Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/02009/2014**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th April 2016	**On 18th May 2016**

Before

MR JUSTICE M TURNER
and
DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR DERRICK OKAI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms A Brocklesby-Weller, a Home Office Presenting Officer
For the Respondent: Ms G Loughran, of counsel

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal which allowed the appeal of Mr Okai ('the claimant') against a decision, taken on 14 October 2014, to make a Deportation Order under section 32(5) of the UK Borders Act 2007 ('the 2007 Act').

Background Facts

2. The claimant is a citizen of Ghana who was born on 14 June 1979. He entered the United Kingdom on 12 June 1983 two days before his fourth birthday with his parents and his elder sister (Harriet). He has a younger sister (Alice) who was born in the UK. On 11 March 1998 the claimant and his family were granted indefinite leave to remain in the UK. He was 18 at that time and has been in the UK lawfully ever since.

3. The claimant has a number of criminal convictions for offences committed in the UK whilst he was an adult. These include three convictions which resulted in sentences of imprisonment. On 31 May 2002 he was sentenced to 2 years' imprisonment for theft by an employee and obtaining property by deception. On 5 January 2005 he was sentenced to 12 months 268 days' imprisonment for obtaining property by deception. On 4 May 2005 the Secretary of State wrote to the claimant warning him that continued criminality would result in consideration of his deportation. On 13 July 2011 the claimant was sentenced to 12 months' imprisonment for conspiracy to steal/theft of motor vehicles.

4. The claimant has six children in the United Kingdom aged under 18 years and a son who is now aged over 18 years. The children are from three separate partners and the claimant does not reside with any of the children. The children live with and are cared for by their mothers.

5. On 7 November 2011 the Secretary of State notified the claimant that section 32(5) of the 2007 Act required that a deportation order be made against him unless he could demonstrate that he fell within any of the specified exceptions set out in section 33 of the Act. The Secretary of State took into account the claimant's representations but concluded that the claimant's children would remain with their mothers, who are their primary carers, and that there was insufficient evidence in relation to them to outweigh the public interest in deporting the claimant as a foreign criminal. In a notice dated 14 October 2014 the Secretary of State made a deportation order against the claimant under section 32(5) of the 2007 Act.

The First Appeal to the First-tier Tribunal

6. The claimant appealed to the First-tier Tribunal against the Secretary of State's decision to deport him from the United Kingdom and to refuse his human rights claim. On 13 May 2015 the First-tier Tribunal heard his appeal and in a decision promulgated on 17 June 2015 his appeal was allowed by First-tier Tribunal Judge Scott. The First-tier Tribunal found that it would be unduly harsh for the claimant's children to remain in the United Kingdom if their father were deported to Ghana.

7. The Secretary of State appealed to the Upper Tribunal. She argued that insufficient weight has been given to the claimant's lengthy criminal history before the index offence, that the possibility of the children maintaining contact with the claimant

by modern means of communication had not been considered, and that no consideration had been given to the claimant's ability to support himself in the United Kingdom and not revert to crime for financial reasons. Permission to appeal was granted on the basis that the assessment of what might be 'unduly harsh' was flawed in light of the guidance given by the Court of Appeal in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192 at paragraph 43.

8. On 27 October 2015 Upper Tribunal Judge Gleeson, having heard the submissions of the parties, decided that the decision of the first-tier tribunal contained an error of law. The Upper Tribunal found that the First-tier Tribunal failed to engage in part 5A and in particular the provisions of section 117C of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'). The Upper Tribunal found that although the First-tier Tribunal judge did consider whether the effect of the claimant's deportation on the children would be unduly harsh he failed to direct himself by reference to two recent decision of the Upper Tribunal on the meaning of unduly harsh, namely *KMO (section 117 – unduly harsh)* [2015] UKUT (IAC) 543 and *MAB (para 399; "unduly harsh")* [2015] UKUT 435 (IAC). The Upper Tribunal was not satisfied that the judge had applied the very high standard required. According to both *MAB* and *KMO* unduly harsh means inordinately or excessively harsh. The Upper Tribunal was not satisfied that the judge took proper account of all the claimant's offending history and the public interest in deportation as required by sections 117A and 117C of the 2002 Act. The Upper Tribunal set aside the First-tier Tribunal's decision and remitted the matter to be heard afresh. Tribunal.

