Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/01775/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
on 8 January 2016	**On 6 July 2016**

Before

UPPER TRIBUNAL JUDGE HANSON
UPPER TRIBUNAL JUDGE WIKELEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

OAO
[ANONYMITY DIRECTION MADE]

Respondent

Representation:

For the Appellant: Mr P Duffy Senior Home Office Presenting Officer
For the Respondent: Ms E Greenwood of Counsel instructed by G Singh Solicitors

DECISION AND REASONS

Introduction

1. In this appeal the Secretary of State appeals against the decision of the First-tier Tribunal (Judge Beach) promulgated on 18 February 2015. The First-tier Tribunal had allowed the appeal by Mr OAO (hereafter simply "OAO") against the Secretary of State's decision taken on 28 August 2014 to deport him from the United Kingdom (UK).

2. In summary OAO, who is a citizen of Nigeria, had been convicted of several offences of benefit fraud and had been sentenced to two years' imprisonment in December 2010. OAO is currently the sole carer of his son J, a British citizen now

aged 15. The First-tier Tribunal allowed OAO's appeal against the deportation decision having found that he satisfied the requirements of Paragraph 399 of the Immigration Rules ("the Rules"). In particular, the First-tier Tribunal concluded "it would be unduly harsh for the child to remain in the UK without the person who is to be deported" within limb (b) of Paragraph 399(a)(ii).

3. We held a hearing on 6 November 2015 at which we ruled that the First-tier Tribunal's decision had involved an error of law. We concluded that the First-tier Tribunal had failed to apply the correct legal test under Paragraph 399 and had also failed to provide adequate reasons for its decision. We made further directions for a resumed hearing which took place before the Upper Tribunal on 8 January 2016.

4. Having set aside the decision of the First-tier Tribunal, we substitute a fresh decision, namely to dismiss OAO's appeal against the deportation order.

5. This appeal also raises an important point of construction relating to the meaning of the expression "unduly harsh" in Paragraph 399 of the Rules (in effect from 28 July 2014, *Statement of Changes in Immigration Rules*, HC 395 as amended by HC 532). In addressing this question of interpretation we consider the difference of approach as between the Upper Tribunal's decisions in *MAB (para 399; "unduly harsh" USA* [2015] UKUT 00435 (IAC) and *KMO (section 117 – unduly harsh) Nigeria* [2015] UKUT 00543 (IAC).

6. The legal issue raised by those decisions, in short, is whether the assessment under Paragraph 399 as to the impact of OAO's deportation on the child is to be informed by the seriousness of the offence committed by the foreign criminal facing deportation, or whether the assessment is focussed solely on the impact on the innocent family member (here J), without regard to the gravity of the offence giving rise to the deportation order.

7. The decision was made in principle shortly after the hearing. The delay in this matter has been occasioned by the knowledge that the Court of Appeal were to hear appeals against the two conflicting Upper Tribunal decisions in *MAB* and *KMO.* That has now occurred and judgment handed down with neutral citation MM (Uganda) and anr v Secretary of State for the Home Department [2016] EWCA Civ 450.

The background facts

8. OAO was born in Nigeria in 1964. He came to the UK in August 1986. He has what the First-tier Tribunal rightly described as "an appalling immigration history" (at [54]) – it is said he was initially given 6 months leave to enter as a visitor, although there is no proof of this. He has subsequently remained in the UK without leave and, as the First-tier Tribunal found, "has made very little effort to regularise his status in the UK until deportation proceedings were commenced" (at [54]).

9. OAO married a British national in 1989 and they have five children – an older son (D) and three daughters, all now aged in their 20s, and a younger son (J), who is 15. All five children are UK citizens. The couple separated in 2009, the children remaining with their father, and divorced in 2013.

10. On 15 December 2010 OAO was convicted at Basildon Crown Court of six counts of making dishonest representations to obtain benefit and two counts of producing/furnishing false documents/information. He was sentenced to two years' imprisonment for each offence to run concurrently. HH Judge Lodge, in his terse but pointed sentencing remarks, described OAO as "a man who is dishonest to the core". The Judge noted that OAO had embarked "on a course of conduct involving creating a wholly fictitious claim for benefit to profit for yourself, and you maintained that over a number of years. Nothing other than a substantial custodial sentence is appropriate." The Judge continued "I take the view this is an offence which is fraudulent from the outset, professionally planned, and continued over a period of time, involving multiple frauds", including using the identities of other people.

11. OAO was actually in prison for 7 months until late July 2011, when he was released early for good behaviour, with the remainder of the term being served on licence. During his period of imprisonment OAO's older son D (then 21) cared for J (then aged 10) with help from the other siblings and OAO's friends.

12. On 16 June 2014 OAO was convicted at Isleworth Crown Court of possession/control of identity documents with intent and was sentenced to a community order and a curfew requirement for 4 months with electronic tagging.

13. The relevant chronology in this appeal, taking it forward to the Upper Tribunal final hearing, can thus be summarised as follows:

Date	Events
10 October 1964	Claimant's date of birth
August 1986	Claimant arrives in UK from Lagos and is (apparently) granted 6 months leave to enter as a visitor
August 1989	Claimant marries R, a UK national
November 1989	Claimant's son D born (now 26)
June 1991	Claimant's daughter Da born (now 25)
June 1993	Claimant's daughter R born (now 23)
September 1994	Claimant's daughter E born (now 21)
May 2000	Claimant's son J born (now 16)
2009	Claimant and his wife separate
15 December 2010	Claimant sentenced to 2 years' imprisonment for benefit fraud
29 July 2011	Claimant released from prison
January 2013	Claimant and wife divorced

21 October 2013	Claimant served with deportation order (later withdrawn)
16 June 2014	Claimant sentenced to community order for further offence
30 August 2014	Claimant served with deportation order
13 January 2015	First-tier Tribunal hears and allows deportation appeal
16 March 2015	First-tier Tribunal refuses Secretary of State's application for permission to appeal
11 June 2015	Upper Tribunal Judge Storey grants Secretary of State's renewed application for permission to appeal
6 November 2015	Upper Tribunal error of law hearing
8 January 2016	Upper Tribunal resumed hearing

OAO's Appeal to the First-tier Tribunal

14. As noted at [2] above, following the hearing on 13 January 2015 OAO's appeal before the First-tier Tribunal was successful. The First-tier Tribunal Judge's conclusion was summarised in the following terms:

> "62. This is a very finely balanced case given the circumstances of the Appellant and the somewhat narrow issue before me. However, I find that the effect on J of being deprived of a proper parental relationship with his father just outweighs the public interest in deporting the Appellant from the UK. I therefore find that it would be unduly harsh for J to remain in the UK without the Appellant."

