Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00630/2014

THE IMMIGRATION ACTS

Heard at Stoke	**Decision & Reasons Promulgated**
On 4th May 2016	**On 12th July 2016**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms C. Johnstone, Senior Presenting Officer
For the Respondent: No appearance or representation

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the decision of the First-tier Tribunal panel (hereinafter referred to as "the panel") promulgated on 17th July 2014 in which the Tribunal allowed the appeal of M against the decision of the Secretary of State to refuse to revoke a deportation order against him.

2. Although the Secretary of State is the Appellant before the Tribunal, I will for ease of reference refer to her as the Respondent as she was the Respondent in the First-tier Tribunal. Similarly I will refer to M as the Appellant as he was the Appellant before the First-tier Tribunal.

3. There is no dispute that the Tribunal should make an anonymity direction pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) as the case involves the interests of children. Unless the Upper Tribunal or a court orders otherwise, no report or any proceedings or any form of publication therefore shall directly or indirectly identify the Appellant or the minor children. This prohibition applies to, amongst others, all parties and their representatives.

Background:

4. The Appellant is a citizen of the DRC. The Appellant's history is not in any dispute. The Appellant initially arrived in the UK on 28th October 1991 with his ex-spouse and son using a false Belgium passport and claimed asylum on arrival. In 1996 a further child was born to his present partner. His asylum application was refused on 30th August 1996 and he later made a further claim which was again refused on 26th November 1997. There were fresh representations made on his behalf which led to a grant of exceptional leave to remain (ELR) on 27th July 1998 which was valid until 27th July 2003. Another daughter was born in February 2003. On 27th July 2003 he was granted indefinite leave to remain. However, his application for naturalisation was refused in or about November 2006 for reason of his failure to respond to further enquiries.

5. On 22nd August 2008 a deportation order was made against the Appellant under Section 5(1) of the Immigration Act 1971 following his conviction for conspiracy to defraud for which he was on 8th September 2006, sentenced to a period of imprisonment of three years and six months. His appeal against the notice of intention to deport was dismissed on 19th June 2008 and he became appeals rights exhausted on 27th June 2008.

6. The papers refer to attempts to remove the Appellant which proved unsuccessful and further representations against removal raising Article 3 issues were made on his behalf. His appeal against the decision of 21st May 2009 was dismissed in a determination promulgated on 17th December 2009.

7. The decision of the First-tier Tribunal panel on 17th December 2009 related to a decision to refuse to revoke a deportation order dated 23rd August 2008. The basis of his appeal was on the ground that his removal to the DRC would be a breach of the UK's obligations under the Refugee Convention. He also appealed on Article 8 grounds. The panel reached the conclusion that he was not part of a political party [paragraph 27] and that even if he had attended meetings whilst in the United Kingdom, the panel did not find that those activities would lead to his persecution or ill-treatment in his country of nationality. As to the appeal on Article 8 grounds, the panel set out brief findings at paragraphs [33]-[40] and made reference to the previous Tribunal decision but found there was no "obstacle" to the Appellant's

partner and children returning to the DRC, as they were not British citizens and that it would be reasonable for his spouse and the children to return to live in the DRC with the Appellant.

8. There was a further unsuccessful application for review to the High Court and the Appellant became appeals rights exhausted on 13th July 2010.

9. In September 2012 his youngest child was born and further representations were made in support of the revocation of the deportation order made on 5th November 2012 and on 19th December 2013. In the later representations, reliance was placed on the High Court decision of **P (DRC) R (On the application of) v SSHD [2013] EWCH 3879 (Admin)** in relation to the risk on return relating to criminal deportees.

10. The reasons given for that decision are set out in a letter of the Respondent dated 26th March 2014 and are summarised in the decision of the panel at paragraphs [2]-[10].

11. The Appellant appealed against that decision to the First-tier Tribunal.

The Decision of the First-tier Tribunal:

12. The first appeal came before the First-tier Tribunal panel on 26th June 2014. In a decision promulgated on 17th July 2014 the panel allowed the appeal on human rights grounds (Article 3 and Article 8).

13. In reaching their decision the panel had regard to a large amount of material having made reference to the bundle filed on behalf of the Secretary of State at paragraph [12] and at [13] by reference to the Appellant's bundle comprising of some 483 pages which included a number of expert reports from the Probation Trust, the Foreign National Support Team, a Psychiatric Report and also a report of independent social worker. The panel also had the advantage of hearing the Appellant give evidence along with his partner and two of his children (both under 18 years).

14. The panel's findings were set out at paragraphs [17]-[62]. At paragraph [18] the panel set out the basis of the Appellant's claim by reference to his lengthy residence in the United Kingdom since 1991, the circumstances in which he had built up a substantial family and private life with his partner and his three British children. The Appellant's reliance on probation reports which disclosed that he was at a low risk of re-offending or of serious harm to others and that he had led a law-abiding life for the previous eight years, enjoying family life with his partner and children. The Appellant relied upon his relationship with his partner and his children and that removal to the DRC would not only separate the family but would have a serious detrimental effect upon the children (relying on the Independent Social Worker Report) and also by relying on his psychiatric evidence regarding his own mental health which would deteriorate if family support was removed from him. He relied on his remorse whilst accepting that he had committed what was a serious criminal offence.