The Second Appeal to the First-tier Tribunal

9. On 24 February 2016 the First-tier Tribunal reheard the claimant's appeal. In a determination promulgated on 11 March 2016 First-tier Tribunal Judge Coll allowed the claimant's appeal. The First-tier Tribunal found that the claimant's deportation would be unduly harsh on his children thereby outweighing the strong public interest in deportation.

The Second Appeal to the Upper Tribunal

10. The Secretary of State sought permission to appeal to the Upper Tribunal. The grounds of appeal in essence were that the First-tier Tribunal failed to appreciate the great weight to be attributed to the public interest in deportation and that the assessment of whether deportation would be unduly harsh was conducted through the prism of the best interests of the child. On 4 April 2016 First-tier Tribunal Judge Grimmett granted the Secretary of State permission to appeal. The grant of permission sets out that it is arguable that the First-tier Tribunal Judge erred in concluding that the consequences of the claimant's children being separated from him would be excessively harsh as the reasons suggest only that the children would be extremely upset by his removal which may not reach the threshold of 'unduly harsh'. Thus, the appeal came before us.

11. At the commencement of the hearing a preliminary issue was raised. Ms Loughran argued that the grant of permission was restricted to ground 2, namely the incorrect approach and application of the law in respect of the 'unduly 'harsh' test. Ms Brocklesby-Weller confirmed that both grounds were being pursued.

12. The grant of permission consists of two paragraphs as follows:

    1. The respondent seeks permission to appeal, in time, against the decision of the First-tier Tribunal judge Coll promulgated on 11 March 2016 to allow the appellant's appeal grounds (sic) against the decision of the respondent on 14 October 2014 to make a deportation order against him.

    2. It is arguable that the Judge erred in concluding that the consequences of the appellant's children being separated from him would be excessively harsh as the reasons suggest only that the children would be extremely upset by his removal which may not reach the threshold of unduly harsh.

13. The issue that arises is whether the grant extends to both grounds or only to ground two. In the absence of any express exclusion we consider that the grant of permission should be read as including both grounds of appeal.

14. For a second time the issue on appeal to the Upper Tribunal in this case is essentially whether or not the First-tier Tribunal has erred in law by failing to interpret and apply the relevant statutory provisions and the Immigration Rules HC395 (as amended) ('the Immigration Rules') correctly by failing to take into consideration appropriately the great weight that Parliament has placed on the public interest in deportation and to apply the test of 'unduly harsh', as set out in s117C of the 2002 Act and Paragraph 399(a) of the Immigration Rules, correctly in light of decided case-law on this issue. The claimant does not rely on s117C(4) of the 2002 Act or paragraph 399A of the Immigration Rules.

Summary of the Submissions of the Secretary of State

15. There are two grounds of appeal. Firstly, it is asserted that the First-tier Tribunal judge failed to appreciate the great weight to be afforded to the public interest in deportation where a person is given a term of imprisonment in excess of 12 months. The Secretary of State refers to the case of *SS (Nigeria) v SSHD* [2013] EWCA Civ 550 at paragraphs 53 and 54. It is asserted that the judge's reference to the claimant's offending as not being at the more significant end of the scale failed to appreciate that his conduct is sufficient to satisfy the Parliamentary benchmark set by the 2007 Act. It is submitted that the judge erred in affording weight to matters that are irrelevant, such as a low risk of reoffending, the fact that the sentence was at the lower end of the scale etc. in assessing the public interest in this case. The Secretary of State relies on the case of *Gurung v SSHD* [2012] EWCA Civ 62, where the court held that an absence of reoffending does not represent the ultimate aim of the deportation regime. It is asserted that the judge has diminished the public interest having emphasised a low risk of reoffending and the fact that the claimant's offence did not attract a more significant sentence.

