**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00590/2014

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision and Reasons Promulgated** |
|---|---|
| **On 12 January 2016** | **On 20 January 2016** |

**Before**

**UPPER TRIBUNAL JUDGE SMITH**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR JAVAD CHAUDHURI**
(NO ANONYMITY DIRECTION MADE)

Respondent

**Representation:**
For the Appellant: Mr Melvin, Senior Home Office Presenting Officer
For the Respondent: Ms King, Counsel

**Anonymity**
*Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008*
No anonymity order was made by the First-tier Tribunal. I find that no particular issues arise on the facts of this case that give rise to the need for a direction. For this reason no anonymity direction is made. I have however referred to the Respondent's children by initials to protect their identity.

**DECISION AND REASONS**

**Background**

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-Tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Secretary of State appeals against a decision of First-Tier

Tribunal Judge Beach promulgated on 17 April 2015 ("the Decision") allowing the Appellant's appeal against the Secretary of State's decision dated 31 March 2014 that section 32 UK Borders Act 2007 applies and making a deportation order against him dated 27 March 2014.

2. The Appellant who is a national of Bangladesh arrived in the UK with his mother, father and siblings originally in 1974 aged eight years. The Appellant says that he arrived as a dependent on his father's investor visa. The Judge in the Decision says that he came as a visitor. Whatever the position at the outset, he was granted indefinite leave to remain on 15 November 1983. Between 1985 and 2007, the Appellant received ten convictions for twenty-six offences. Those offences ranged from driving under the influence of alcohol and without insurance to offences of violence including attempting to wound with intent and threats to kill. On 13 June 2013, the Appellant was convicted of two counts of theft by an employee. Those latest convictions concerned offences of deception namely the theft of deposits for the letting of property by the Appellant in his position as the owner of his own property letting agency. He was sentenced to two concurrent terms of sixteen months. He pleaded guilty to those offences and sought to mitigate by saying that he had intended to repay the money but had not been given time to do so by the victims. It is clear from the sentencing Judge's remarks that he was unimpressed by the Appellant's explanation. The Appellant relies in evidence on a report of a Thinking Skills Programme which the Judge in the Decision said showed that the Appellant had addressed some of the issue of his prior offending but also accepted showed that at times the Appellant provided "textbook answers" to scenarios which cast some doubt on whether he displayed a real insight into that offending.

3. The Appellant is in a relationship with Ms R J, a relationship which he entered into in 1993. They were not at the date of the Respondent's decision married as both the Appellant and Ms J had been married before and their previous marriages had not been dissolved. Since they did not live together, the Respondent took issue with whether that relationship was genuine and subsisting. The Appellant and Ms J married on 16 January 2015 and their relationship was accepted by the Judge as being genuine and subsisting. That finding is not challenged. Ms J's family was originally from Pakistan but settled in Tanzania. She was born in the UK in 1969 and lived for a time in Tanzania but came to the UK in 1976 with her family and settled here. She has a son from her previous marriage who is aged twenty-three and is now at university but continues to live with her. The Appellant does not live with his wife because she looks after her mother and he looks after and lives with his elderly mother. He stays over some nights with his wife and children but the evidence is that he maintains daily contact with his wife and children even when he is not staying at their home.

4. The Appellant's previous marriage produced two children who remained with their mother and are now adults. The Appellant has maintained

contact with them. The Appellant and Ms J have two children from their relationship, FC who is now aged thirteen years and JC who is now aged eight years. They were aged twelve and seven years respectively at the date of the Decision.

5. The Judge allowed the Appellant's appeal on human rights grounds, finding that the effect of deportation of the Appellant would be unduly harsh for his minor children (but not his wife) and that there were very significant obstacles to the Appellant reintegrating in Bangladesh. Accordingly the Appellant succeeded under paragraphs 399(a) and 399A of the Immigration Rules.