15. The panel began their assessment by considering the appeal by reference to Article 3 and in particular the judgment of Phillips J in **P (DRC)** (as cited earlier). The panel considered the evidence provided on behalf of the Secretary of State in rebuttal of that decision [28] but reached the conclusion at [29] that information had already been considered by the High Court in reaching its conclusions and that they found there was "no good reason" to take a different view of the reports already considered by Mr Justice Phillips. As to the evidence that was not considered by the court in **P (DRC)** the panel found at [30] that the evidence came from a senior member of the state security forces who acted with impunity (by reference to the background material) and thus they found that that report could not be relied upon. They also reached the conclusion that the evidence of the DGM was not impartial. They further found that the assertion that there were no detention facilities at the airport was supported by other background evidence and that the DGM evidence was inconsistent with that considered by the High Court in **P (DRC)**. They contrasted the material before the High Court in **P (DRC)** which they noted came from "a far wider range of sources" thus they concluded that in such circumstances "little weight" could be attached to the purported assurances provided by the DGM in relation to the circumstances of foreign national offenders who were to be deported.

16. At paragraph [31] they considered the IGC Report found that the information within that document did not take matters any further than that information considered by the High Court. Thus at [32]-[36] they reached the conclusion that a record of his offending would be available to the DRC via a simple internet search and at [33] and that as his criminal history may be ascertained with relative ease, that there was a "real likelihood" that if questioned by the immigration security officials on his return, in the absence of any reliable rebuttal evidence following the decision of the High Court, the panel found that there was a real risk that he would be detained and thus a breach of his Article 3 rights.

17. The panel went on to consider Article 8 and set out its findings and conclusions at paragraphs [37]-[62]. The panel set out the sole issue between the parties under the Immigration Rules in respect of paragraph 399(a)(ii)(b). Furthermore, the panel had regard to Chapter 13: Criminality Guidance in Article 8 ECHR cases, which provided an internal guidance as to the assessment of the criteria laid down under the applicable Rule. The panel set out the relevant extract of that guidance at paragraph [38]. The panel at [39] reached the conclusion that the refusal letter did not explicitly address the factors set out in the guidance when reaching a decision but that the Appellant nonetheless was unable to demonstrate that "there is no other family member who is able to care for the child in the UK". This was based on the fact that the children's mother, who was settled in the UK, had remained a constant figure in their lives since their births and was able and willing to continue with that. That whilst his case fell within paragraph 398(b) he could not satisfy either paragraph 399 or paragraph 399A. The panel however noted the following:-

> "We will return to a consideration of the factors identified in the guidance later in this determination."

That is, because, the panel took into account the reasons why the Appellant could not meet paragraphs 399 or 399A when reaching a decision as to whether or not there should be a revocation of the deportation order.

18. At paragraph [40], the panel reminded themselves that where paragraphs 399 and 399A do not apply, that it would "only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors." They made a reference to the decision of the Court of Appeal in **MF (Nigeria)** at [43] that "exceptional circumstances" means that in order for an argument under Article 8 to succeed there will need to be "very compelling" reasons beyond the broad range of circumstances contemplated by the Rules. The panel then went on to consider whether there were "exceptional circumstances" that demonstrated that the strong public interest in deportation was outweighed.

19. Their findings can be summarised as follows:-

    (i) The Respondent did not dispute the Appellant has a genuine and subsisting relationship with his partner and his three British children each one being under the age of 18. The children were born in the UK and have lived here for their entire lives. Applying the principles of **Devaseelan**, in June 2008 the panel reached their findings on the basis that the Appellant's two children were not British citizens. Furthermore, his partner was not considered a settled person [see paragraphs 20 and 22] of the decision in June 2008. They were significant matters in the panel's conclusion that there were no obstacles to the continuation of family life in the DRC and upon the family choosing to relocate. The panel in 2009, also assessed matters from the standpoint that all the individuals who constitute family life were citizens of the DRC. It is accepted by the Respondent that at the date of the hearing all three children were British citizens and that the Appellant's partner was a settled person with indefinite leave to remain and that it was unreasonable to expect the Appellant and the three children to relocate to the DRC (albeit it would be open to them to elect to do so).

    (ii) When considering the best interests of the children, the panel gave careful consideration to the report of the ISW who also appeared as a witness and whose evidence was unchallenged by the Secretary of State.

    (iii) Looking at the children's best interests, the panel heard direct evidence from two of the three children who the panel found to be credible witnesses [see paragraph 50].

    (iv) The panel found that the Appellant and his longstanding partner with their three children enjoyed a strong and subsisting relationship and that their relationship had been –

> "substantially tested not only on account of enforced separation through the Appellant's 22 month period of imprisonment but also through his various periods of immigration detention."

The panel accepted the Appellant's partner's evidence that despite challenges faced by her and bringing up her two children as a single parent she was intent on keeping the family intact. The panel found that his partner and two daughters visited him in prison every week and also maintained contact by telephone and letters. The visits continued throughout various periods of immigration detention, even when the Appellant was transferred despite severe financial difficulties and put practical limitations on the family.

(v) The panel found that the Appellant's family members have sort of "preserved family life with the Appellant so as to ensure that he remained an integral part of their family unit."

(vi) In relation to the eldest child, the panel found that the Appellant's imprisonment had a "particularly detrimental impact on her". The panel accepted her evidence that she found the consequences of her father's imprisonment particularly challenging and that prior to imprisonment they had enjoyed an especially close relationship [see 51]. The panel took into account the ISW report and its contents reacting to the effect on the children.