The Secretary of State's Appeal to the Upper Tribunal

15. On 16 March 2015 Judge Pooler of the First-tier Tribunal refused the Secretary of State's application for permission to appeal, ruling that Judge Beach's decision was one that was open to her on the evidence and there was no material misdirection of law.

16. On 11 June 2015 Judge Storey granted the Secretary of State's renewed application, concluding that it was arguable the First-tier Tribunal had applied the wrong legal test and that its assessment of Article 8 both within and outside the Rules was contrary to established case law principles.

17. As noted at [3] above, on 6 November 2015 we found the First-tier Tribunal's decision to involve an error of law. Thus the appeal came before us in the Upper Tribunal at a renewed hearing on 8 January 2016.

Summary of the parties' submissions

18. Mr Duffy, on behalf of the Secretary of State, points out that OAO falls squarely within the terms of section 32(5) of the UK Borders Act 2007 ("the 2007 Act") as someone against whom the Secretary of State *must* make a deportation order. The question therefore, he submits, is whether if J had to live with one or other of his siblings (or his mother) that would be unduly harsh on J, when weighed

against that very strong public interest in deportation. Mr Duffy further invited us to follow the reasoning in *KMO* over that in *MAB*, not least as the former is consistent with the relevant guidance in the *Immigration directorate instructions* (IDI). Mr Duffy further submitted that while J would obviously prefer to stay with his father, and the adult siblings would obviously prefer not to have the burden of caring for a 15 year old, that did not make the situation harsh, let alone unduly so, given the wider context. Mr Duffy further argued that if we were unwilling to make a finding of fact that one of the siblings would care for J, J's mother still has parental responsibility for him although she lives apart from OAO and J. If the siblings did not assist, she would have to step in and resume care of J, which could not be "unduly harsh" on him. Finally, Mr Duffy submitted there were no "very compelling circumstances" over and beyond Paragraphs 399 or 399A such that deportation should not be ordered.

19. Ms Greenwood, on behalf of OAO, maintained the central and original ground of appeal, namely that deportation would not be in accordance with Paragraph 399 of the Rules and that it would be a breach of OAO's rights under Article 8 ECHR. Her detailed skeleton argument and oral submissions set out the relevant facts and legal provisions. As regards the point of construction at stake, Ms Greenwood asked us to follow the reasoning in *MAB* in preference to that in *KMO*, as official guidance cannot as a matter of law dictate the meaning of ordinary words. Her primary argument as to the facts was that the impact of OAO's deportation on J would necessarily involve undue hardship for J, given the strength of the father-son bond and J's present needs. She further argued that the evidence showed that if OAO were deported, J would not be cared for by any of his siblings or his mother. In support of OAO's case, Ms Greenwood called OAO himself to give evidence as well as Mr A, Da's partner; both had also made witness statements. We refer to their evidence further below. If these arguments did not find favour, Ms Greenwood contended that there were very compelling circumstances (namely the interference with the private life of J, E and OAO) which outweighed the public interest in deportation in this case. She therefore asked us to reach the same decision as the First-tier Tribunal, namely to allow OAO's appeal against the Secretary of State's deportation order.

The legal framework

20. The 2007 Act makes provision for the automatic deportation of any individual who is a "foreign criminal", i.e. someone who is not a British citizen, is convicted in the UK of an offence and (in the terms of 'Condition 1') is sentenced to a period of imprisonment of at least 12 months (see section 32(1)). OAO in this case plainly fits that definition. Furthermore, section 32(5) mandates that "the Secretary of State must make a deportation order in respect of a foreign criminal". This statutory requirement is subject to certain exceptions as set out in section 33. The only such provision which may be in play in the present case is 'Exception 1', which applies "where removal of the foreign criminal in pursuance of the deportation order would breach (a) a person's Convention rights" (section 33(2)(a)). Those rights, as protected by the Human Rights Act 1998, obviously include the right to respect for an individual's "private and

family life" under Art. 8. It is axiomatic that interference with that right may be justified if it is in accordance with the law, for a legitimate aim and is proportionate (see Art. 8(2)).

21. Paragraphs 396-400 of the Rules, as first inserted with effect from 9 July 2012 and as amended with effect from 28 July 2014, set out the weight to be given to the public interest in deportation where an Art. 8 claim is made. Paragraph 396 is the starting point, and reinforces section 32(5) of the 2007 Act:

> "Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with Section 32 of the UK Borders Act 2007."

22. Paragraph 397 in turn reinforces the exception in section 33(2), stipulating that "a deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention". Paragraph A398 then defines the scope of application of the rules governing deportation and Art. 8.

23. Paragraph 398 provides as follows:

> "Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

24. There is no suggestion in this case that Paragraph 399A applies, as that requires that the individual in question has been "lawfully resident in the UK for most of his life", which is plainly not the case for OAO.

25. Accordingly the question for us is whether Paragraph 399 applies and, if not, whether there are "very compelling circumstances" over and above those matters such that the public interest in deportation is outweighed.