6. Permission to appeal was granted by First-Tier Tribunal Judge Frankish in a decision dated 13 May 2015 on the following basis:-

> "Aside from absences through custodial sentences, the appellant is an absentee father of a 7 and a 12 year old. Arguably, the consequences of separation after 26 offences in addition to the present theft from employer offences lacks the balance required by AJ"

7. The matter comes before me to decide whether the Judge made an error of law in the Decision.

**Grounds of appeal and submissions**

8. The Respondent challenges the Decision on three grounds. Ground one submits that the Judge failed to properly apply paragraph 399(a)(ii)(a) of the Immigration Rules when considering whether it would be unduly harsh for the minor children to live in Bangladesh with the Appellant and his wife. Ground two submits that the Judge has failed to properly apply paragraph 399(a)(ii)(b) when considering whether it would be unduly harsh for the minor children to remain in the UK with the Appellant's wife if he were deported to Bangladesh. Ground three submits that the Judge failed to provide adequate reasons for the finding that the Appellant meets the requirements of paragraph 399A of the Immigration Rules when considering whether there would be very significant obstacles to the Appellant's reintegration in Bangladesh.

9. The Respondent relies in her written grounds on the cases of Secretary of State v AJ (Angola) [2014] EWCA Civ 1636 in relation to grounds one and two. At the hearing, Mr Melvin referred additionally to the cases of Secretary of State v KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 00543 (IAC), Secretary of State v MAB (paragraph 399; "unduly harsh") USA [2015] UKUT 00435 (IAC) and Secretary of State v AB (para 399(a)) Algeria [2015] UKUT 657 (IAC). Mr Melvin naturally relied on KMO in relation to the conflicting decisions of that and MAB but for reasons I explain when I come to my decision below, I do not need to resolve that conflict in this case. Mr Melvin submitted that the Judge failed to explain her reasons for the findings in relation to why the effect of the Appellant's deportation would be unduly harsh on the children and why there were very significant obstacles to the Appellant's reintegration in Bangladesh.

10. Mr Melvin argued that the Judge had failed to have proper regard to the public interest. There was what he described as a "throwaway paragraph" considering section 117 Nationality, Immigration and Asylum Act 2002 ("section 117") at [52] of the Decision but the Judge had, he said, completely failed to have regard to the wider public interest as regards for example the deterrent effect of deportation. He pointed out that the children in KMO were similarly British citizens and the sentence in that case was similar to the index offence here. In that case, the Judge noted the considerable public interest in deportation. He accepted the tragic consequences of deportation but pointed out as Sedley LJ said in Lee [2011] EWCA Civ 348 that this was the natural consequence of deportation. Mr Melvin accepted that much of the Appellant's offending occurred when he was younger but some offences were committed when he was no longer a youth. A proper consideration of the public interest reveals he said that the findings made by the Judge in the Decision were not open to her.

11. Mr Melvin also pointed to the Judge's recitation of the headnote in Ogundimo (Article 8 – new rules) [2013] UKUT 00060 at [36]. He submitted that, since that was a case considering the Rules as they existed prior to 28 July 2014, this amounted to a mis-direction. He referred in that regard to what was said in AB.

12. Mr Melvin submitted that it was clear from the Decision that, although the Judge set out the correct version of the Rules, she failed to make adequate findings in relation to whether the effect of deportation would be unduly harsh or that there were very significant obstacles to the Appellant's reintegration in Bangladesh. He submitted in relation to the former that, as KMO and MAB both make clear the threshold for what would be unduly harsh is a very high one involving consequences which would be "severe" or "bleak". There is nothing which discloses such consequences in this case. Indeed, the Appellant does not live with his wife and children on a permanent basis. He noted that the Judge found at [48] that it would be in the best interests of the children for them to remain in the UK with both parents but that should not be the end of the consideration. He submitted that the Judge appeared to have substituted a reasonableness test for the unduly harsh test which applies. In relation to paragraph 399A, there are no very significant obstacles to the Appellant's return and the Judge was wrong to decide that there are. The Appellant does not require the support of family as he is an adult. He has no health issues.