(vii) In relation to the second youngest child, the panel found that she encountered the same sense of separation and isolation and that this had had a real impact on the children's personal and emotional development.

(viii) The Appellant was released on licence for a period of three months before being re-detained in 2009 until 2010 and was then detained again from October 2010 until May 2011. The panel accepted the children's evidence that having their father taken into detention was distressing and difficult to comprehend. The panel found that for the past three years having been reunited with their father had been "especially significant" for them. The panel made reference to this period of stability at [52]. They were satisfied that he had resumed the role of being a joint primary carer including for the youngest child [52].

(ix) The panel took into account the stages in which each of the children were in terms of their social and educational development and attached weight to the ISW report for the reasons set out at paragraph [53].

(x) The panel found that it was not in the best interests of the children to be solely cared for by their mother in the circumstances where they had now readjusted to living with both parents. They found the decision would have the effect of separating them from the Appellant for a substantial period of time except the visits which they found would be "infrequent and impractical and long distance forms of communication." The panel went on to find that it would be unreasonable to expect them to continue family life with him in the DRC and that there were insurmountable obstacles to that continuing [see 54].

(xi) The panel also took into account the psychiatric evidence at [55].

(xii) Thus the panel found that this was a "tight knit family unit" and that the support derived from being in a functioning and caring family unit is distinct to the issue of whether he would be able to access treatment and medication to manage a condition in the DRC.

(xiii) The panel considered that the nature of the Appellant's relationship with his three children, and that of his partner and the specific practical emotional dependency upon them for the stability of his mental health and the circumstances of the children were matters that constituted "exceptional circumstances".

(xiv) They took into account the relevant factor that he had not re-offended for nearly eight years taking into account the Probation Officers' reports which found him to be at low risk of re-offending or of serious harm to the public [2009]. They made reference to the absence of any further offences in that period of eight years but attached considerable weight to the wider objective of deportation as a deterrent [see 60].

(xv) The panel took into account the delay at [61].

(xvi) The panel found that the adverse impact on the Appellant's three minor children was a "weighty consideration against deportation". At paragraph [62] for the reasons that they gave they found that the Appellant had demonstrated that there were "exceptional circumstances" albeit the decision was one that they found to be "finally balanced."

The Appeal before the Upper Tribunal:

20. The Secretary of State sought permission to appeal that decision and permission was refused by Upper Tribunal Judge Deans (sitting as Judge of the First-tier Tribunal) but permission was granted on the 12th February 2015 by Upper Tribunal Judge Kekic. Her reasons for granting permission were as follows:

> "The application is made out of time but I consider that a satisfactory explanation has been offered and then time is therefore extended.
>
> Three grounds have been put forward. The first takes issue with the consideration of the letter of 23rd January 2014 relied on by the Respondent which provides information from a meeting between officials from the British High Commission and a senior official in the DRC Migration Service. It is arguable that the panel did not give due weight to that evidence and did not provide adequate reasoning for that approach.
>
> The second ground criticises the panel's assessment of the IGC report. It is arguable that the panel disregarded the evidence of removals to the DRC by other European countries.
>
> The third and final ground takes issue with the proportionality assessment carried out by the panel. It is arguable, as the grounds maintain, that the majority of the assessment focuses on the Appellant's circumstances with very little attention being

> given to the public interest in his deportation. For these reasons the grounds are arguable and permission is granted."

21. Thereafter the appellant's solicitors began judicial review proceedings to challenge the decision of the Upper Tribunal to extend time to the Secretary of State and to grant permission and therefore the proceedings were adjourned to await the outcome of those proceedings. There are no papers in the bundles relating to those JR proceedings but the court record accessed by the Tribunal demonstrate that permission was refused on the papers in April 2015 and on oral application was refused on the 15th October 2015 by Mr Justice Edis.

22. Thus the application was listed before the Upper Tribunal.

23. At the hearing there was no appearance nor representation on behalf of the Appellant. There had been an application for an adjournment on 28th April 2016 which had been refused by an Upper Tribunal Judge. The basis of the application related to the inability of the solicitors to contact the Appellant. The Upper Tribunal Judge considering the application set out that –

> "The Appellant has been served with the notice of the hearing and it is incumbent on him to attend the hearing in person, even if he is not legally represented."

That refusal was sent to the Appellant's solicitors. A further letter was later received stating that they were no longer acting on his behalf and would not be attending.

24. On checking the file, the Appellant was served at his home address on 14th April 2016 with the notice of hearing. Nothing further has been heard from the Appellant and he did not appear before the Tribunal. As set out in the notice, if a party or his representative does not attend the hearing, the Tribunal may determine the appeal in the absence of that party. Therefore having considered the file in accordance with the Procedure Rules, I considered that I should determine the appeal in his absence.