16. With regard to the second ground of appeal the Secretary of State asserts that the assessment of unduly harsh was conducted solely through the prism of the best interests of the child. It is asserted that whilst such interests are a primary consideration there are not the only relevant factor and as such do not holistically answer the proportionality assessment contained within the unduly harsh rubric. It is necessary to contemplate that deportation expressly engages the possibility of separation even where it would be contrary to a child's best interests. The Secretary of State relies on the case of *AR (Pakistan) v SSHD* [2010] EWCA Civ 816 where the Court noted that it would be contrary to principle for children's interests always to take precedence over the wider public interest where the two are in conflict. The Secretary of State asserts that it is not clear on what basis the judge found that it is highly likely that the children will suffer emotional harm or possibly serious harm. The judge does not refer to any objective evidence to support that contention and that it is not clear why the claimant's deportation would cause serious emotional harm when the children are primarily cared for by their mothers. Reliance is placed on the case of *PF (Nigeria) v SSHD* [2015] EWCA Civ 51 in which the Court of Appeal held that even where deportation will cause a real and damaging impact to a deportee's children the public interest will normally prevail.

17. Ms Brocklesby-Weller relied on the grounds of appeal. She referred to paragraph 67 of the First-tier Tribunal's decision. She submitted that the judge made findings that deportation would be unduly harsh by looking solely at the interests of the children. She submitted that the judge already made primary findings regarding whether removal would be severe and bleak without considering the public interest in deportation. She referred to paragraph 73 of the tribunal's decision where the judge considered the public interest in deportation submitting that this was, however, after his finding that deportation was unduly harsh. She submitted that there was no express consideration, or that there was an inadequate consideration, and weighing in the balance the public interest in deportation.

18. Ms Brocklesby-Weller referred to paragraph 67(xii), and submitted that there was no objective evidence to support the judge's final conclusion that the children will suffer emotional harm or possibly serious emotional harm at the loss of face to face contact with the claimant. When pressed she accepted that she could not take issue with the judge's findings in paragraph 67 (i) – (xi). She submitted that the children would continue to be looked after by their mothers, that although they would suffer distress this is not sufficient to meet the test as set out in *KMO* and as approved in *MM.* There has to be something more than the normal reaction that the loss of a parent involves. She submitted that in *KMO* a similar situation arose but in that case the father was actually the primary care giver whereas in this case the claimant doesn't even live with the children. Notwithstanding a finding that it would be in the best interests of the children to be with both parents the Upper Tribunal in *KMO* found that there was insufficient evidence to amount to a finding that the deportation would be excessively harsh. She referred to *PF Nigeria* and the citation of the case of *AD Lee* therein where it was held that there are going to be repercussions but that is the effect of deportation. She submitted that there was

nothing in this case that was different to the effect on any genuine and subsisting relationship with children that arose from forced separation. The judge had focused on the solidity of the relationship (para 83) but this was required before paragraph 399(b) applied. She submitted that notwithstanding the identification of the correct legal test as set out in *KMO* the judge has not applied the test when conducting the balancing exercise.

19. Ms Loughran relied on the Rule 24 (of the Tribunal Procedure (Upper Tribunal) Rules 2008) response. She submitted that the Secretary of State was merely attempting to re-argue the case because she didn't like the outcome. She submitted that the judge didn't simply refer to *KMO* the judge followed *KMO* as set out in paragraph 68 of the decision. She submitted that the judge has to refer to matters in a certain order and the fact that the judge had set out in paragraph 67 the conclusions that he reached with regard to the effect on the children of the deportation of the claimant, this was simply the structure of the decision. She referred to paragraph 77 of the decision which was headed 'Determination'. It is clear from this paragraph that the judge is at this point setting out the correct test. The judge recognised the strong public interest in deportation, considered the history of the claimant's offences and made findings regarding the children. In paragraph 80 the judge set out that the public interest was a weighty factor and recognised that the appellant's offence was serious. The judge was entitled to conclude that as the sentence was 12 months that this was the lower end of the spectrum which is for offences between one and four years. She submitted that the judge's findings at paragraph 67(xii) were the only findings that the Secretary of State took issue with. In response to the tribunal's questions she did not accept that the findings in this paragraph are conclusions based on the cumulative facts in the preceding sub-paragraphs. She submitted that there is no requirement for corroborative evidence in any event so that the fact that the judge did not refer to the objective evidence is not relevant.

