Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00026/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 November 2015	**On 22 December 2015**

Before

MR JUSTICE PHILLIPS
UPPER TRIBUNAL JUDGE REEDS

Between

G T
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms H. Ephraim-Adejumo of Counsel, instructed by Solomon Shepherd Solicitors
For the Respondent: Mr S. Whitwell, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is national of Angola. The Tribunal makes an anonymity direction pursuant to Rule 14 of the Upper Tribunal (Procedure Rules) 2008 (as amended) in view of the fact that the circumstances of the appeal involve minor children Unless the Upper Tribunal or a court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This prohibition applies to, amongst others, all parties and their representatives.

2. By a decision promulgated on 14 August 2015 the First-tier Tribunal (Judge Herlihy) dismissed the appellant's appeal against the decision of the Secretary of State dated 12 March 2015 to refuse to revoke a Deportation Order (made in 2009) and to refuse the appellant's human rights claims. The appellant now appeals that decision with permission of the First-tier Tribunal.

3. The appellant first came to the United Kingdom in about 1996 using a false identity and claiming to be Portuguese. She committed numerous offences of dishonesty and was convicted in both her own name and her falsely-adopted name. In 2004 she received a sentence of 15 months' imprisonment. In 2009 she was arrested trying to leave the country on a false French passport, following which she was convicted by the Crown Court of possession of a false or improperly obtained identity document and sentenced to 18 months' imprisonment. She was served with a Deportation Order and deported to Angola on 20 July 2009. Her two sons (now aged 16 and 13) remained in the United Kingdom and have been in the care of their father (who is estranged from the appellant) ever since. They became British Citizens in October 2013.

4. In breach of the Deportation Order the appellant returned to the United Kingdom on a date unknown, being apprehended on 13 April 2010. In 2012 she married a British Citizen, although she and her husband do not live together. On 24 April 2013 the appellant gave birth to a daughter, a British Citizen. Whilst the parties are separated and her daughter lives with the appellant, her natural father continues to visit and support the child (see [67] of the determination of the First-tier Tribunal).

5. The First-tier Tribunal set out the applicable legal framework at paragraphs [57]-[62] of its determination. Rule 390 of the Immigration Rules provides that an application for revocation of a deportation order will be considered in the light of all the circumstances including (i) the grounds on which the order was made; (ii) any representations made in support of the revocation; (iii) the interests of the community, including the maintenance of an effective immigration control; and (iv) the interests of the applicant, including any compassionate circumstances. Rule 390A sets out that, where rule 398 applies, the Secretary of State will consider whether 399 or 399A applies and that, if not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

6. The exception relied upon by the appellant is under rule 399(a), namely, that she is in a genuine and subsisting relationship with a child under 18 years of age, who is in the UK and is a British Citizen and that:

   (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;

7. The judge's central finding, for present purposes, was that, although the appellant has a genuine and subsisting relationship with her three children who are British citizens and reside here, it was not unduly harsh for the two older children to remain here without the appellant and it was not unduly harsh for the youngest child (now 2 years old) to live in the country to which the appellant was to be deported. The appellant's case therefore did not fall within rule 399(a) of the Immigration Rules.

8. The appellant was granted permission to appeal on the grounds that the judge had (a) failed properly to address and decide the "unduly harsh" issues arising under paragraph 399(a) in that she failed properly to consider the effect on the appellant's children of going to live in Angola or of remaining in the UK without the appellant and (b) erred in taking into account the scale of the appellant's criminality in considering whether her deportation would be unduly harsh on her older children, such an approach being inconsistent with the decision in *MAB (paragraph 399, "unduly harsh") USA [2015] 435 (IAC)*.

