote the welfare of children. This Guidance does not appear to consider specifically the role of the UKBA in consideration of British Citizen children who would be separated from one or other parents in the event of deportation; it is aimed more at non British/non settled children. Nevertheless, the principles in this guidance apply to all children and are matters to be taken into account.

26. Part 1 of the Guidance explains the duty to make arrangements to safeguard and promote the welfare of children. Paragraph 1.4 refers to "preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development')". Paragraph 1.14 identifies a key feature of a system to safeguard and promote the welfare of individual children includes "Ethnic identity, language, religion, faith, gender and disability" and that "communication is according to his or her preferred communication method or language". Paragraph 1.16 refers to work with children and families being "holistic" "building on strengths as well as identifying and addressing difficulties", and in paragraph 1.17 refers to 'identifying both strengths and difficulties within the child, his or her family and the context in which they are living is important, as is considering how these factors have an impact on the child's health and development. Working with a child or family's strengths becomes an important part of a plan to resolve difficulties".

27. Part 2 of the Guidance sets out the role of the UKBA in relation to safeguarding and promoting the welfare of children. It refers (2.6) to the status and importance of the UN Convention on the Rights of the Child in relation to children whilst the UKBA exercises its functions as expressed in domestic legislation and policy. Paragraph 2.7 requires disability to be taken into account.

28. It is plain from the evidence that the child S will suffer very considerably from the departure of his father from the UK. Although there have been two periods of his life when he has been separated previously, these have been managed because of the combination of circumstances at that time (including his age, that he did not have a younger sibling and because his mother was able to give him more

attention; that there were grandparents available and there was some contact possible that was not restricted to telephone contact and the prospect of future 'reconciliation' was a distinct possibility).

29. As explained in *KMO*, it is necessary, where making an assessment as to whether a person meets the requirements of paragraph 399 of the Immigration Rules, to have regard to the seriousness of the offence committed. The more serious the offence, the greater is the public interest in the deportation of the foreign criminal. As already noted above it is not sufficient for this appellant to be able to meet the requirements of paragraph 399; there have to be very compelling circumstances over and above those criteria. It is plain, from the extracts of evidence I have set out above, the extent of the serious effect the deportation of Mr M will have on this child S. It is plain that there will be consequences both short and long term for him and that is likely, in turn to impact not only upon Ms A but also on the new baby. The 'best interests' and the need to safeguard and promote the welfare of this child can be seen to be heightened by the combination of all these factors.

30. The greater the criminality the more difficult it is to establish that the impact on the child of the deportation of his father will be unduly harsh. A foreign criminal with a sentence of imprisonment for 12 months with a genuine and subsisting relationship with a seriously ill child where the foreign criminal's presence is an important element of palliative care and a foreign criminal with a sentence of 20 years for terrorist offences with a genuine and subsisting relationship with a child who will miss him represent two ends of a calibrated scale. Cases are to be determined by reference to the public interest informed by matters such as the nature and extent of criminal offending, the risk of re-offending, the need to deter others from committing crime and the need to protect the public on one side of the balance with the specific needs and welfare of a minor child on the other. The needs of the many (the public interest) might not reach the high level of impact for an individual member of society that the consequences (and impact) would have on an individual child. Another way of putting this is that few members of society will weep if the foreign criminal is removed but the child will weep on his departure. The specific child's interests and welfare will have been the subject of reports and detailed consideration and assessment. But sometimes, where the extent and nature of the criminality is sufficiently serious considered together with the need to deter others, that child's suffering is outweighed by the public interest. That is what deportation does. That is the nature of the proportionality test in play.

31. The circumstances of this family but taken in the context of a foreign criminal who has been sentenced to less than four years may well be sufficient to show that the impact of deportation on the child would be unduly harsh. Such an appellant may have fallen within the Exception. But in this case the nature of the criminality, and the length of sentence reflecting that, is extremely serious – a sentence of 9 years has to be reflected and considered in the assessment of the deportation decision and consideration given to whether there are other very compelling circumstances over and above what is required to demonstrate that Mr M would fall within the statutory exceptions to automatic deportation, if those were available to him which, of course, they are not. It is clearly not possible to 'box up' all the circumstances relied upon and consider them individually. There has to be a holistic assessment not only of the child's circumstances but the circumstances overall. This includes

the effect on Ms A, the likely future effect on the new baby, the effect on the family as a whole, economic and social consequences both long and short term, and also including the evidence of rehabilitation and the very strong positive statements made about Mr M. This has to be set against the very real and emphatic public interest in deportation not only because of the nature of the crime and public revulsion but the length of sentences he received and deterrence. Although it is plainly important that Mr M has been successful in responding to rehabilitative processes and is to be lauded for that, such process would not have been necessary had he not committed such crimes in the first place.