13. Ms King relied on the Appellant's Rule 24 statement. She accepted that [10] of that statement where it was said that the Judge found that "the children's health, welfare and development would be seriously impaired if the Appellant were to be deported" overstates the Judge's findings. However, she submitted that the Judge properly directed herself and her findings were open to her. She submitted that the grounds were no more than a disagreement with the conclusions which the Judge reached.

14. She argued that Mr Melvin's submissions in relation to consideration of the public interest were an impermissible attempt to expand on the Respondent's grounds. I pointed out that consideration of the public interest, if KMO is rightly decided, would form part of my analysis whether the Judge properly considered if deportation would have an unduly harsh effect on the children. Ms King very fairly submitted that KMO was rightly decided as she considered the analysis in that case to be correct. She submitted however that the Judge did properly consider the public interest throughout the Decision. She referred me to the references to case law at [34] to [39] particularly the reference to McLarty at [34]. She submitted that the Judge properly considered the facts and circumstances of the Appellant's offending at [42] and [43] of the Decision. The analysis of the future risk posed by the Appellant was properly considered at [43] which paragraph also referred to the Appellant's pattern of previous offending. The Judge made findings in relation to that offending history at [48]. Ms King fairly accepted that the Judge did not explicitly refer herself to the deterrent impact of deportation but she did consider the wider impact of the Appellant's offending. Although the balancing of the public interest by reference to section 117 comes at the end of the Decision, she submitted it was clear that the Judge considered this properly.

15. In relation to the factors taken into account in the consideration of whether the effect of deportation was unduly harsh, Ms King referred me to the section of the Decision dealing with the evidence. She fairly accepted in response to a question from me that the Judge did not refer to what she considered to be the threshold for what would be unduly harsh but she said that this was not necessary. Even if this amounted to an error of law, it was not a material one. The factors to which the Judge gave weight are those set out at [50] of the Decision but those factors had to be read with the account of the evidence which the Judge received. As I note above, Ms King accepted that KMO was correctly decided but submitted that the Judge in fact took the Appellant's offending into account at [48] before reaching her conclusions under paragraph 399(a) at [50].

16. In relation to whether there are very significant obstacles to the Appellant's reintegration in Bangladesh, she submitted that, although the Respondent took issue with the Judge's findings in relation to the Appellant's employment history, there was ample evidence of his social and cultural integration in the UK, particularly in light of the age the Appellant was when he first came to the UK. Particularly given his young age at that time, there was no error by the Judge in her findings that the Appellant lacks any identification with Bangladesh. He has no family ties there. Although he may receive support from family in the UK, that would be financial and would not be sufficient to overcome the very significant obstacles. I pointed out to Ms King that at [51] where the Judge considers the Appellant's reintegration in Bangladesh, the Judge refers only to "significant obstacles". Ms King submitted that there was no error – this is a matter of legal semantics. The Judge set

out the relevant Rules at [28] to [31] of the Decision and was clearly aware of the appropriate test.

17. In relation to the Respondent's reliance on AJ (Angola) Ms King pointed to the fact that both cases referred to in that judgment were cases where the criminal sentences exceeded four years and therefore the Court of Appeal was there considering whether there were exceptional circumstances over and above those in paragraphs 399 and 399A. As such, she submitted that the case had no bearing on the present appeal. In relation to the Judge's reference to Ogundimu she submitted that it was clear that the Judge had regard to the right Rules and there was nothing to suggest that the Judge erred by considering the wrong set of Rules or had misdirected herself by reference to that case.

## Decision and Reasons

Very Significant Obstacles to reintegration

18. I start by considering the Judge's decision in relation to the Appellant's case under paragraph 399A. Obviously, if the Judge has not erred in law in relation to whether the Appellant can himself return to Bangladesh, there is no need for me to go on to consider whether his deportation would be unduly harsh for his children.

