Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/02319/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14 July 2016	**On 20 July 2016**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

SA
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Haruna, of Mandy Peters Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Guinea, date of birth 01 March 1975, appeals against the Respondent's decision of 04 November 2013 that s.32(5) of the UK Borders Act 2007 applies to him (the making of an automatic deportation order). The Appellant's appeal against this decision was initially allowed by the First-tier Tribunal panel, consisting of Judge Vaudin d'Imecourt and Mr A.E. Armitage (non-legal member), in a determination promulgated on 25 September 2014. The Respondent sought permission to appeal the First-Tier Tribunal's decision and, following a hearing on 12 August 2015, the Upper Tribunal found that the First-Tier Tribunal's decision contained material errors of law.

2. The First-tier Tribunal erred in law by focusing entirely on sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002 whereas it should have first considered whether the Appellant met the requirement of paragraph 399 of the immigration rules. the First-tier Tribunal additionally erred in law by failing to sufficiently appreciate the nature of the 'unduly harshness' test and failing to assess or explain why the break-up of the Appellant's immediate family unit would have unduly harsh consequences on the children if they remained in the United Kingdom and their father was deported. The First-tier Tribunal also concluded that, if the Appellant were removed, there would be 'little hope of contact' with him, but it was unclear on what evidential basis this conclusion was reached. The Upper Tribunal additionally found that the First-tier Tribunal erred in law by taking into account public interest factors in its assessment under paragraph 399. The Court of Appeal in *MM (Uganda) & Anor v Secretary of State for the Home Department* [2016] EWCA Civ 450 however resolved conflicting case law on this issue and it is now clear that any assessment of the term 'unduly harsh' under the immigration rules must import public interest considerations.

3. Although the matter was initially listed for a resumed hearing on 17 December 2015 to enable further evidence to be provided by the parties, for various reasons that hearing had to be adjourned. There was a Case Management Review Hearing on 11 May 2016 at which the Appellant indicated that he did not have a legal representative but was hoping to instruct a representative. It was additionally brought to the Tribunal's attention that the Appellant was facing a further criminal matter and had a trial in a Crown Court warned list for 31 May 2016. The Appellant was convicted of a criminal offence relating to burglary and received a three-year sentence at Blackfriars Crown Court on 3 June 2016.

4. Mandy Peters Solicitors were instructed by the Appellant on 7 July 2016 and made an adjournment request on that day (although the request was only received by the Tribunal on 12 July 2016) in order to take proper instructions from the Appellant. This adjournment application was refused on 12 July 2016. No further adjournment application has been made.

Background and preserved factual findings

5. In the error of law decision promulgated in August 2015 the Upper Tribunal held that the primary factual findings made by the First-Tier Tribunal were to be maintained.

6. The First-tier Tribunal accepted that the Appellant has a daughter born in the United Kingdom on 29 November 2006, and another daughter born in the United Kingdom on 09 January 2013. He now claims to have a son born after the First-tier Tribunal decision. Although no evidence was adduced in relation to his son the First-tier Tribunal accepted that the Appellant's partner was pregnant and no issue has been raised by Ms Isherwood in respect of this

assertion. I therefore accept that the Appellant does have a son born sometime in late 2014. The oldest daughter is now 9 years old. She has Indefinite Leave to Remain. Her siblings are British citizen.

7. The First-tier Tribunal accepted that the Appellant was in a genuine and subsisting relationship with MS, the mother of his children. She is a national of Guinea who was granted Indefinite Leave to Remain on 09 December 2009 on the basis, according to the decision letter, of her 'strength of connections in the United Kingdom, length of residence in the United Kingdom and/or compassionate circumstances.' The Appellant and MS underwent a marriage by proxy in Ghana on 25 August 2008.