20. She submitted that in this case the family life is particularly important because there are two separate families. If the claimant was deported there was no longer have contact with each other siblings. Further she submitted that there would be no contact at all between the claimant and the children because the young children would not have access to social media and the children's mothers had refused to cooperate with the claimant's attempts to keep in touch via mobile phone.

Legislative Framework

21. Sections 32 and 33 of the UK Borders Act 2007 provide, so far as material:

"*32. Automatic deportation*

(1) In this section "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who is convicted in the United Kingdom of an offence, and

(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that-

(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (serious criminal), and

(b) the person is sentenced to a period of imprisonment.

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33). ...'

33. Exceptions

(1) Section 32(4) and (5)—

(a) do not apply where an exception in this section applies (subject to subsection (7) below), and

...

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention."

23. Para 396 of the immigration rules provides the following presumption:

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

24. And paras 397 and A398 make clear that the rules aim to encompass rights protected by the ECHR:

"397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked."

25. That is reinforced by the heading that follows of "Deportation and Article 8" under which the framework of the rules is set out:

"398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

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

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

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

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

(i) the child is a British Citizen; or

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

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

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

22. As from 28 July 2014 statutory provisions in a new Part 5A of the 2002 Act (inserted by s.19 of the Immigration Act 2014) requires, in legislative form for the first time, the Tribunal to take certain factors into account when determining

whether a decision made under the Immigration Acts breaches respect for private and family life. The decision in the instant case is a decision made under the Immigration Acts. The relevant provisions provide:

23. Section 117A sets out the scope of the new Part 5A headed "Article 8 of the ECHR; Public Interest Considerations" as follows:

"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)."

24. The considerations listed in s.117B are applicable to all cases and are:

"117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

25. The considerations applicable specifically in the context of the deportation of foreign criminals are set out in s.117C 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) …

(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."

26. Section 117D provides the definition of a number of terms used in Part 5A. A "qualifying child" means a person under the age of 18 who is either a British citizen or who has lived in the UK for a continuous period of seven years or more. In addition, s.117D(2) defines "foreign criminal" as person who is not a British citizen, has been convicted of an offence in the United Kingdom and who has been sentenced to a period of imprisonment of at least twelve months or has been convicted of an offence that has caused serious harm or is a persistent offender.

Discussion

27. The framework set out above provides a structured approach to the case advanced by a person facing deportation who claims that if he is removed there will be an infringement of his rights protected by Article 8 of the ECHR. Section 32 of the 2007 Act provides that the deportation of a foreign criminal is conducive to the public good and that the Secretary of State must make a deportation order unless one of the exceptions contained in s33 applies. In order to assess whether a person's Convention rights would be breached the First-tier Tribunal had to consider whether paragraph 399 applies. It is important to recognise, therefore, that the assessment as to whether para 399 applies is an assessment of whether deportation would result in an infringement of Article 8 rights. Paragraph 399(a) does not require deportation of a foreign criminal if it would be unduly harsh for the deportee's child(ren) to remain in the UK without the person who is to be deported or it would be unduly harsh for the child to live in the country to which the person is to be deported.

28. The immigration rules, in the context of deportation, represent a complete code so far as Article 8 of the ECHR is concerned: see *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192. Thus, the concept of proportionality, involving a striking of a balance between the public interest matters in play and rights protected by article 8 of the ECHR, is to be conducted through the lens of the Immigration Rules (see *SSHD v LW (Jamaica)* [2016] EWCA Civ 369, paragraph 14).