25. Miss Johnstone for the Secretary of State relied upon the written grounds.

26. In her oral submissions, in relation to Ground 1, she submitted that the panel erred in law in finding that the Appellant was at risk of a breach of his Article 3 rights on return to the DRC. She made reference to the evidence relied upon by the Secretary of State, including the letter dated 23rd January 2014 which provided information from a meeting between officials from the British High Commission and a specific, senior official in the DRC Migration Service (DGM). She submitted that the officials asked about detention on return and stated that the enquiries in respect of criminality preceded re-documentation and was limited to identifying those DRC nationals who have been documented and also appear on a list of persons with outstanding DRC arrest warrants. That evidence, she submits was highly relevant to the assessment of the Appellant's risk on return. She further submitted that the reasons given by the panel for placing little weight on the evidence were inadequate, and that it was illogical to suggest that evidence of the type criticised by the panel was unreliable without the name of its source. She submitted the panel had not

called into question the genuineness of his official position or that the British High Commission official had not recorded his answers accurately. Thus she submitted, that evidence superseded the evidence in the decision of the High Court in **P (DRC)** and that the panel's statement that the officials' answers were inconsistent with the FFM Report was inadequately reasoned.

27. She made reference also to the decision of **Lokombe** which considered the question of the bulletin.

28. In respect of Article 8, she submitted that the challenge was that the panel had given inadequate reasoning to support their conclusion that the appeal should be allowed on Article 8 grounds. In particular she submitted that the panel had failed to consider the public interest (see **BL (Jamaica) v SSHD [2016] EWCA Civ 357**) at [49]-[52]. She further submitted that the panel's determination at paragraph [54] had not adequately considered the public interest when considering the proportionality assessment in relation to the children. She submitted that "the exceptional circumstances" that the panel purported to rely upon did not constitute "exceptional circumstances" and that there was nothing exceptional about their situation. She submitted on the facts of the appeal, the Appellant's partner could continue to provide for them and that there was no detrimental effect on them. She submitted that where the Appellant is a foreign offender, separation from family is not an exceptional circumstance. In this case the chronology showed that he had been detained following his imprisonment and that the children had continued to live with their mother during those periods of time.

29. She further submitted, as the written grounds set out, that the panel failed to consider the issue of deterrence and whilst the public interest was set out at paragraphs [43] and [44] no consideration was given to the difficulties that would be encountered by the Appellant's family relating to deportation. She further submitted that the panel did not give sufficient reasons as to why there would be "insurmountable obstacles" for family life taking place outside of the UK and furthermore, the fact that there would be infrequent contact would not make it unjustifiably harsh. She submitted that the panel had not given reasons as to why, in the event of his deportation, there would be infrequent contact or that such contact in the DRC would be impractical. It was up to the family, she submitted as to how they would communicate if the Appellant was deported and it could not be said to be unjustifiably harsh on the circumstances of this particular case. She submitted the panel had erred in law.

30. There had been no submissions made on behalf of the Appellant, either in writing or by way of a Rule 24 response.

31. I reserved my decision.

Discussion:

Article 3:

32. Dealing with the first ground, the Secretary of State seeks to challenge the findings made by the panel relating to Article 3. As set out in their determination, the panel allowed the appeal on Article 3 grounds on the basis of **R (On the application of P) v SSHD [2013] EWHC 3879 (Admin)**. In that decision Phillips J had concluded that criminal deportees would be at risk on return to the DRC as they would be investigated on arrival and it would come to light that such a person would have criminal convictions which would lead to ill-treatment contrary to Article 3 (see paragraphs [44] and [--] of the decision of **P (DRC)**).

33. The judge's assessment of those issues are set out at paragraphs [24]-[36] of the determination. The panel observed at [37] that the Secretary of State had withdrawn an appeal to the Court of Appeal against that decision and further observed that there had been no further country guidance that had been issued.

34. Since the decision in **P (DRC)** the Secretary of State has relied on further evidence set out in a DRC Policy Bulletin dated 1st/2014 (intended to postdate the decision in **P (DRC)** and update the DRC Country Policy Bulletin of 1/2012). The Secretary of State relied upon a letter from the British High Commission dated 23rd January 2014 from the Directore Générale de Migration (DGM) that the authorities in the DRC had no interest in Foreign National Offenders (FNO's) or failed asylum seekers, unless they had criminal matters outstanding in the DRC.

35. The panel at [30] stated that they had placed little or no weight on this letter because its author remained anonymous and it had come from a senior member of the state security forces relating to border control and was therefore not considered to be impartial.

36. The letter made it clear that detention on return preceded re-documentation and thus was limited to those persons who had outstanding DRC arrest warrants, a category that this Appellant would not have fallen into.

37. The question before the Tribunal is whether the panel were entitled to attach limited weight to this evidence. The fact that the author was anonymous does not seem to me to necessarily lessen the weight attached to the report in circumstances where the panel did not consider that its contents were inaccurately recorded or that there was any challenge to its genuineness. Furthermore, the fact that he had not been named was of little relevance bearing in mind that the conversation took place at the Home Office between an official of the FCO and a high-ranking official of the DRC. However, it was open for the panel to consider that the author of the report was someone whose role was involved in the security services and therefore may not be impartial, which is what the panel had stated at [31].

38. Dealing with the IGC report of December 2013, the panel considered that this did not provide further information that was different to that before the High Court in **P (DRC)** (see paragraph [31] of their determination). This was a document which provided replies from eight countries to a number of questions posed to them. Questions 1 to 3 related to the issue of return and whether the countries in question

returned (either voluntarily or by force) rejected asylum seekers to the DRC and if not, why not. Question 3 related to the number of returnees since March 2012 by force or on a voluntary basis. Questions 4 to 6 related to allegations of returnees being subjected to problems on return and if so what problems and whether any of the allegations had then been substantiated. Questions 7 to 8 referred to the overseeing of returnees.