8. The First-tier Tribunal was satisfied the Appellant was a caring and loving partner and father to his children. The First-tier Tribunal accepted evidence from his daughter's school confirming that he dropped her off and picked her up at school. The First-tier Tribunal accepted that the Appellant took his children to their GP/hospital appointments, that he took them to playgrounds, and that he cooked at home for everyone. It was accepted that he was a loving father who cooked, cleaned and maintained the house. The First-tier Tribunal was consequently satisfied that the Appellant was in a genuine and subsisting relationship with a Qualifying Partner and Qualifying Children as defined in section 117D of the Nationality, Immigration and Asylum Act 2002. The First-tier Tribunal found the best interests of the children required that the Appellant remain in the United Kingdom.

9. The First-tier Tribunal additionally recorded a concession by the Home Office Presenting Officer that the Appellant's partner and children would not be able to go to Guinea with him. The Upper Tribunal rejected an attempt by the Respondent to go behind this concession at the error of law hearing as it was validly made by the Presenting Officer in the First-tier Tribunal and had not been part of the Respondent's Grounds of Appeal. No attempt was made by Ms Isherwood to revoke the concession at the resumed hearing.

10. The First-tier Tribunal found the Appellant had an appalling immigration history and that he had told many untruths. This included the use of difference aliases with different dates of birth and the making asylum claims in respect of different countries. On 14 May 1999 the Appellant first came to the notice of the Respondent under an assumed name (LM) and using a different date of birth and claimed to be from Gambia. He claimed asylum in that name, was granted temporary admission with reporting restrictions, but failed to report after October 1999 and was recorded as an absconder. On 18 May 2003 the Appellant was arrested by the police for motoring offences and gave an entirely different name (MC) and date of birth on this occasion, claiming to be from Sierra Leone. The Appellant subsequently claimed asylum again in the identity of MC. This asylum application was refused and the Appellant lodged an appeal against the refusal, still under the assumed name. On 15 June 2004 the Immigration Fingerprint Bureau at Lunar House received a letter from the Federal

Department of Justice and Police in Switzerland, dated 10 June 2004, in which they informed the United Kingdom authorities that the Appellant was currently staying in Switzerland. The Appellant then returned to the United Kingdom. His asylum appeal was dismissed on 29 July 2004. His appeal rights became exhausted on 21 December 2004 and he then failed to report as required under his temporary admission conditions.

11. On 10 August 2006 the Respondent received a letter from the immigration Fingerprint Bureau of the Swiss authorities informing them that the Appellant was staying in Switzerland under the assumed name LM and claiming to be from Gambia. On 3 April 2007 the Appellant claimed asylum under his current identity and providing his current date of birth. He claimed to be at a Guinean national and said that his wife and daughter remained in the Ivory Coast. Following a fingerprint check which revealed that the Appellant had previously claimed asylum in the identity of MC he withdrew his asylum claim and stated that he wished to return to the Ivory Coast. He subsequently absconded. On 22 May 2007 the Appellant claimed asylum in Ireland using his current identity and nationality. The Appellant was returned to the UK pursuant to the Dublin Convention.

12. On 24 June 2009 the Appellant was convicted of conspiracy to commit fraud by false representation and sentenced, on 13 July 2009, to 15 months imprisonment. The Respondent subsequently set in motion the machinery leading to the decision that the Appellant was a foreign criminal who was subject to the automatic deportation provisions.

13. The First-tier Tribunal noted the Appellant's offence was serious but that he had not re-offended since his release on 02 December 2009. The First-tier Tribunal noted the content of a pre-sentence report indicating the Appellant was at low risk of offending, that he had lawfully worked in the United Kingdom, and that he had been cohabiting with his partner and children since 2012.

The resumed hearing

14. At the start of the resumed hearing Ms Isherwood handed to me a PNC report indicating that the Appellant received a three year sentence on 3 June 2016 for an offence of burglary with intent to steal at a non-dwelling, committed on 6 April 2014. The PNC document indicated that the Appellant pleaded guilty to the offence. Mr Haruna however indicated that the Appellant did not plead guilty, that he still maintained his innocence and that he was challenging his conviction. Other than the PNC printout there was no other documentation relating to this offence or the alleged challenge to the conviction. Mr Haruna informed the Tribunal that the Appellant was not present because he was a serving prisoner. Mr Haruna confirmed that the Appellant was not relying on any further documentary evidence.