29. S117C of the 2002 Act opens with two statements of principle. First, the deportation of foreign criminals is in the public interest. Secondly, the more serious the offence committed by the foreign criminal, the greater is the public interest in his or deportation. In *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550 at paragraphs 47 and 54 the Court of Appeal held:

> "47. … (2) In a child case the right in question (the child's best interests) is always a consideration of substantial importance. (3) Article 8 contains no rule of "exceptionality", but the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail …
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> ...
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> 54. I would draw particular attention to the provision contained in s.33(7): "section 32(4) applies despite the application of Exception 1...", that is to say, a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on Article 8. I said at paragraph 46 that

> while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed."

30. The wording in section 117C(5) 'unduly harsh' echoes the wording of paragraph 399(a) of the immigration rules.

31. In the case of *KMO* at paragraph 24 the Upper Tribunal held:

> "… 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."

32. In delivering its extempore judgment in *MM (UGANDA) v SSHD* (2016) the Court of Appeal confirmed the correctness of the approach taken in *KMO* to the 'unduly harsh' test and held that in determining whether deportation was unduly harsh a court or tribunal had to have regard to all the circumstances including the deportee's criminal and immigration history.

33. In *PF (Nigeria) v The Secretary of State for the Home Department* [2015] EWCA Civ 251 (a case involving deportation of a foreign criminal sentenced to a prison sentence in excess of 4 years) the Court of appeal held:

> "43. … I fully recognise that if the Judge's factual findings are well founded, there will be a real and damaging impact on his partner and the children; but that is a common consequence of the deportation of a person who has children in this country. Deportation will normally be appropriate in cases such as the present, even though the children will be affected and the interests of the children are a primary consideration …"

34. Having set out the structured approach and relevant case-law we turn to the first ground of appeal, namely that the First-tier Tribunal judge 'diminished' the great weight to be afforded to the public interest in deportation by emphasising the low risk of re-offending and the fact that the claimant's offence did not attract a more significant sentence.

35. The First-tier Tribunal judge recorded, at paragraph 68, that he followed the case of *KMO* which requires a balancing exercise when considering the public interest. The judge noted also that he was required to engage with Part 5A of the 2002 Act. At paragraph 70 the judge set out the provisions of section 117C. He then set out at paragraphs 71- 76 the following:

> "71. With regard to the index offence, I accept that substantial sums were involved and that in the sentencing judge's view, he committed the crime to offload financial difficulties on to someone else. Nevertheless, the sentencing judge accepted that he

was a part player, his plea of guilty was at the earliest opportunity and his expression of remorse genuine. In terms of the nature and seriousness of the index offence and past offences, I find in reliance on the sentencing remarks that the appellant's offence is not at the higher end of the scale of seriousness nor is his overall past criminal conduct.

72. I note that the pre-sentencing report identified the appellant as a medium risk of re-offending. In that context I am aware that his last conviction was over four years ago (in 2011) and that he has not reoffended since. In addition, he has set about gaining qualifications in order to provide himself a more secure and reliable basis upon which to earn his living. This has led to the establishment of his business with Ms Douglas (and another director). I find that in this way, he has sought to protect himself from future financial difficulties, which were the root cause of some of his offending, including the index offence and the previous offence in 2005. A judicious selection of his degree course (which is at Westminster University) and his business partner, (Ms Douglas) and through the identification of a business which suits their skills and experience and for which there is a recognised market, the appellant has maximised the likelihood that he will not fall into financial difficulties again.

73. I am aware that the public interest in deporting a person who has committed a serious crime includes a public interest in '*deterring and preventing serious crime generally and to upholding public abhorrence of such offending*' (see **DS (India) v SSHD [2009] EWCA Civ 554**). I am however also aware of the clear guidance that these elements of public interest (and in particular the weight to be given to them) are not a fixity (see **JO (Uganda)** and **UT (Ivory Coast) v SSHD [2010] EWCA Civ 10.**

74. I bear in mind in this context the Government Report which states at paragraph. 173:

> *"Lives can often go off course and when they do we want to ensure that the responses are as effective as possible, and people always have a second chance in life.*

75. I find that the government report is supportive of the proposition in **AA v UK [2010] ECHR 656** that the need for deterrence and expressions of repugnance is lowered when balanced against full rehabilitation.