26. Paragraph 399(b) applies where the person liable to deportation has a genuine and subsisting relationship with a partner who is a British citizen or settled in the UK. It accordingly is not relevant on the present facts. Paragraph 399(a) applies where children are concerned:

> "399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported".

27. We interpose that it is not in dispute that OAO has a "genuine and subsisting parental relationship" with J and also that J is a British citizen, so Paragraph 399(a)(i) is satisfied. There is, in addition, no suggestion that J either would or should relocate to Nigeria. The primary question for us, therefore, is whether "it would be unduly harsh for the child to remain in the UK without the person who is to be deported" within the terms of limb (b) of Paragraph 399(a)(i).

28. There is one remaining important aspect of the legal framework we must mention. Section 19 of the Immigration Act 2014, entitled "Article 8 of the ECHR: public interest considerations", inserted a new Part 5A (comprising new sections 117A-117D) into the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act". The scope of the new provisions is defined by section 117A:

> **"117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

29. In accordance with section 117A(2)(a), section 117B thus sets out a number of generally applicable public interest considerations which potentially apply in all cases. We do not set it out here in full as it was not suggested that the outcome of the present appeal turned to any material extent on those provisions.

30. In accordance with section 117A(2)(b), section 117C provides as follows:

"117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

31. The definition of the term "foreign criminal" is to be found in section 117D(2) and for present purposes is the same as that to be found in section 32(1) of the 2007 Act. It therefore encompasses OAO. As J is aged under 18, is a British citizen and has lived in the UK for a continuous period of seven years or more (indeed, for all his life), he in turn is a "qualifying child" within section 117D(1) for the purpose of 'Exception 2' in section 117C(5).

32. We have to give effect to both the new statutory regime set out in Part 5A and to the provisions of the Rules as amended, given that we are re-making the decision of the First-tier Tribunal (*YM v Secretary of State for the Home Department* [2014] EWCA Civ 1292). The main focus of the submissions to us centred around the Rules, and especially Paragraph 399, so for convenience we start there.

Discussion: "unduly harsh" and Paragraph 399 of the Rules

33. We have identified the principal point of construction at issue at [5] and [6] above as being the proper approach to the "unduly harsh" test in Paragraph 399(a) (although the context is different, there is no suggestion that as a matter of principle the expression means anything different when used in Paragraph 399(b)). As noted above, Ms Greenwood urged that we follow *MAB* whereas Mr Duffy invited us to follow *KMO*.

34. The headnote to the decision in *MAB* by the Upper Tribunal (Upper Tribunal Judge Grubb and Deputy Upper Tribunal Judge Phillips) reads as follows:

> *1. The phrase "unduly harsh" in para 399 of the Rules (and s.117C(5) of the 2002 Act) does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned.*
>
> *2. Whether the consequences of deportation will be "unduly harsh" for an individual involves more than "uncomfortable, inconvenient, undesirable,*

unwelcome or merely difficult and challenging" consequences and imposes a considerably more elevated or higher threshold.

3. The consequences for an individual will be "harsh" if they are "severe" or "bleak" and they will be "unduly" so if they are 'inordinately' or 'excessively' harsh taking into account of all the circumstances of the individual.

*(*MK (section 55 - Tribunal options) Sierra Leone *[2015] UKUT 223 (IAC) at [46] and* BM and others (returnees - criminal and non-criminal) DRC CG *[2015] UKUT 293 (IAC) at [109] applied.)*

35. However, the headnote to the decision in *KMO* by Upper Tribunal Judge Southern reads as follows:

> *The Immigration Rules, when applied in the context of the deportation of a foreign criminal, are a complete code. Where an assessment is required to be made as to whether a person meets the requirements of para 399 of the Immigration Rules, as that comprises an assessment of that person's claim under article 8 of the ECHR, it is necessary to have regard, in making that assessment, to the matters to which the Tribunal must have regard as a consequence of the provisions of s117C. In particular, those include that the more serious the offence committed, the greater is the public interest in deportation of a foreign criminal. Therefore, the word "unduly" in the phrase "unduly harsh" requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh.*

36. For convenience in our decision – although these terms were not suggested by the advocates – we label *MAB* as the "subjective" or "child-focussed" approach and *KMO* as the "objective" or "polycentric" approach.

37. Before considering the differences between those two approaches, it is important to note that there is a degree of common ground between the two previous authorities, as Upper Tribunal Judge Southern recognised in *KMO* at para 26:

> "Although … I respectfully depart from the approach advocated by the Tribunal in *MAB* I do adopt the other guidance offered by that decision:
>
> > '2. Whether the consequences of deportation will be "unduly harsh" for an individual involves more than "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging" consequences and imposes a considerably more elevated or higher threshold.
> >
> > 3. The consequences for an individual will be "harsh" if they are "severe" or "bleak" and they will be "unduly" so if they are "inordinately" or "excessively" harsh taking into account all of the circumstances of the individual.'

> Although I would add, of course, that 'all of the circumstances' includes the criminal history of the person facing deportation."

38. For the avoidance of doubt, and putting to one side for the moment the question of the precise scope of the circumstances to be taken into account, we also agree with the summary in paras 2 and 3 of the headnote to *MAB*, as approved in *KMO*, which reflects the plain meaning of the language used in both the primary legislation and the Rules.

39. At this stage, however, we should also make it clear that we do not follow *KMO* in preference to *MAB* simply on the basis that the former's approach is consistent with the Secretary of State's published guidance in the IDI, as Mr Duffy sought to persuade us. To that extent we agree with Ms Greenwood's submission that the Home Office guidance cannot be determinative in matters of interpretation (see also *MAB* at paras 67-70 and *KMO* at para 25).

40. We now turn to consider the divergence between the approaches adopted in *MAB* and *KMO* respectively. But, before doing so, we should refer to the decision of the Chamber President (McCloskey J and Upper Tribunal Judge Perkins) in *MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 00223 (IAC), an authority relied on in both *MAB* and *KMO* (albeit to different ends).