15. The Appellant's partner, MS, adopted her 2014 statement. She began to give evidence relating to the circumstances of the Appellant's most recent offence. I informed both her and the Appellant's representative that there was no basis for me to go behind the Appellant's conviction. MS confirmed that the Appellant pleaded not guilty and was found guilty after trial. She explained that she almost paid £1000 for an independent social worker, money obtained through her job as a sole trader selling jewellery and makeup in a market. But when the social worker first came to her house the Appellant was already detained. After explaining the situation to the independent social worker, who told MS that she did not know what to do as it was her job to consider the relationship between the Appellant and her children, MS asked for the money to be returned and indicated that she would instead look for a solicitor for her husband.

16. The Appellant's partner indicated that, in order to be in a marriage, she had to be with her husband. She would not consider returning to Guinea for fear that her daughters would be subjected to FGM. She said she was depressed and had not yet informed her oldest daughter of the Appellant's incarceration. The oldest daughter believed her father was in Ireland. The partner said that she took the children to school now that the Appellant was in prison. Because of this the partner could not go to the market during weekdays as she had to be there at 5am in order to get a space for her stall. The Appellant was the one who used to take the children everywhere. When asked what she thought the effect on her children would be if the Appellant never came home MS became very upset and said that this would greatly affect her children. She described how her youngest used to fall asleep playing with the Appellant's ears, how she took her three-year-old to see the Appellant in prison, and that her oldest would suffer the most. MS described how the Appellant cooked food that her children preferred to eat. She claimed she would have to claim benefits if unable to work.

17. In cross-examination, when asked whether she was aware of the Appellant's abuse of the immigration system, MS said that she knew many Africans come to the UK with different names in order to run away from problems. When asked whether she was aware that the Appellant used names and claimed to come from different countries she said she had not been aware. With respect to his first criminal offence the Appellant's partner claimed that he had made a mistake, possibly because his English was not good and he had been in the wrong place. She knew he was innocent in respect of his most recent conviction. She maintained that the Appellant had never been to Switzerland and that the Home Office had not produced a photograph of the person who claimed asylum in Switzerland using an identity previously used by the Appellant. The Appellant's partner confirmed that she received child tax credits, working tax credits and child benefit. She said that she had to manage with the Appellant in prison. Their oldest daughter had not seen the Appellant but they had spoken to each other on the telephone. MS had taken the youngest two children a couple of times to see the Appellant. MS had spoken to her oldest child's

teacher and informed the teacher that the child did not know of her father's incarceration.

18. Although she accepted that she had not provided any further documentary evidence to show the impact of the deportation decision on her or her children MS said that she knew what the impact would be and no document was capable of showing how she felt. She made reference to a supportive letter obtained from a neighbour but this was not produced. There were no letters from the school as MS had not asked them to provide any letters. When questioned about the absence of any medical evidence supporting her claim to be suffering from depression the Appellant's partner said that she did not need to be on pills to be depressed. She claimed that only G-d knew how she suffers at home. She did not want to discuss the possibility of the family relocating to Guinea because she did not want to put her children in the same position that she had faced. She described the effect of FGM on her relationship with her husband. Although she had taken her middle child to Guinea in 2014 to see her aunt on her return she had been questioned for two hours by an immigration officer who did not believe that the photo in the child's passport was that of the child. On prompting from me she then stated that when she was in Guinea in 2014 "they" wanted to circumcise her daughter. It was suggested to MS that if she were visiting only her husband her children would not be at risk from any other family member. In reply MS claimed that someone would just come and try to circumcise her daughters and that she could not keep an eye on them 24 hours a day.