76. Given the appellant's age at arrival in the UK and has length of time here, I am aware of and must add into the balancing exercise, **Maslov v Austria [2008] ECHR 546 (23 June 2008)**. In **Maslov** the European court of human rights held at paragraph. 75 that "*for a settled migrant who has lawfully spent all of the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion*." Mr **Maslov** was an adolescent when he committed his crimes. I am however also aware of **MJ Angola v SSHD [2010] EWCA Civ 557** where the Court of Appeal applied the **Maslov** criteria to a man whose most recent offences were committed whilst he was an adult."

36. At paragraph 77 under the heading 'Determination' the judge set:

> "77. So the question is whether, viewed in light of the guidance and the appellant's family life with his six children, his deportation would be unduly harsh on the children so as to outweigh the strong public interest in deportation."

37. Considering these passages in the context of the decision as a whole it is clear that the judge has recognised the strong public interest in deportation – this is

identified in paragraph 77. The judge was entitled, and indeed required to arrive at a conclusion about the seriousness of the offence. Section 117C requires that the more serious the offence the greater the public interest is in deportation. The category that the judge was considering was for foreign criminals sentenced to a period of imprisonment of between 12 months and 4 years. This range of length of sentences will encompass offences of varying degrees of gravity. Of course the seriousness of the offence will be (at least to some extent) reflected in the length of prison sentence. We accept that Parliament has set 12 months as the benchmark for automatic deportation. That is, however, subject to the exceptions which import a balancing exercise that in turn requires consideration of the seriousness of the offence(s). The judge took into consideration his past criminality (see paragraphs 21, 72), the nature of the offences and the sentencing remarks for the index offence when arriving at his conclusion. We consider that the judge was entitled to arrive at the conclusion that the neither the appellant's index offence nor his overall past criminal conduct was at the higher end of the scale of seriousness.

38. The risk of reoffending is a relevant consideration in a deportation case (see *PF (Nigeria) v The Secretary of State for the Home Department* [2015] EWCA Civ 251). The judge recognised that the public interest in deportation extends beyond the risk of re-offending – see paragraph 73 (as set out above). At first blush the judge appears to have, to some extent, placed emphasis on factors that have little relevance, namely, the efforts made towards rehabilitation (see paragraphs 74 and 75 of the decision, as set out above). In *Velasquez Taylor v Secretary of State for the Home Department* [2015] EWCA Civ 845 ('*Taylor*') the Court of Appeal held:

> "20. Mr. Husain submitted that the Upper Tribunal had itself erred in law in reaching its conclusion, in particular in failing to give sufficient weight to the degree of rehabilitation that the appellant had achieved. In that connection he reminded us that in **Danso v Secretary of State for the Home Department [2015] EWCA Civ 596** the court had recognised that rehabilitation was a factor to be taken into account and could in some cases be an important factor.
>
> 21. I would certainly not wish to diminish the importance of rehabilitation in itself, but the cases in which it can make a significant contribution to establishing the compelling reasons sufficient to outweigh the public interest in deportation are likely to be rare. The fact that rehabilitation has begun but is as yet incomplete has been held in general not to be a relevant factor: see **SE (Zimbabwe) v Secretary of State for the Home Department [2014] EWCA Civ 256** and **PF (Nigeria) v Secretary of State for the Home Department [2015] EWCA Civ 596**. Moreover, as was recognised in **SU (Bangladesh) v Secretary of State for the Home Department [2013] EWCA Civ 427**, **rehabilitation is relevant primarily to the reduction in the risk of re-offending. It is less relevant to the other factors which contribute to the public interest in deportation**. In any event, the tribunal in this case was clearly aware of the extent to which the appellant had rehabilitated herself. It was for the tribunal to decide how much weight should be attached to that. [emphasis added]."