41. *MK* was not actually a case in which Paragraph 399 featured prominently at all. The appellant, who had been sentenced to five years' imprisonment in 2002 for robbery and other offences, had 'turned his life round' on release from custody, only to be served with a deportation order in 2013. Given the length of his sentence, he fell within the terms of Paragraph 398(a) and so could not directly invoke Paragraph 399. It followed his appeal could only succeed if there were "very compelling circumstances over and above those described in paragraphs 399 and 399A". On appeal to the Upper Tribunal, the two central issues were (i) the nature and import of the two-fold statutory duties in section 55 of the Borders, Citizenship and Immigration; and (ii) the powers of Tribunals, and the relevant considerations to be taken into account, in deciding whether or not to remit such cases for reconsideration and fresh decision. This much is evident from the headnote to the Upper Tribunal's decision, which makes no reference to Paragraph 399 or indeed to the "unduly harsh" test. However, in proceeding to redetermine the original appeal, the President made observations on the application of the "unduly harsh" test to the children in question on the facts of that case (see at paras 42(v) and 47).

42. Both *MAB* and *KMO* were cases in which Paragraphs 398(b) and 399(a) were directly in point. In *MAB* the appellant had been sentenced to three years' imprisonment for sexual offences involving children under the age of 13 and was served with a deportation order. The First-tier Tribunal accepted that it would be "unduly harsh" within Paragraph 399(a) of the Rules for the appellant's three children (aged 20, 17 and 13; no point was taken on the age of the eldest – see para 76) to remain in the UK if he were deported. The Upper Tribunal held that the Judge below had erred in law by failing to give adequate

reasons and in reaching an irrational conclusion about the impact of deportation on the children. The Tribunal proceeded to re-make the decision in question, in the event dismissing the appeal against the deportation order.

43. In *KMO* the appellant had been sentenced to 20 months' imprisonment for the offence of conspiracy to dishonestly make false representations (in connection with planning a major financial fraud: see para 36). The appellant had a 17-year-old step-daughter and four younger children (aged 10, 6, 4 and 2). He was served with a deportation order. The First-tier Tribunal allowed his appeal, finding that deportation would involve a disproportionate interference with Art 8 rights because the family would be broken up. The Upper Tribunal held that the Judge below had erred in law by, inter alia, failing to make any finding as to whether it would be unduly harsh for the children to remain in the UK without their father. Again, as in *MAB*, the Tribunal proceeded to re-make the decision in question, dismissing the appeal against the deportation order.

44. Thus both cases involved appellants whose criminality fell within the terms of Paragraph 398(b) – having resulted in a sentence of imprisonment of more than 12 months but less than four years. In both cases therefore Paragraph 399(a) fell to be considered. In both cases the First-tier Tribunal allowed the appeals, but in both instances the Secretary of State's further appeals to the Upper Tribunal were successful, both on the law and as to the merits. The practical outcomes of the two cases were thus the same. The difference lies in the legal approach by which the Upper Tribunal arrived at that outcome in each case.

45. The Upper Tribunal in *MAB* rejected the Secretary of State's submission that whether consequences were "unduly harsh" could only be determined by looking at the magnitude of the public interest furthered by the individual's deportation, and that the more serious the crime the greater must be the consequences for them to be properly characterised as "unduly harsh". Rather, as the headnote accurately summarised at para 1:

> *1. The phrase "unduly harsh" in para 399 of the Rules (and s.117C(5) of the 2002 Act) does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee). The focus is solely upon an evaluation of the consequences and impact upon the individual concerned.*

46. The Upper Tribunal in *MAB* advanced three main reasons for arriving at this conclusion that a subjective or child-focussed approach applied. First, this reading was said to be consistent with existing authority, and especially the Chamber President's decision in *MK* (see para 40 above, and also McCloskey J's decision in *BM and Others (returnees – criminal and non-criminal) DRC CG* [2015] UKUT 293 (IAC); see *MAB* at paras 55-66). Second, it was said Part 5A of the 2002 Act has no relevance to Stage 1 of the assessment ('does the claimant succeed under Paragraph 399 or 399A?'); rather, it only becomes relevant at Stage 2, where the court or tribunal is considering the issue of proportionality (see *MAB* at paras 48 and 71). Third, the child-focussed approach, shorn of a

wider balancing exercise, was consistent with the understanding of the term "unduly harsh" in refugee law, and it would not be prudent to have two different approaches to the meaning of the very same phrase in two immigration contexts (see *MAB* at para 73).

47. In contrast the Upper Tribunal in *KMO* adopted the objective or polycentric approach, taking into account all material considerations in the balancing exercise. The Tribunal's conclusion is summarised at para 24:

> "24. The Immigration Rules, when applied in the context of the deportation of a foreign criminal, are a complete code. Where an assessment is required to be made as to whether a person meets the requirements of para 399 of the Immigration Rules, as that comprises an assessment of that person's claim under article 8 of the ECHR, it is necessary to have regard, in making that assessment, to the matters to which the Tribunal must have regard as a consequence of the provisions of s117C. In particular, those include that the more serious the offence committed, the greater is the public interest in deportation of a foreign criminal. Therefore, the word "unduly" in the phrase "unduly harsh" requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh."

48. The Upper Tribunal in *KMO* accordingly respectfully differed from the view taken by the panel in *MAB* (see para 22). As regards existing authority, Upper Tribunal Judge Southern considered that the case law relied upon did not on closer scrutiny support the subjective or child-focussed approach (see *KMO* at para 21). The Upper Tribunal in *KMO* also concluded that the two-stage approach did not mean that the issue of proportionality only arose at Stage 2 (see paras 13-19). Finally, the position with regard to refugee law was distinguished on two grounds (at para 20).