9. At the hearing of the appeal Ms Ephraim-Adejumo, Counsel for the appellant, did not expand on either of those grounds of appeal, but deployed a further argument, to which we will return. As for the grounds on which permission was granted we have reached the following conclusions:

   a. The contention that the judge did not consider the effect on the appellant's older children is not sustainable on a fair or proper reading of paragraph [66] of the judge's reasons. The judge starts by setting out the appellant's contention that it would be unduly harsh for her older children to live with her in Angola or if she returned alone to be separated from them. There is then a detailed consideration of the appellant's relationship with those children, including the fact that she has not lived with them for 6 years, that she could communicate with them by modern means, that they could meet in Portugal and that there is no evidence that the appellant has played a significant role in their upbringing. Although referring to the steps the appellant could take to avoid undue hardship, it is in our view clear that the judge was considering whether there would be undue hardship for the children. We find no error of law in the judge's approach in this regard.

   b. The Tribunal in *MAB* did indeed decide that the evaluation of whether the effect of deportation would be unduly harsh on children was to be considered independently of the public interest in deporting the foreign criminal, and therefore was unaffected by the degree of criminality in question. However, in *KMO (section 117 – unduly harsh) Nigeria* [2015] UKUT 00543 (IAC) Upper Tribunal Judge Southern reached the opposite conclusion, having considered the reasoning of the panel in MAB in reaching his own conclusion. Miss Ephraim-Adejumo did not address us on which of the two decisions we should follow. Having considered both decisions, we prefer the reasoning set out in KMO. In a detailed and carefully reasoned decision, Judge Southern pointed out that s117A (2) of the 2002 Act provides that, in considering whether an interference with a person's right to respect of private and family life is justified under Article 8(2) ECHR, the tribunal must in all cases concerning the deportation of a foreign criminal have regard to the considerations listed in s117C. Those considerations expressly include, by virtue of s117C (2), that the more serious the offence committed by a foreign criminal, the greater is the public interest in the deportation of the criminal. Judge Southern therefore concluded that 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. We entirely agree with that analysis and find that there was no error of law in the judge's approach in this case. The Judge was fully entitled to take into account, as she did (see [66] and [71]), the scale of the appellant's criminality, that almost the entirely of her time in the UK has been spent here illegally, that she has used numerous false identities and has perpetrated serious fraud, she had failed to repay the sums ordered by the court following her conviction for fraud despite having owned a property which was sold and generated a profit of £20,000. Therefore in those

circumstances and against that background, it was open to the judge to reach the conclusion that it was in the public interest to maintain the deportation order.

10. We should add that, even if (contrary to our finding above) there was an error of law in the judge's reasoning, we consider that it would not have been material. On the findings of fact made by the First-tier Tribunal judge, as the appellant does not live with her older children and can take her two year-old child with her and raise her in Angola, we can see no basis on which it could be said that the deportation of the appellant would cause undue hardship to the children. The Rules contemplate separation as being a possible outcome of deportation proceedings (or the continuation of the deportation order) and thus it is not sufficient to say that it is "harsh" to separate the parties involved. Furthermore, it is not sufficient for the Appellant to point to the fact that the Appellant has a genuine and subsisting relationship with a child under 18 who is a British citizen because, overlaying those features of the case, is the requirement for separation to be "unduly harsh". Whilst it might be said that the children may find separation from their mother to be harsh, the evidence before the First-tier Tribunal did not establish that it would be "unduly harsh" for them to remain in the UK if there mother was removed from the UK when balanced against the strong public interest considerations identified by the judge. Thus the evidence before the judge did not establish the existence of unduly harsh consequences for the children involved.

11. Ms Ephraim-Adejumo's additional argument was that the judge, in reaching her decision, failed to take into account properly or at all the respondent's duty to safeguard and promote the welfare of children as set out in section 55 of the Borders, Citizenship and Immigration Act 2009. However, that provision was expressly considered by the respondent in her decision letter. The judge, in turn, expressly considered at the outset, before considering countervailing considerations, what was in the best interest of each of the children (see paragraphs 64 and 67 of her reasons). We are therefore satisfied that the judge had the welfare of the children fully in mind as required by section 55 and that she made no error of law in that regard. It was unnecessary for the judge to refer expressly to section 55 provided that she had proper regard to the duty it imposes: see *AJ (India)* [2011] EWCA Civ 1191.

12. We therefore find no error of law in the decision of the First-tier Tribunal and that the decision should stand.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall stand; the appeal is dismissed.

Signed

Mr Justice Phillips

8/12/2015

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

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