39. Having considered the grounds in the light of the panel's determination, I am satisfied that the Secretary of State has made out her grounds in this respect. At paragraph [31] of the determination only seeks to consider the replies to the questions posed at questions 1 to 3 and places emphasis on the answers relating to the number of returnees. However, the replies to questions 4 to 6 was material evidence to be considered by the panel but as that material demonstrated eight of the responding states had referred to allegations made about returns (except for Belgium) and that after they had been investigated, none of them were found to be either upheld or substantiated. Whilst the panel dismissed the bulletin's contents as the same as the evidence that had before the High Court in **P (DRC)**, that is not borne out by the contents of the replies to those particular questions. Furthermore, there was material evidence in the Fact-Finding Mission of November 2012 which supported that later evidence, namely that there was no evidence of substantiated allegations of ill-treatment on return. The point relied upon by Miss Johnstone, is that those who were returned to the DRC as foreign national offenders would have been likely to notify sources in their home country, including family members as to when they would be arriving and that it is reasonable to assume if there were problems, that there would have been reference to those difficulties to that person's representatives or to any NGOs operating in the country.

40. In the circumstances, I find that the panel's consideration of the evidence in this respect was flawed. In particular, their reliance on the lack of monitoring at the point of return, failed to engage with the evidence that had been provided by the responding states and that there were no allegations of mistreatment at the airport.

41. I am therefore satisfied that the Secretary of State has made out their grounds and thus their assessment of the evidence relating to risk on return contrary to Article 3 was flawed and cannot stand.

42. The Appellant has not complied with the directions and has not provided any further evidence or any Rule 24 response. Since the determination of the panel, the Tribunal has considered further evidence which has resulted in the promulgation of a country guidance determination of **BM and Others (Returnees – criminal and noncriminal) DRC CG [2015] UKUT 00293**. The decision reached the conclusion after considering all the evidence relating to FNOs that a national of the DRC who has acquired the status of an FNO in the United Kingdom is not, simply by virtue of such status, exposed to a real risk of persecution or serious harm or treatment proscribed by Article 3 of the ECHR in the event of an enforced return to the DRC. It further found that such a national who attempted to acquire refugee status but was unsuccessful would not without more, be exposed to a real risk of persecution or serious harm or

proscribed treatment contrary to Article 3 of the ECHR in the event of an enforced return to the DRC.

43. At paragraphs [80]-[81] the Upper Tribunal analysed the country materials. The Appellant has provided no evidence to challenge the decision of **BM** or seek to distinguish the decision relying on any further evidence or by reference to the facts of the appeal. The case before the panel was advanced solely on the basis of him as an FNO thus based on the decision of **BM** and the country material set out in that decision, it cannot be said that the Appellant has demonstrated that he would be at risk of Article 3 mistreatment on return as a Foreign National Offender or as a failed asylum seeker.

44. However, the panel did not only allow the appeal on Article 3 grounds but also allowed the appeal on Article 8. Therefore, any error of law in relation to Article 3 would not be material if the panel's decision relating to Article 8 does not disclose any error of law. I have therefore considered the grounds advanced by the Secretary of State to challenge the Article 8 assessment of the panel.

Article 8:

45. The relevant legislative background at the time of the First-tier Tribunal appeal is set out below.

46. The Appellant appealed the decision of the Secretary of State of the 26th March 2014 to refuse to revoke the deportation order made on the 23rd August 2008. The First-tier Tribunal set out the applicable legal framework at paragraphs [14] and [37] of its determination.

47. 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.

48. 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.

49. From the 9 July 2012 until the 27 July 2014 the relevant Immigration Rules provided as follows:

> "**Deportation and Article 8**
>
> 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 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 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 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, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

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 not be reasonable to expect the child to leave the UK; and

(b) there is no other family member who is able to care for the child in the UK; or

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

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

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

(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or

(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

399B. Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted."

50. This appeal came before the First-tier Tribunal panel on the 26th June 2014 and their decision was promulgated on the 17th July 2014 and therefore the new provisions under the Immigration Act 2014 which came into force on the 28th July 2014, did not apply to this particular appeal (see **YM (Uganda) v Secretary of State [2014] EWVA Civ 1292**).

51. By reason of the Appellant's conviction and sentence of imprisonment of three and a half years he fell within paragraph 398(b) and thus the panel were required to consider whether he satisfied the conditions set out in paragraphs 399 or 399A.

52. The Rules therefore reflect the statutory obligation to deport foreign criminals whilst recognising that there may be cases where the making of a deportation order (or as in this case, the continuation of the deportation order) would be incompatible with Article 8 (as set out in the provisions of Rules 398, 399 and 399A).

53. As set out in **MF (Nigeria) v SSHD [2013] EWCA Civ 1192** at [36]:-

> "What is the position where paragraph 399 or 399A do not apply either because the case falls within paragraph 398(c) or because, although it fell within paragraph 398(b) or (c) none of the conclusions set out in paragraph 399(a) or (b) or 399A(a) or (b) applies? The new Rules provide that in any event it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors."

54. The court observed at [38] that paragraph 398 expressly contemplated a weighing of "other factors" against the public interest in the deportation of foreign criminals. The central question was whether the use of the phrase "exceptional circumstances" meant that the weighing exercise contemplated by the new Rules was to be carried out …… compatibility with the ECHR.