49. We consider that the Upper Tribunal in *KMO* was correct in adopting what we have characterised as the objective or polycentric approach to the application of the "unduly harsh" test in Paragraph 399. We do not find the Tribunal's analogy in *MAB* with the position in refugee law persuasive for the reasons identified in *KMO* (at para 20). The different contexts may mandate different approaches to the phrase "unduly harsh" and on this third point we cannot usefully add to the reasons given in *KMO*. We therefore focus in our own analysis on the other two main justifications advanced in *MAB* for adopting an exclusively child-focussed approach to the statutory test.

50. The first turns on the significance of the Chamber President's decisions in *MK* and in *BM and Others*. Put simply, we do not consider that the passages cited from either decision can bear the weight accorded to them in *MAB*.

51. As we have noted above, *MK* was a Paragraph 398(a) case, not a Paragraph 398(b) case. It followed that the appellant's Article 8 argument could only exceed if there were "very compelling circumstances *over and above* those described in paragraphs 399 and 399A" (emphasis added). *MK* was accordingly a clear Stage 2 case in which proportionality and the balancing test was always going to be central to, and determinative of, the analysis. Any discussion of paragraph 399 was necessarily part and parcel of that wider consideration, and so the Chamber President's observations on the meaning of "unduly harsh" must be considered in that wider context, rather than in splendid isolation.

52. The Upper Tribunal in *MAB* placed considerable emphasis (see paras 57-66) on para 46 of the decision in *MK*, where the Chamber President opined as follows (the reference to the two questions posed in para 44(d) is a misprint for para 45(d), citing the tests set out in limbs (a) and (b) respectively after para 399(a)(ii):

> "46. The determination of the two questions which we have posed in [44](d) above requires an evaluative assessment on the part of the Tribunal. This is to be contrasted with a fact finding exercise. By way of self-direction, we are mindful that "*unduly harsh*" does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "*unduly*" raises an already elevated standard still higher. Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less than cruel."

53. However, for the reasons above we agree with the view expressed in *KMO* that the absence here of any reference to the public interest in deportation does not mean that the expression "unduly harsh" in Paragraph 399(a) has to be read in an exclusively child-focussed way. This is because in any event the public interest was "to be factored into the assessment that had to be carried out under paragraph 398" (i.e. the "very compelling circumstances" test).

54. The main focus of paragraph 46 of *MK* was the possibility of the child's return to Sierra Leone in the context of the test under limb (a) following Paragraph 399(a)(ii). On the alternative hypothesis under limb (b), where the appellant is deported but the child remains, the Chamber President observed as follows at para 47 (emphasis added):

> "47. The final question is whether it would be unduly harsh for either child to remain in the United Kingdom without the Appellant. This is a different question from that considered in [46] above. *We have identified a range of facts and considerations bearing on this issue*. Once again, an evaluative

> judgment on the part of the Tribunal is required. *In performing this exercise we view everything in the round.* The Appellant plays an important role in the lives of both children concerned particularly that of his step son. He is the provider of stability, security, emotional support and financial support to both children. We have rehearsed above the various benefits and advantages which he brings to the lives of both children, coupled with his personal attributes and merits. We remind ourselves of section 55 of the 2009 Act. We acknowledge the distinction between harsh and unduly harsh. *We remind ourselves again of the potency of the main public interest in play, emphasised most recently by the Court of Appeal in SSHD v MA (Somalia) [2015] EWCA Civ 1192*. The outcome of our careful reflections in this difficult and borderline case and in an exercise bereft of bright luminous lines is as follows. *Balancing all of the facts and factors*, our conclusion is that the severity of the impact on the children's lives of the Appellant's abrupt exit with all that would flow therefrom would be of such proportions as to be unduly harsh."

55. The italicised phrases in this passage are all consistent with a polycentric approach to the application of the "unduly harsh" test in Paragraph 399, which requires an evaluation of *all* relevant factors, and not simply those which are confined exclusively to an evaluation of the consequences and impact for the child concerned. If that were so, then the Chamber President's express reference to "the potency of the main public interest in play" would necessarily have involved an error of law at this stage of the analysis. With respect, we find that it is not the case.

56. Nor do we find that the Chamber President's decision in *BM* advances the argument for an exclusively child-focussed approach to the "unduly harsh" test in Paragraph 399(a). *BM and Others* was a country guidance case about Article 3 claims in the context of the risks faced by failed asylum seekers on being returned by the UK to the Democratic Republic of the Congo (DRC). One of the five appellants (BBM), who had been sentenced to a total of 16 months' imprisonment for offences relating to false identity documents, had a potential Article 8 claim. In the passage in question the Upper Tribunal was considering whether or not BBM's claim could succeed under 'Exception 2' in section 117C(5) of the 2002 Act. McClosky J observed as follows (emphasis added):

> "109. Given the invocation of "*Exception 2*", we must assess the likely impact of the Appellant's deportation on his spouse. In order for the exception to apply, the impact must qualify as "*unduly harsh*". We consider that this does not equate with uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging. Rather, it poses a considerably more elevated threshold. "*Harsh*", in this context, denotes something severe, or bleak, the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "*unduly*" raises an already elevated standard still higher. The members of the family unit in question are but two. We acknowledge the likelihood of this changing in the very

> near future, while adding that section 55 of the Borders, Citizenship an Immigration Act 2009 has no application to a child *en ventre sa mère*."