19. The evidence and submissions before the Judge are set out at [9] to [26] of the Decision. The reasoning of the Judge in relation to the Appellant's case under paragraph 399A is at [51] of the Decision which I set out in full below:-

> "I have also considered whether the Appellant fulfils the requirements of Paragraph 399A of the Immigration Rules. The Appellant arrived in the UK when he was 8 years old. He has spent little time in Bangladesh since then and states that he no longer speaks Bengali. The Appellant said that he had no family in Bangladesh. It is very difficult to verify this one way or the other but the Appellant does have a number of family members in the UK including his mother. The Appellant has lived in the UK for over 38 years. He has gained skills in the UK which would assist him in Bangladesh. I find it hard to believe that the Appellant speaks no Bengali at all given that he was 8 when he arrived and this would have been his first language and it seems likely that his mother would have continued using this language to some extent even if only in the home. I find therefore that it is likely that the Appellant speaks some Bengali even though I accept that he is likely to feel more comfortable speaking English and this is likely to be his first language now given that his partner does not speak Bengali and his children are unlikely to speak Bengali either. The Appellant has very few ties to Bangladesh. He has numerous family members in the UK who provided witness statements and attended the hearing. He clearly has a good support network in the UK and they may be able to provide some support to him if he is deported to Bangladesh but this would be likely to be mainly financial and will not assist in the inevitable cultural reintegration that the Appellant would have to undergo if he were deported to Bangladesh. The Appellant has spent many years in the UK and it is inevitable that he

> would consider himself to be British now rather than Bangladeshi. This mind set will cause some problems to the Appellant in itself but it is the Appellant's lack of identification with Bangladesh which will cause problems if he is deported. The Appellant has lived lawfully in the UK for well in excess of 20 years and I find that he is socially and culturally integrated into UK life. I further find that there will be significant obstacles in the Appellant reintegrating into life in Bangladesh given his lack of family and the length of time he has spent outside Bangladesh"

20. The Appellant meets paragraph 399A so far as his length of residence in the UK is concerned. He has lived here for most of his life. That though is but one factor to be considered when assessing whether the Appellant can be deported. I accept also in this case that the Appellant is socially and culturally integrated in the UK due to his length of residence, family ties, friendships and employment in the UK. The crux of this case however is whether the Judge erred in finding that there were very significant obstacles to the Appellant's reintegration in Bangladesh.

21. The Judge sets out the correct version of the relevant Rule at [31]. Although the Judge has referred at [36] to the headnote of Ogundimo which includes the "no ties" test and there are some comments in [51] which might suggest that the Judge had that "old" test in mind, overall I am satisfied that the Judge did have the new Rule in mind. However, I am satisfied that in applying that test, the Judge has lost sight of the level of interference which is required for the Appellant to satisfy the test under paragraph 399A. The Judge refers at [51] only to "significant" and not "very significant" obstacles. If it were clear from the context of that finding that there were indeed very significant obstacles, then I would accept Ms King's submission that this is merely an exercise in legal semantics. However, in this case there is no reflection of the level of that test in the surrounding findings. The Judge accepts that the Appellant can speak the language of his native country, albeit he may no longer view this as his first language. It is clear that since he is socially and culturally integrated in the UK he will identify himself as British and not Bangladeshi. The Judge says that the Appellant will have "problems" because of his lack of identification with Bangladesh but "problems" do not equate with "very significant obstacles". The Judge expressly finds that the Appellant has skills which he could put to use in Bangladesh. Although all his family are in the UK and he says he has no family in Bangladesh (although it is not entirely clear that the Judge accepted that) that could not without more amount to very significant obstacles for a man approaching fifty years old. He has been resident in the UK for a significant period but that is already reflected in paragraph 399A(a). I note also that the Appellant has returned to Bangladesh albeit some ten years ago for a visit (see [11]) which finding does not find its way into the Judge's consideration.