55. The court continued at [40]-[41] as follows:-

> "40. ... Miss Giovannetti submits that the reference to exceptional circumstances serve the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paragraphs 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under Article 8.1 trump the public interest in the deportation.
>
> 41. We accept this submission ...".

56. Lord Dyson MR, delivering the judgment of the court stated at [42]-[46]:

> "42. … In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase "exceptional circumstances" is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals.
>
> 43. The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".
>
> 44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence. We accordingly respectfully do not agree with the UT that the decision-maker is not "mandated or directed" to take all the relevant Article 8 criteria into account (para 38).
>
> 45. Even if we were wrong about that, it would be necessary to apply a proportionality test outside the new rules as was done by the UT. Either way, the result should be the same. In these circumstances, it is a sterile question whether this is required by the new rules or it is a requirement of the general law. What matters is that it is required to be carried out if paras 399 or 399A do not apply.
>
> 46. There has been debate as to whether there is a one stage or two stage test. If the claimant succeeds on an application of the new rules at the first hurdle ie he shows that para 399 or 399A applies, then it can be said that he has succeeded on a one stage test. But if he does not, it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. That is an exercise which is separate from a consideration of whether para 399 or 399A applies. It is the second part of a two stage approach which, for the reasons we have given, is required by the new rules. The UT concluded (para 41) that it is required because the new rules

> do not fully reflect Strasbourg jurisprudence. But either way, it is necessary to carry out a two stage process."

57. There can be no dispute that the effect of the 2007 Act and Section 32(4) makes plain that the deportation of a foreign national is conducive to the public good. This is described as a statement of public policy and enacted by Parliament (see **SS (Nigeria)** at paragraph [53] and **LC (China) [2014] EWCA Civ 1310** at [17].

58. In *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550; [2014] 1 WLR 998, Laws LJ neatly distilled this principle at [53]:-

> "The importance of the moral and political character of the policy shows that the two drivers of the decision-maker's margin of discretion – the policy's nature and its source – operate in tandem. An Act of Parliament is anyway to be specially respected; but all the more so when it declares policy of this kind. In this case, the policy is general and overarching. It is circumscribed only by five carefully drawn exceptions, of which the first is violation of a person's Convention/Refugee Convention rights. (The others concern minors, EU cases, extradition cases and cases involving persons subject to orders under mental health legislation.) Clearly, Parliament in the 2007 Act has attached very great weight to the policy as a well justified imperative for the protection of the public and to reflect the public's proper condemnation of serious wrongdoers. Sedley LJ was with respect right to state that "in the case of a 'foreign criminal' the Act places in the proportionality scales a markedly greater weight than in other cases …".

59. Both of the decisions set out in the Secretary of State's grounds emphasise the great weight to be attached to the public interest in the deportation of foreign criminals (or in this case the maintaining of the deportation order) and the importance of the policy in this regard which effect has been given by Parliament to the UK Borders Act 2007. In the decision of **LC (China) v SSHD [2014] EWCA Civ 1301** Moore-Bick LJ said this (at [17]):

> "Two points of importance emerge from the decisions in **SS (Nigeria)** and **MF (Nigeria)**. First both emphasise the great weight to be attached to the public interest in the deportation of foreign criminals and the importance of the policy in that regard to which effect has been given by Parliament in the UK Borders Act 2007 ... The second is that it is wrong to consider the question of infringement of Article 8 rights outside the terms of the Immigration Rules ...".

60. This approach was further considered by Sales LJ in the **SSHD v AJ (Angola) [2014] EWCA Civ 1636**, at [39]-[40]:

> "39. The fact that the new Rules are intended to operate as a comprehensive code is significant, but if it means that an official or a Tribunal should seek to take account of any Convention rights of an Appellant through the lens of the new Rules themselves, rather than looking to apply Convention rights for themselves in a freestanding way outside the new Rules. This speech for the new Rules makes the decision-making framework in relation to foreign criminals different from that in relation to other parts of the Immigration Rules, where the Secretary of State retains a general discretion outside the Rules in exercise of which, in

some circumstances, decisions may need to be made in order to accommodate claims for leave to remain on the basis of Convention rights ...

40. The requirement of assessment through the lens of the Rules also seeks to ensure that decisions are made in a way that is properly informed by the considerable weight to be given to the public interest in deportation of foreign criminals, as declared by Parliament in the 2007 Act and reinforced by the Secretary of State ... so as to promote public confidence in that system in this sensitive area."

61. The Court of Appeal in the decision of the **Secretary of State for the Home Department v LW (Jamaica) [2016] EWCA Civ 369** at [14] summarised succinctly the law as follows:-

(i) the new Rules provide a comprehensive code:

(ii) the context is the great weight to be attached to the public interest in the deportation of foreign criminals:

(iii) that public interest and related questions of public confidence reflect (1) protection of the public from re-offending; (2) deterrence; (3) public revulsion:

(iv) the considerations in a deportation case are thus very different from those applicable to the cases of immigration control:

(v) a proportionality test, taking all the relevant Article 8 criteria into account and weighed in the scales against the public interest in deportation, is to be conducted – but through the lens of the new Rules, rather than as a freestanding exercise:

(vi) and the case for a person sentenced for at least four years' imprisonment, paragraph 398(a) applies and neither paragraph 399 nor 399A is applicable; accordingly, it will only be in 'exceptional circumstances' that the public interest in deportation will be outweighed by other factors:

(vii) 'exceptional' here means something 'very compelling' rather than something 'unusual'; hat something is 'unusual' is, no doubt, a necessary but not sufficient condition for the determination that 'exceptional circumstances' apply.