57. In our view the underlined passage sets out the definitive approach to the meaning of the phrase "unduly harsh", as was acknowledged in both *MAB* and *KMO* (and, for that matter, in this decision). Paragraph 109 of *BM and Others* thus provides a helpful gloss on the meaning of "unduly harsh" but goes no further than that. It does not purport to seek to confine the assessment of whether consequences are "unduly harsh" by reference *only* to the impact on the child (or partner) concerned. Indeed, it is plain from the following paragraph of the Chamber President's decision that the Upper Tribunal took into account *all* factors in the round in deciding whether the "unduly harsh" test in Exception 2 (and so by inference Paragraph 399(a)) as satisfied:

> "110. We accept that life will be very difficult for a young, single mother who will have the additional burden of grieving her husband's departure abroad in circumstances where the prospects of future reunification are unfavourable. However, these we consider to be typical effects of a husband's deportation and Parliament has decreed that cases of this kind are insufficient to outweigh the public interest. Furthermore, we take into account the availability of strong family support to the Appellant's spouse, as we have found above. To this we add that she is a graduate who has evidently been in regular employment and it is, therefore, predictable that she will be able to support herself and her child. We do not overlook the duration of this relationship or its various qualities, all of which we have acknowledged above. However, our conclusion is, balancing all of the relevant facts and factors that the statutory public interest must prevail by some measure. Accordingly, this Appellant's appeal under Article 8 ECHR fails."

58. The second principal reason relied upon in *MAB* for adopting the exclusively child-centred approach to the meaning of "unduly harsh" was the Tribunal's finding that Part 5A of the 2002 Act has no relevance to Stage 1 of the assessment ('does the claimant succeed under Paragraph 399 or 399A?') and only becomes relevant at Stage 2 ('are there "very compelling circumstances" above and beyond those itemised in Paragraphs 399 or 399A?').

59. The Upper Tribunal in *KMO*, notably at para 13, disagreed with that approach:

> "… If that were correct, the result would be somewhat remarkable in that a clear presumption enshrined in primary legislation would be displaced by an immigration rule. That approach seeks to disregard the unambiguous requirement of s.117A(2) that in considering the public interest question, the court or tribunal *must* (in particular) have regard to, *inter alia*, the statement of principle found in s117C(2) that the more serious the offence, the greater is the public interest in deportation."

60. The Upper Tribunal in *KMO* went on to observe:

> "17. There is nothing in the rules, or the statute, to eliminate from an assessment of what is "unduly harsh" considerations of the seriousness of the offence committed. Put another way, it is not at all difficult to see that what may be an unduly harsh consequence in the context of a person who faces deportation because of imprisonment for 12 months for an offence that does not involve violence, drugs or sexual connotations may not be unduly harsh in the case of a person who, by reason of committing such an offence, plainly represents a serious risk to the public if allowed to remain."

61. We are also conscious that the Upper Tribunal addressed the inter-relationship between the Rules and Part 5A in *Secretary of State for the Home Department v Bossade* [2015] UKUT 00415 (IAC), although the main focus there was Paragraph 399A. This decision was not cited in *MAB*, being promulgated on the very same day, and was also not discussed in *KMO* either. *Bossade* reiterated the two stage approach that must be conducted in deportation cases. The first stage is to decide whether the claimant meets the conditions of e.g. Paragraphs 398 or 399. The second stage is the proportionality assessment, but both stages must take place within the Rules. There is no freestanding Article 8 assessment in deportation cases.

62. We respectfully take the view that the divergence of views between *MAB* and *KMO* on this point is a somewhat arid jurisprudential debate which (in many cases at least) may have little direct impact on outcomes. In doing so, we recognise, of course, in the context of deportation that the Rules represent a complete code as far as Article 8 is concerned (see *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192). But the Part 5A factors are plainly important matters which we are required to take into account in making such decisions within the framework of the Rules. The point is rather that while Part 5A tells us what is in the public interest, it does not in terms tell us how to balance that public interest against an individual's Article 8 rights. Even if the purist's view, as set out in *MAB* is conceptually correct, we do not consider that it can detract from the plain meaning of the phrase "unduly harsh" or alter the polycentric approach we have identified.

63. As it is, we are inclined to agree with the Upper Tribunal's analysis in *KMO* at paragraphs 8-19, for the reasons set out there. The test in both section 117C(5) and Paragraph 399 is plainly whether the impact of deportation on the remaining family member (whether child or partner) would be "*unduly* harsh", not simply "*very* harsh". In our judgment the word "unduly" emphasises that the impact of deportation on family members must be considered in the round including, amongst other relevant matters, the principle that the more serious the offence, the greater the public interest in deportation. As the Upper Tribunal's in *KMO* neatly explained (at para 14), "the public interest question inhabits para 399 and 399A just as surely as it does in para 398". To put it another way, we do not accept the view that "unduly harsh" represents a fixed threshold; it must be a variable benchmark – so, as *KMO* explains, what is

"unduly harsh" for the family member of a shoplifter may not be "unduly harsh" for the family member of a robber or rapist.

64. In any event, we note that neither of the parties in this case advanced arguments based on the more nuanced discussion in *Bossade*. Ms Greenwood proceeded on the pragmatic basis that we should consider the Rules in the context of Part 5A and we do so.

65. For all these reasons we agree with the Upper Tribunal in *KMO* and respectfully disagree with the decision in *MAB* as to the proper approach to the "unduly harsh" test as contained in section 117C(5) of the 2002 Act and Paragraph 399 of the Rules. We also note that the Court of Appeal allowed the Secretary of States appeal in MM (Appeal allowed and remitted to the Upper Tribunal for further consideration)) and dismissed that of the appellant in KO: (Appeal dismissed) finding that the decision in KMO sets out the correct approach to be adopted in law. The Court stating:

> 26. For all these reasons in my judgment MAB was wrongly decided by the Tribunal. The expression "unduly harsh" in section 117C(5) and Rule 399(a) and (b) requires regard to be had to all the circumstances including the criminal's immigration and criminal history.

Remaking the decision on appeal

The legal framework

66. The starting point is that OAO satisfies the definition of a "foreign criminal" in section 32 of the 2007 Act. Accordingly, the presumption is that he is subject to automatic deportation unless one of the exceptions apply (see also Paragraph 396 of the Rules).