22. It is of course a matter for the Judge to assess on the evidence whether there are very significant obstacles and it is only where there has been some misdirection or inadequacy of reasoning that I should

interfere with her finding that there are. However, in this case, I am quite unable to ascertain from [51] of the Decision what the Judge identifies as very significant obstacles or whether she did indeed consider that those obstacles had to be very significant and not merely significant.

Unduly harsh effect of deportation

23. I turn then to the Judge's reasoning in relation to whether the effect of deportation on the Appellant's children would be unduly harsh (the Judge accepted at [44] and [45] that the effect would not be unduly harsh on the Appellant's wife). In relation to whether the effect would be unduly harsh if the children were to return to Bangladesh with him, the Judge deals with that at [49] as follows:-

> "The Appellant's younger children are 7 and 12 years old. Whilst it would be easier for the Appellant's 7 year old to adapt to life in Bangladesh there would still be significant difficulties given that the Appellant has not lived there since he was 8 years old and the Appellant's partner has no connection with Bangladesh. It is likely that they would struggle in establishing themselves in Bangladesh and this would have an inevitable adverse impact on the 7 year old. This would also be the case for the 12 year old but there would be added issues with regard to the fact that he has now been in the UK education for 7 years and has established his own life in the UK including forming friendships and networks outside the family. It was not suggested that either child spoke Bengali and whilst they could learn this language it would take some time and would have an adverse impact on their education in Bangladesh. They would also be leaving all their relationships in the UK and would lose the benefits given to them by British nationality including free education and free healthcare. I find that it would be unduly harsh for the Appellant's younger children to relocate to Bangladesh to live with the Appellant if he were deported from the UK."

24. In relation to whether it would be unduly harsh for the Appellant's children to remain in the UK without him, that is dealt with at [50] as follows:-

> "I therefore consider whether it would be unduly harsh for the children to remain in the UK without the Appellant. They have a strong relationship with their mother who provides for them emotionally and financially. However they also have a strong relationship with the Appellant who has always been a constant figure in their lives and who has continued to have contact with them during his time in prison. The Appellant's 12 year old is particularly aware of all the circumstances and recognises that he may lose his father in terms of having a normal everyday parental relationship with him. The Appellant's partner's evidence was that the 12 year old had been particularly affected and had withdrawn into himself. It is likely that this would be exacerbated if the Appellant were deported from the UK. The Appellant's 12 year old is at a particularly pivotal time in his life when he is becoming a teenager and is in need of parental guidance from both parents. A relationship with his father will be of particular importance to a male child at this stage in his life where that relationship is a good relationship and there is no evidence before me to suggest that it is not a good relationship. I find that it would be unduly

harsh for the Appellant's children to remain in the UK without the Appellant."

25. I asked Ms King in the course of her submissions to direct me to where the Judge had considered what the threshold of "unduly harsh" entails. She accepted that the Judge has not set this out. I accept of course that the decisions in MAB and KMO post-date the Decision. However, if the test is not expressed in terms, it ought to be clear on what factors the Judge has based her conclusions that the effect on the children would be unduly harsh.

26. Assuming for the moment that MAB is rightly decided and the issue is therefore one of threshold, I accept that there is (just) sufficient reasoning to make out the conclusion at [49] that it would be unduly harsh to expect the Appellant's children to accompany him to Bangladesh if he is deported. The fact that the Appellant's wife is not from Bangladesh and that the Appellant left Bangladesh at an early age would lead to significant difficulties in the children establishing themselves in a country they have never visited. They do not speak the language. Their education would be disrupted. The twelve year old in particular is at a crucial point in his education. Those factors are taken into account by the Judge. She was entitled to do so. If the question is one of threshold and not proportionality, the Judge's reasoning is adequate and there would be no error of law.