(viii) 'the application of the new Rules in an individual case is necessarily fact specific."

62. The Secretary of State's written grounds and adopted by Miss Johnstone in her oral submissions, as set out at paragraphs 20 to 27, make reference to the above Court of Appeal decisions and in particular that of **MM** and **MF (Nigeria)** quoting paragraphs [14]-[16], and paragraphs [42]-[44]. It further makes reference to SS (Nigeria). The thrust of the written grounds and the oral submissions were to the effect that the panel misdirected themselves in law by failing to consider the public interest in deporting the Appellant when assessing proportionality outside the Immigration Rules and paragraphs [43]-[44] of the determination were insufficient as the vast majority of the determination comprised of an exhaustive assessment of the Appellant's circumstances and the effects of deportation on his family and that there was no consideration of deterrence.

63. A careful consideration of the determination demonstrates that the criticisms made by the Secretary of State are not made out. The panel had proper regard to the conviction upon which the original deportation proceedings were based and which had resulted in the term of imprisonment of three and a half years. As the panel set out at [42] there was no doubt that this was a serious offence and one in which his deportation was necessary to safeguard one of society's fundamental interests, namely the prevention of crime and disorder. At [43] the panel went on to state:-

> "43. Notwithstanding that the offence was committed in 2006 we take into account the strength of the Respondent's view that the public interest lies in the deportation of foreign national criminals. We find that heavy weight must be attached to the public interest in deporting foreign criminals who do not satisfy the circumstances laid down in paragraph 399 or 399A. In this case albeit that the offence was non-violent in nature the public interest in deporting a foreign national who has been convicted of conspiracy to defraud is considerable ...".

The panel then went on to set out and take into account the particular circumstances of this offence and went on to state:-

> "... there is no doubt that the offence was one which also had real consequences on the economic wellbeing of the country."

> 44. We find that the fact that the Appellant has failed to meet the requirements of the new Rules is of significance to consideration in the overall assessment of proportionality. It is well established through Strasbourg jurisprudence that states are entitled to decide that there is generally a compelling public interest in deporting foreign criminals."

64. The panel at [45] then identified a number of factors which they found "weighed heavily" in favour of his deportation including that a significant proportion of his family and private life was formed in the knowledge that his immigration status was precarious, that he had lived in the UK with valid leave for a period of approximately nine years out of his 23 years and that the youngest child was born during the period in which the Appellant and his partner were well aware that enforcement action would be taken. Thus the panel concluded that:-

> "The combination of the Appellant's conviction for a serious criminal offence, the duration of the sentence imposed and his lengthy irregular immigration status contributed to the strength of his private and family life in the UK are each individually, and cumulatively matters which we find weigh heavily in favour of his deportation."

65. Furthermore, contrary to the grounds at [29] the panel when considering the issue of the public interest plainly did consider the issue of deterrence as set out at paragraph [60] of the determination where the panel, whilst finding that the Appellant had not re-offended for nearly eight years and had been assessed as a low risk of re-offending, observed:-

> "However we are also mindful that in considering his lack of propensity to re-offend we are required to attach considerable weight, which we do, to the wider objective of deportation as a deterrent, its expression of societal abhorrence in the criminality in question and as a system of control that maintains public confidence. We have taken these considerations into the balance in reaching our overall assessment."

66. Thus the panel clearly expressed that they had taken account of the essential elements of the public interest of deterrence and revulsion. Therefore, contrary to the grounds I am satisfied that the panel properly identified and took into account the strong public interest and approached their decision on the basis that the scales were weighted in favour of deportation unless there were circumstances which were sufficiently compelling (and therefore exceptional) to outweigh that public interest in deportation (see **MF (Nigeria)** at [46]) and that there must be "something very compelling" to outweigh the public interest (see Richards LJ in **MA (Somalia) v SSHD [2015] EWCA Civ 48** at [17]).

67. Furthermore the panel did properly direct themselves in accordance with the correct legal framework. Having found at [39] that the Appellant could not meet paragraph 339 or 399A, they applied **MF (Nigeria)** at paragraphs [39] and [40] of the panel's determination.

68. Whilst the grounds at paragraph [29] assert that there was no consideration of the mitigation of the difficulties which would be encountered by the Appellant's family on his deportation such as arranging visits by the family to his country of nationality, the panel expressly dealt with this at paragraph [54]. The panel made reference to the acceptance on behalf of the Respondent that all three children were British citizens and that their mother (the Appellant's partner) was settled and that it would be unreasonable for them to relocate (see [48]). At [54] the panel considered the effects of separation. The panel, having already found on the evidence that it was not in the best interests of the children to revert to being solely cared for by their mother in circumstances where they had readjusted after periods of separation. This was based on the unchallenged evidence of the ISW and the direct evidence of the children concerned (see [49], [50], [51]-[53] of the determination). Thus the panel did consider the issue and were entitled to reach the conclusion on the evidence before them that such contact would be infrequent and impractical given the circumstances of the country in question and the prohibitive cost involved. I find no merit in that ground either.