67. The only exception potentially applicable in the present case is where OAO's removal under a deportation order would breach an individual's Convention rights ('Exception 1' in section 33(2) of the 2007 Act; see also Paragraph 397)). We recognise it is J's Convention rights, in particular his right to family life, which are primarily in issue.

68. In considering under the Rules whether an immigration decision breaches any person's Article 8 rights (and so would be unlawful under section 6 of the Human Rights Act 1998), and in considering the public interest question, i.e. whether any interference with Article 8 rights is justified (under ECHR Article 8(2)), we must have regard to the factors enumerated in Part 5A of the 2002 Act (see also Paragraph A398). In short, they inform but do not determine the balancing exercise conducted under the Rules. We accept the need to consider article 8 aspects through the prism of the Rules as the Rules relating to deportation are a complete code.

69. We have taken into account the general public interest considerations as set out in section 117B but neither advocate sought to persuade us that any of the

matters listed there was likely to be decisive in the circumstances of the present appeal.

70. We also acknowledge Parliament's categorical and unambiguous declaration that the deportation of foreign criminals is in the public interest, the more so according to the gravity of the offence concerned (section 117C(1) and (2)). We return to this issue later in our analysis. As OAO's sentence of imprisonment did not exceed four years, the public interest requires deportation unless either 'Exception 1' or 'Exception 2' applies (section 117C(3)). There is no suggestion that the former exception is relevant.

71. It follows that the central issue to be determined is whether Exception 2 in section 117C(5) applies. This requires that the claimant [C] has "a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the … child would be unduly harsh". This is echoed by the parallel requirement in the Rules at Paragraph 399 that "it would be unduly harsh for the child to remain in the UK without the person who is to be deported". There is no issue over the other conditions in either section 117C(5) or Paragraph 399; the sole issue is whether OAO's deportation would be "unduly harsh" for J.

72. As already noted, we also recognise that in the context of deportation the Rules represent a complete code (see *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192).

The evidence

73. We took into account all the documentary evidence on file. We refer to it further below in our findings of fact. At the outset of the hearing Ms Greenwood applied to have two further documents admitted into evidence. The first was a Recognition of Attainment certificate awarded to J by his school in December 2015 (in Business Studies). The second was J's timetable for mock Year 11 examinations, which explained his absence from the hearing we held. Mr Duffy did not object to either and they were admitted in evidence.

74. As previously noted, we heard oral evidence from both OAO and from Mr A, the partner of Da, one of his daughters (i.e. one of J's sisters).

75. OAO confirmed the contents of his witness statements, subject to one minor typographical error. He confirmed that two of his adult children (including his oldest son, who had looked after J when he had been imprisoned) now lived in the USA. His oldest daughter was working full-time in London and living with Mr A. His youngest daughter was at University in Leicester, and was returning to London next year to take up a training contract. He said that J's progress at school and behaviour had been affected by the prospect of his deportation, and that he had been advised to conceal his feelings about this so as not to upset J. As a result, he said, there had been some improvement in J's attitude to school.

76. When questioned by Mr Duffy, OAO's attention was drawn to the apparent conflict between J's letter (in which he said he *saw* his mother only at Christmas)

and his own statement, when he said J only *spoke* to her at Christmas. OAO replied that perhaps J saw her when he himself was not around. He repeated that J's mother did not wish to participate in family life with J and his siblings and the feeling was mutual. He said he did not stop J seeing his mother and that she sent J Christmas and birthday cards.

77. Mr A also gave evidence. He explained that he was the partner of one of OAO's daughters and that they shared a small one-bed flat. It would not be possible for them to look after J and he himself had little contact with J.

*The parties' submission*s

78. Mr Duffy's submission was essentially that this was a family which had pulled together to look after J when OAO had been imprisoned in 2010/11 and the reality is that they would do the same in the event that OAO were deported. He argued that one or other or both of the UK-based siblings would feel compelled to care for J for the rest of his minority. He accepted it would be difficult and inconvenient for the siblings, but that was not the test, which was whether the impact would be unduly harsh on J. Failing that, J's mother retained parental responsibility. He suggested that there had been some minimisation of the extent of contact between J and his mother. Although J may not have as strong a relationship with his mother as his father, it could not be *unduly* harsh for J to live with her. Mr Duffy noted that the sentence of imprisonment was twice the threshold in the Rules, and so the test for whether the impact of deportation would be unduly harsh was accordingly heightened. Furthermore, there was no scope for any exceptional circumstances to come into play at the second stage of an Article 8 consideration; the case was all about whether the impact was unduly harsh or not.

79. Ms Greenwood's submission was that it would be unduly harsh for J to remain in the UK in OAO's absence. The reality was that OAO had brought J up as a single parent. Their father-son bond was exceptionally close; J had particular needs, supported by the school's evidence, and was at a critical stage in his education and needed OAO's guidance and support on a day-to-day basis. J's siblings were not able to step in as they had 5 years ago – two were living overseas and the other two were not in a position to care for J, given their own circumstances. Further, and in any event, Ms Greenwood argued that the impact on the sibling relationship would be damaging as either of those living in the UK would have to make substantial personal sacrifices to do so. J's mother had played no real part in his life for some years now; moreover she had not stepped in when OAO had been imprisoned, and it was unrealistic to expect her to do so now. In the alternative, Ms Greenwood argued that deportation would amount to a disproportionate interference in OAO's family life with his two youngest children, and so there were very compelling circumstances that outweighed the public interest in deportation.