32. It has been made abundantly clear in guidance given by the higher courts that the public interest in deportation encompasses the need for deterrence, the promotion of public confidence in the treatment of foreign criminals and the need to express society's condemnation of those who commit serious offences. In *N (Kenya) v SSHD* [2004] EWCA Civ 1094, Judge LJ (as he then was) 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 …"

33. In *AM v SSHD* [2012] EWCA Civ 1634, Pitchford LJ, having referred to this *dicta* 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."

34. The importance of these considerations was emphasised in *JO (Uganda) v SSHD* [2010] EWCA Civ 10, per Richards LJ at paragraph 29:

> "… the factors in favour of expulsion are, in my view, capable of carrying greater weight in a deportation case than in a case of ordinary removal. The maintenance of effective immigration control is an important matter, but the protection of society against serious crime is even more important and can properly be given corresponding greater weight in the balancing exercise …"

35. 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."

36. As was noted in *Richards v SSHD* [2012] EWCA Civ 244 "the strong public interest in deporting foreign criminals is now not merely the policy of the Secretary of State but the judgment of Parliament", and [9] of *Velasquez Taylor*, noted the emphasis given to this in *SS (Nigeria) v SSHD* [2013] EWCA Civ 256.In *LC China v SSHD* [2014] EWCA Civ 1310 the Court of Appeal said at para 24

> "… The starting point for any such assessment is the recognition that the public interest in deporting foreign criminals is so great that only in exceptional circumstances will it be outweighed by other factors, including the effect of deportation on any children. ... where the person to be deported has been sentenced to a term of 4 years' imprisonment or more, the provisions of paragraph 399 do not apply and accordingly the weight to be attached to the public interest in deportation remains very great despite the factors to which that paragraph refers ..."

37. [17] of *Velasquez Taylor* considers the particular circumstances of an appellant whose sentence exceeded four years:

> "… The factors to which the tribunal attached importance reflected credit on the appellant, but it is difficult to see that they amounted to exceptional circumstances or very compelling reasons of a kind that could properly outweigh the public interest in her deportation. Nor do I think that the risk to her marriage takes the matter much farther. Some indication of the kind of circumstances that will meet the requirement are to be found in paragraphs 399 and 399A of the Rules to which I have referred, but it is to be noted that they do not apply in the case of a person who has been sentenced to a term of imprisonment of four years or more. The appellant's sentence in this case was considerably longer than that and reflected the seriousness of her offence. The public interest in her deportation was correspondingly heightened. …"

38. In so far as the instant case is concerned it can be seen from the above that there are many factors weighing in favour of Mr M. Although he remains on licence and is considered very low risk of re-offending, the fact remains that the crimes committed and the sentences imposed result in a heightened public interest in deportation. It is not sufficient to succeed that he has a strong case that would (or may) lead to success under paragraph 399 or 399A. Factors and circumstances that fall within those Rules or ss117C (4) or (5) of the Nationality, Immigration and Asylum Act 2002 are simply insufficient. Where paragraphs 399 or 399A do not apply (as in the case of foreign criminals sentenced to more than 4 years), there have to be, in the words of paragraph 398 of the Rules "*… very compelling circumstances over and above those described in paragraphs 399 and 399A*" and in the words of the statute "*very compelling circumstances, over and above those described in Exceptions 1 and 2*".

39. The impact on the child S falls within an assessment of whether it is unduly harsh for him to be separated from his father. The fact that the evidence is sufficient to satisfy the *unduly* harsh test to be found in s117C (5) takes the appellant no further at all in the assessment to be carried out under paragraph 398 (a foreign criminal sentenced to more than four years imprisonment). Having said that, if in any particular case the evidence establishing that it would be *unduly* harsh does so to a significantly greater extent, that is relevant to the assessment under paragraph 398 - because the assessment is of circumstances over and above what is required to meet the s117C(5) Exception. Even if that particular threshold is not met it is still potentially open to some appellants to succeed if there are other very compelling circumstances of a different nature.

40. Mr Pipe was careful to try and identify other such matters and I have referred to these above. It cannot be however that any of those factors, whether individually or together, amount to *very compelling circumstances*. The consideration of such circumstances is informed by the seriousness of the offence and the public interest in deportation. The more serious the crime, the more heightened the public interest in deportation and the consequent raised bar for very compelling circumstances. There will be considerable difficulties for Ms A, the new baby, the family as a whole. That Mr M appears to have successfully rehabilitated is laudable but the removal or diminution of a propensity to commit crime cannot amount to a very compelling circumstance such as to outweigh the public interest in deportation which exists because of his criminal activity. The reason the exception is not open to him is because it is not unduly harsh in the context of his criminality and extensive sentence.

41. In conclusion therefore I find that there is nothing that comes close to displacing the public interest arguments. I dismiss the appeal.

Conclusion

42. For the reasons given in the error of law decision the First-tier Tribunal decision was set aside.

43. I substitute a fresh decision dismissing the appeal.

Date 1st December 2015

Upper Tribunal Judge Coker