39. As set out in *Taylor* rehabilitation is less relevant but it is not irrelevant. When considered in the context of the decision as a whole we do not consider that

weighing rehabilitation in favour of the claimant has tainted the judge's appreciation of the great weight that must be afforded to the different purposes served by deportation, namely, to reflect public revulsion at serious crime, to protect the public from further offending and to deter others who might be tempted to act in a similar way. At paragraph 80 in his decision the judge, subsequent to considering the effect of rehabilitation, reiterated that:

> "... the public interest is, as stated, weighty. The appellant's index offence was rather serious, involving as it did significant sums of money …"

40. We do not find any material error of law in the First-tier Tribunal's decision in respect of the appreciation of, and great weight to be afforded to, the public interest in deportation.

41. With regard to the second ground of appeal (which overlaps to some extent with the first ground) the Secretary of State focused on the judge's findings in relation to the claimant's children and argues that the judge's assessment of whether it would be 'unduly harsh' for the claimant's children to remain in the UK if he were deported was conducted solely through the prism of the best interests of the child. In particular, the Secretary of State drew attention to paragraph 67(xii) where the judge made a finding that it is:

> "… highly likely that some or all of the six children will suffer emotional harm and possibly serious emotional harm at the loss of face to face contact with the appellant (and with their half siblings, which will be a consequence)."

42. As set out above Ms Brocklesby-Weller accepted that there was no issue that could be taken with the judge's findings in respect of sub-paragraphs (i)-(xi) of paragraph 67. It is clear to us that the finding in sub-paragraph (xii) is a conclusion based on the cumulative facts in the preceding sub-paragraphs. We do not accept Ms Loughran's submission that there is objective evidence to support the concluding finding. The CAFCASS evidence was that it was in the children's best interests to have a relationship with the claimant and that it was the wish of the twins to see him every day. There was no evidence that the children would suffer severe emotional harm if that were not the case. The judge's concluding finding is one that was not necessary. It is not a 'common sense' finding that requires no expertise and, in our view, was not one that the judge ought to have engaged in the absence of some expert evidence.

43. However, this is only one element of the judge's findings in respect of the effect of deportation on the claimant's children. It does not form the basis of the final conclusion when the judge undertook the balancing exercise. We do not consider that this erroneous finding is sufficient to taint the judge's assessment of whether deportation would be unduly harsh.

44. The Secretary of State asserts that there is nothing over and above the normal consequences of deportation in this case. It is clear from the case law that unduly harsh is a high threshold and that for the consequences to be harsh they must be severe or bleak, and to be unduly so they must be inordinately and/or excessively

harsh. At paragraph 63 and 64 the judge identifies correctly the high threshold of the test to be applied.

45. If one looks at the decision disjunctively there is the appearance that the judge might have considered the 'unduly harsh' test solely through the prism of the children's best interests. Paragraph 66 concerned the consequences if the children relocated to Ghana and opens with:

> "Taking each matter in turn, I find the consequences … would be "severe" and "bleak" and "inordinately" and "excessively" harsh …"

46. Paragraph 67 opens with:

> "Furthermore, I find that the consequences for the children of being separated from the appellant, should he be removed to Ghana would be "severe" and "bleak" and "inordinately" and "excessively" harsh because:
>
> …"

47. The judge then sets out 11 factual findings with regard to the children. In these 2 paragraphs the judge does not refer to the balancing exercise or the public interest. We accept Ms Loughran's submission that a decision must have a structure and the fact that these paragraphs are set out prior to the public interest considerations does not lead to the conclusion that the judge had considered the unduly harsh test solely by reference to the children's interest.