27. In relation to whether it would be unduly harsh for the children to remain in the UK with the Appellant's wife were he to be deported though, I am satisfied that the Judge's conclusion is in error. As noted in MAB, if the issue is one of threshold alone the consequences must be "inordinately" or "excessively" "severe" or "bleak". Whilst I do not downplay the impact of the Appellant's deportation on the minor children, particularly the twelve year old who was affected by his father's imprisonment, I am quite unable to discern on what factors the Judge based her conclusion. The fact that the children may lose daily contact with their father (who does not presently live with them permanently and does not see them every day), that the twelve year old in particular will lose the opportunity to do things with his father and that a "good" or even "strong" relationship between the Appellant and his children will be disrupted cannot on any view be described as inordinately or excessively severe or bleak in terms of the consequences for the Appellant or his children. The evidence as to the impact on the twelve year old child who was affected by his father's imprisonment is that he became withdrawn. That evidence is based on the Appellant's partner's evidence and a short letter from the child. There is no independent evidence relied on from, for example, the child's teachers or a social worker; nor is there any evidence that his health was affected. I am quite unable to accept the assertion made in the Appellant's Rule 24 statement that the Judge found that the children's health, welfare and development would be seriously impaired (and as I have already noted, Ms King did not invite me to do so).

28. Although I have based my decision on MAB, I agree with both representatives that KMO is the more persuasive authority. If the test in that case is applied, the error made by the Judge is even starker and her conclusions in relation to whether it would be unduly harsh for the children to return to Bangladesh with the Appellant are also then legally unsustainable. Although section 117 is set out at [32] and [33] and the Judge says that she has regard to those considerations at [52], her reasoning there is superficial. She starts by giving the Appellant credit for the fact that he speaks English and is financially independent (via support from his family). That is itself legally unsustainable following AM (S117B) Malawi [2015] UKUT 0260 (IAC) although such error might not be material if there were not other errors. Although she goes on to say that she recognises the strong public interest in deporting foreign criminals, she does not consider the deterrent effect of deportation. I accept Ms King's submission that the Judge has considered within [43] the risk posed by the Appellant but I pause there to note that the Judge takes into account that the Appellant committed most of his offences when he was young whereas at least one further offence was in 2007 when he was in his thirties. The Judge also notes at [48] that the Appellant's wife has been a steadying influence on his life whereas it is the case that his relationship with her appears to have begun in 1993 prior to the end of his main period of offending in 1995 and certainly before the further offences in 2007 and 2013. There is no reasoned consideration at [52] of the Appellant's pattern of offending.

29. For the above reasons, I am satisfied that the Judge made an error of law in her findings both in relation to paragraph 399(a) and paragraph 399A due to her failure to provide adequate reasons for the Decision.

30. Mr Melvin submitted that, if I were to find an error of law, I could go on to re-make the Decision, if necessary following a resumed hearing. Ms King submitted that if I were to find an error of law, I should remit the appeal to the First-Tier Tribunal Judge for a re-hearing, particularly since the appeal involved young children and the appeal hearing was ten months ago which is a long period in a young child's development. Ms King indicated that the Appellant would probably wish to adduce further evidence, in particular in relation to the position of the children.

31. The Appellant succeeded before the First-Tier Tribunal. It is clear from my above reasoning that further factual findings will be required in order to consider the applicability of paragraphs 399(a) and 399A. There are young children impacted by the outcome of this appeal. The hearing of the appeal was about ten months ago during which time the children and their relationship with their father may well have developed and circumstances may have changed. I therefore consider that, in accordance with paragraph 7.2(b) of the Practice Statement and the overriding objective, it is appropriate to remit the appeal to the First-Tier Tribunal for re-hearing before a different Judge.

**DECISION**

**The First-tier Tribunal decision did involve the making of an error on a point of law.**

**I set aside the Decision. I remit the appeal to the First-Tier Tribunal for re-hearing with the direction that it be heard by another Judge of the First-Tier Tribunal.**

Signed  Date 18 January 2016

Upper Tribunal Judge Smith