69. It is further submitted on behalf of the Secretary of State that the panel found that the Appellant's relationship with his family and the support that they gave him amounted to an "exceptional circumstance". Miss Johnstone submits that there was nothing exceptional in his mental health difficulties and that whilst they might be unusual they were not exceptional and thus the panel wrongly placed weight and reliance upon this as an "exceptional circumstance".

70. However, the panel's findings need to be read in their entirety. The panel were not solely relying on the Appellant's mental health and the support the family provided

to him. It is true that the panel did consider at [55] the psychiatric evidence and the reference to that set out in the ISW report. However, whilst they found that he had encountered serious difficulties during periods of detention, the panel properly found that that did not reach the threshold to constitute a breach of Article 3 and whilst they accepted the evidence of the effects of deportation on the Appellant at [56] at [57] onwards, the panel made it plain that this was not the only factor which they considered to be exceptional or compelling which they had identified during the course of their consideration of the issues. Therefore I find no merit in the ground submitted by Miss Johnstone.

71. The written grounds did not seek to raise any other grounds of challenge. However Miss Johnstone sought to extend the above ground by submitting that the panel had not identified any compelling circumstances capable of outweighing the strong public interest in the maintenance of the deportation order. She submitted that the fact that the deportation of the Appellant would separate him from his children was insufficient to constitute a "compelling circumstance" and relied on the decision of **AD (Lee) [2001] EWCA Civ 348**. However the circumstances of that particular case are wholly different from those facts of the present appeal. In that case, the Appellant's immigration history included the Appellant having overstayed, left the country and then returned unlawfully, absconded and was removed and re-entered. He was sentenced to a term of seven years' imprisonment for drugs offences. Thus the circumstances of the public interest were different to that of this particular Appellant. It seems to me that the question that the panel had to ask itself was whether there were very compelling circumstances such as to outweigh the strong public interest in deportation. Having approached this question through the lens of the Immigration Rules ensuring that full weight was given to the deportation of foreign criminals.

72. On the facts of this case, the panel, whilst finding that he did not meet paragraph 399 or 399A, sought to consider and rely on matters relevant to those paragraphs, including the length of residence, his family ties in the UK, his relationship with the children and the effect upon the children of the deportation order being maintained and the children being solely cared for by their mother. The panel identified at [39] that whilst paragraph 399 or 399A did not apply, that they "will return to a consideration of the fact identified in the guidance later in this determination". The panel were referring to the guidance set out at [38] which had set out internal guidance as to the assessment of the criteria laid down under the applicable Rules. The panel had set out the relevant factors under the guidance at paragraph [38].

73. The panel did not have the advantage of the case law where it has been subsequently decided that it is permissible to rely upon matters relevant to Paragraphs 399 or 399A when considering whether the Appellant had demonstrated "exceptional circumstances or very compelling circumstances" (see **SSHD v JZ (Zambia) [2016] EWCA Civ 116).**

74. In reaching their decision I am satisfied that the panel did not seek to elevate the best interests of the children and properly took into account that they were a primary

consideration and could be outweighed. As set out in **SS (Nigeria)** the interests of children are a substantive consideration but will have to be stronger the more pressing the nature of the public interest in the parents' removal (or in this case, the maintaining of the decision for removal via deportation). The panel clearly set out what they had considered to be the best interests of the children and were entitled to place weight on the unchallenged evidence of the ISW and the direct evidence of the children themselves and gave sustainable reasons for reaching the decision why their interests were strong enough to displace the public interest in his deportation being maintained.

75. The grounds refer to the decision made as "irrational". However I am satisfied, having read the determination as a whole and in the context of the particular facts and evidence that was before the panel, that it was open to them to reach the conclusion that they did, that they had adequately reasoned their decision and it is a sustainable decision.

76. The panel were entitled to place weight on the Appellant's relationship with his partner and his children, that the children were all British citizens. As I have set out earlier, there was a substantial body of evidence before the panel, including direct evidence from the children and the ISW Report both of which was unchallenged. This was a relationship that the panel found to have been "substantially tested" not only by the enforced separation as a result of his imprisonment but also through periods of immigration detention (see paragraph [51]). It was therefore open to the panel to find that whilst there was someone to look after the children in the Appellant's absence (and thus could not meet paragraph 399(a)) there was evidence before the panel that demonstrates that the separation that had occurred had a real and tangible impact on each of the children's personal and emotional development (see paragraph [51] and [52]) and that the needs of the children were such that their emotional and practical security was of great importance [53]. The panel took into account also the Appellant's length of residence since 1991, that he last offended in 2006, was at a low risk of reoffending and had in essence turned his life around.

77. Consequently I have reached the conclusion that the decision of the panel was one that was open to them. As set out in **MA (Somalia) v SSHD [2010] UKSC 49**, Sir John Dyson SCJ (as he then was) stated at [45]:-

> "… the court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the … (Tribunal's) … assessment of the facts. Moreover where a relevant point is not expressly mentioned by the Tribunal, the court should be slow to infer that it has not been taken into account".

78. The panel found this to be a "finely balanced" case and on the particular facts of this case it was open to them to reach the conclusion that the maintenance of the deportation order was not proportionate.

79. I therefore reach the conclusion that it was open to the panel to conclude that exceptional circumstances existed which outweighed the public interest in maintaining the deportation order.

Notice of Decision:

The decision of the First-tier Tribunal does not disclose a material error of law and the decision relating to Article 8 stands.

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 him or any member of his 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

Signed Date:12th July 2016

Upper Tribunal Judge Reeds