48. We have considered very carefully the decision as a whole. The judge recorded in paragraph 64 that in the case of *KMO* it was held that the assessment of whether deportation would be unduly harsh imports a balancing exercise and requires consideration of the statutory presumptions in the 2002 Act. He noted the conflict between the Upper Tribunal's decision in *MAB* and that the Upper Tribunal in *AB (paragraph 399(a)) (Algeria)* [2015] UKUT 00657 (IAC) preferred *KMO*. As set out above the approach in *KMO* has been approved by the Court of Appeal in *MM (Uganda)*. At paragraph 68 under the heading "Public Interest Considerations" the judge set out:

> "I follow *KMO* which requires a balancing exercise. This in turn requires and includes an engagement with part 5A of the Nationality, Immigration and Asylum act 2002 (as amended by s19 of the Immigration Act 2014 and which came into force on 28 July 2014). I am aware of the provisions in part 5A of Section 117A, 117B and 117C of the 2002 Act and the statutory presumptions therein. I have taken into account than in considering the public interest question as regards to the appellant's claim under article 8 of the 1950 Convention and the weight should be given as regards to the appellant's private or family life in accordance with section 117B (4) and (5) and Section 117C (1) (2) (3) (4) and (7) thereof, and also the general principles of immigration policy set out in section 117B (1), (2) and (3) thereof.
>
> I accept that the maintenance of an effective immigration control is in the public interest (section 117B (one)). I find however that the appellant is able to speak English and therefore would be less of a burden on taxpayers and better able to integrate into society (section 117B(2)). I further find that he receives a regular income from his business (together with the student maintenance grant) and is

> therefore not a burden on the taxpayer and is better able to integrate into society (section 117B(3)). I am aware nevertheless that these two factors cannot count as positive elements to be weighed in the balancing exercise. I note also that he has establish extensive family life in relation to 6 children during lawful residence in the UK (section 117B(5)). Section 117B(6) cannot be applied because the appellant is a person liable to deportation."

49. At paragraph 70 the judge sets out in full section 117C of the 2002 Act.

50. The judge then considered the claimant's convictions and the public interest in deportation in paragraphs 71-76 (some of which we have set out above in relation to the first ground of appeal).

51. The crucial paragraph is paragraph 77. The heading immediately above this paragraph is "Determination". We have set out this paragraph in full above but as it is crucial to this issue we set it out again:

> "77. So the question is whether, viewed in light of the guidance and the appellant's family life with his six children, his deportation would be unduly harsh on the children so as to outweigh the strong public interest in deportation."

52. There then follows in paragraphs 78 -83 the balancing exercise that the judge was required to undertake. The judge took into account all the relevant factors and weighed those both against and for the claimant. The judge recognised that the best interests of the children were a starting point but not necessarily decisive (paragraph 78). He had identified a number of significant factors in paragraph 67 and weighed those in the balance as set out in paragraph 82 of the decision. We acknowledge that in paragraph 83 the judge's reference to the relationships as being solid is irrelevant as there must be a substantial and subsisting relationship before paragraph 399(a) is engaged.

53. The judge had the benefit of hearing the evidence at first hand. He was able to assess the credibility of the claimant and the witnesses when they gave evidence about the consequences for the children if the claimant were to be deported. He considered the CAFCASS reports and the lack of co-operation of the children's mothers in maintaining contact with the claimant and contact between the siblings which would effectively cease if the claimant were deported.

54. The First-tier Tribunal was required to carry out an evaluation. There is a range of possible conclusions which the First-tier Tribunal might have reached, upon carrying out the balancing exercise, without committing any error of law. The judge in this case considered that the Article 8 claim was very strong indeed.

55. We consider that this case is very finely balanced and that we may well have reached a different conclusion. Looking at the determination as a whole, however, we are satisfied that the First-tier Tribunal directed itself correctly and had proper regard to the relevant criteria in reaching its overall conclusion as to the proportionality of deportation, and that the deficiencies we have noted do not

justify a finding of a material error of law. It cannot be said that the decision reached by the First-tier Tribunal was not one that was open to it.

56. We have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously. Having considered all the circumstances and evidence we do not consider it necessary to make an anonymity direction.

Decision

There was no error of law such that the decision of the First-tier Tribunal is set aside. The appeal of the Secretary of State is dismissed.

Signed P M Ramshaw Date 15 April 2016

Deputy Upper Tribunal Judge Ramshaw