Findings of fact

80. We agree with Mr Duffy that on the balance of probabilities in the event of OAO being deported one or other of J's UK-resident siblings would step in and assume care of J. This happened when OAO was imprisoned and when the burden involved was substantially greater, given that J was then aged 10. He is now aged 16 and while that age gives rise to other needs, in general terms a 16-year-old inevitably requires less supervision than a 10-year-old. The evidence of the siblings and Mr A was framed in terms of the difficulty and inconvenience of having to care for J, rather than an outright refusal. We accept that taking care of J will involve a burden, but that does not make it unduly harsh for J. Ms Greenwood invited us to find that the sibling relationship would be harmed by an older sibling have to assume a parental role. In our view that submission was at best asking us to draw an inference. Realistically, we regard it as pure speculation. We also bear in mind that if OAO is deported he will be able to maintain contact with J by telephone and social media. We accept, obviously, that such contact will not be as close and intimate as day-to-day contact, but it remains a valuable means of communication. We were also asked to find that J's older sisters would be unable to provide the proper level of discipline, bearing in mind the evidence of fluctuation in J's school performance. We were not persuaded that there was any causal correlation between a dip in J's performance and the ongoing uncertainty over his father's immigration status. It is a simple fact of life that teenage boys moving from year 10 to year 11 often display fluctuations in their academic performance. We do not find, based on the school reports, that J is a boy who is at any significant risk of "going off the rails" so much so that only his father can provide the right level of parental discipline.

81. If for whatever reason it is truly impossible for J to be cared for by one of his older siblings, we consider it likely that J's mother will step in. We recognise that we had very little evidence about the mother's circumstances. However, there is clearly an enduring relationship between J and his mother. It is in the interests of OAO to downplay the extent and nature of that relationship, as we found he did in his evidence about whether J saw or merely spoke to his mother at Christmas. Ms Greenwood referred several times to J's mother having "abandoned" him, putting him emotionally at risk if he then had to rely on her for care. We took the view that "abandoned" was a value-laden term to describe the circumstances of the parental separation. We had no report of an expert social work assessment before us allowing us to draw any such inference. It was equally plausible that J's mother felt she had no alternative but to leave and that her relationship with J would be fully revived in OAO's absence in the event he is deported. If we considered on the balance of probabilities that it was likely that J would end up in care if his father is deported, we might have been inclined to find separation would be unduly harsh. However, given what happened when OAO was imprisoned, and given the existing family ties, we do not think that is a realistic possibility. Once some form of adequate care is available, the only significantly adverse effect on J would be the fact that he would no longer be able to live with his father. As Mr Duffy argued, that is the ordinary and inevitable consequence of deportation.

82. There are a number of further considerations we must bear in mind in making the relevant assessment. The two most important relate to OAO's offending and to his immigration history.

83. OAO's criminal record is referred to above at paragraphs 9 and 11. The Crown Court Judge's sentencing remarks speak for themselves and do not need to be repeated here. Those remarks, and the length of the sentence, make it clear the criminal course of conduct involved a series of very serious benefit offences; this was not simply a failure to report a change of circumstances to the authorities, but rather a sophisticated and calculated fraud on the public purse. We recognise that OAO was released from prison early due to good behaviour, but the fact remains that the index offences warranted a two-year jail term, comfortably in excess of the 12-month threshold for a presumption of automatic deportation. Contrary to Ms Greenwood's submission, we do not accept that OAO has shown genuine remorse for his offending. In that context we note that he had continued to deny at the First-tier Tribunal hearing that he had fraudulently used another's identity to claim benefits, notwithstanding the clear finding to the contrary referred to in the sentencing remarks. Rather, we find that OAO has persistently sought to minimise his offending behaviour. The conviction for a further offence of identity fraud in 2014 when he must have known he was at risk of deportation is not simply "worrying", as Judge Beach found. It demonstrates a flagrant disregard for the law. We consider there is a real risk of further offences being committed, especially around identity fraud.

84. As regards his immigration history, the First-tier Tribunal accurately described this record as "appalling" (at [54]). Accepting for the present that his original entry was lawful under a visitor's visa – and there is no persuasive evidence either way – the fact remains that OAO has not been lawfully resident in the UK for the best part of 30 years. On the evidence before the First-tier Tribunal, we agree with Judge Beach's doubts as to whether OAO had ever made an application to regularise his status before deportation proceedings commenced.

Conclusion on Paragraph 399

85. We have identified a range of facts and circumstances. We now have to evaluate all these matters in the round. We recognise that OAO plays an important role in J's life. We also remind ourselves of section 55 of the 2009 Act. We acknowledge that it will be harsh on J if his father is deported. However, it is inevitable that deportation breaks up families – the family is broken up "because of the appellant's bad behaviour. That is what deportation does" (*AD Lee v SSHD* [2011] EWCA Civ 248 per Sedley LJ). We find that, as before, the family will find a way to care for J. We also remind ourselves of the potency of the public interest in deportation of foreign criminals. We have taken into account the gravity of the offences committed. Taking all relevant factors into account, while we find it will be harsh on J if his father is deported, we cannot say that it will be unduly harsh.

Are there "very compelling circumstances" even if Paragraph 399 is not met?

86. That leaves us with one final question to address. Given that we have concluded that it would not be unduly harsh for J to remain in the UK without his father, are there "very compelling circumstances" beyond those described in Paragraph 399 of the Rules such that the public interest in deportation is outweighed?

87. We can deal with this point shortly. Section 117B(4) and (5) stipulate that we should accord little weight to a private life formed when OAO's presence in the UK was unlawful or their immigration status precarious. There is nothing in the matters referred to by Ms Greenwood that makes the present case exceptional in any way. We agree with Mr Duffy that the circumstances of this case are such that in practice the appeal stands or falls on the unduly harsh test. There is nothing that comes remotely close to displacing the public interest arguments. For the reasons we have already set out, we find that it falls.

Decision

88. The First-tier Tribunal Judge materially erred in law. We have set aside the decision of the original Judge. We remake the decision as follows. This appeal is dismissed.

Anonymity

89. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. In all the circumstances we do make such an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Signed…….
Upper Tribunal Judge Wikeley

Dated the 5 July 2016