19. When asked what family the Appellant had in Guinea MS stated that he had a daughter living in the country, who lived in a border area. She said that the Appellant and his daughter in Guinea talk on the telephone. Her own children had spoken to the Appellant's daughter in Guinea, although there was a significant language barrier. When asked whether the Appellant was likely to obtain employment in Guinea MS said that getting a job depends on having relationships with people. Her parents were dead and she only had an aunt in Guinea. She had returned to Guinea twice, in 2011 and 2014. The person she described as an aunt was not actually a blood relative but somebody who took care of her when MS was in the country. MS said that she had a sister in the UK who was mentally unbalanced, suffered from sickle-cell, and had another illness. MS had cared for the sister from 2002 until 2007 when she was transferred to Manchester. MS returned to London in 2012.

20. In response to questions from me the Appellant's partner said that her three children were in good health although her oldest may be suffering from asthma. When asked how her oldest daughter was doing at school MS said that her daughter was good at maths. The daughter enjoyed school but was sometimes bullied a little by her friends. MS confirmed that she herself had friends in the UK.

21. Both representatives agreed that the focus of the appeal would be the application of the undue harshness test. Ms Isherwood invited me to find MS an incredible witness as she was fully aware of the Appellant's abuse of the immigration system and because she attempted to minimise his criminality. The previous opinion in a pre-sentence report indicating the Appellant was at low risk of repeat offences was, in light of his most recent offence, inaccurate. I was reminded of the absence of any evidence that the most recent conviction was being challenged. Applying *MM (Uganda)* I was asked to note the seriousness of the Appellant's offending, his immigration history, and the absence of documentary evidence vis-a-vis the impact on the children. Undue harshness was said to be a high threshold and I was referred to *MAB (USA)* [2015] UKUT 435 in support. Whether reference to the authority of *SS (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 550 the possession of children, although a primary consideration, could be outweighed by other public interest factors.

22. Mr Haruna submitted that the Appellant's partner was credible, her evidence had not wavered and she provided truthful answers. It was accepted that there was no evidence that the Appellant was challenging eviction. It was submitted that a three-year offence was not the most serious of offences. It was not disputed that the Appellant had a genuine and subsisting relationship with his partner and children. I was referred to the evidence of MS in respect of the impact on the children. I was invited to find that the Appellant's partner was depressed. When assessing whether the Appellant's deportation had an unduly harsh impact his children and his partner I was urged to consider all relevant factors holistically, applying *MM (Uganda)*.

Discussion

23. It is not in dispute that the Appellant is a "foreign criminal" within the definition in s.117D(2) of the Nationality, Immigration and Asylum Act 2002. It is submitted on the Appellant's behalf that paragraph 399(a) applies to him as he has a genuine and subsisting parental relationship with children under the age of 18 who are in the UK and who are either British citizens, or who has lived in the UK for at least seven years immediately preceding the date of the immigration decision, and because it would be unduly harsh for any of the children to remain in the UK without the Appellant.

24. In light of the preserved findings described in paragraphs 6 to 8 of this decision I proceed on the basis that the Appellant continues to have a genuine and subsisting relationship with his qualifying children (although his physical contact with his children is currently much more restricted as he is now serving a 3 year sentence) and that it is in his children's best interests for him to remain in the UK.

25. I am guided by the authority of MM (Uganda) where, at [26], Laws LJ stated, "*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."

26. In assessing the public interest I have taken into account the seriousness of the Appellant's two offences. Whilst his first offence could be categorised as being towards the lower end of the spectrum, the same cannot be said of his most recent offence. A sentence of three years imprisonment, although lower than the threshold required in both the immigration rules and section 117C for the application of the "very compelling circumstances" test, is still indicative of a serious offence. I take into account that the public interest in deporting the Appellant acts as an expression of society's revulsion at his offence, and that it acts as a deterrent to other foreign nationals against committing offences. I additionally take into account the public interest in ensuring public confidence in the integrity of the immigration system. I note the absence of any evidence that the Appellant is in the process of challenging his conviction. Even were there to be such evidence, the conviction currently stands. I have also taken into account the Appellant's quite appalling immigration history as outlined in paragraphs 10 to 12 of this decision.

27. I take into account the Appellant's claim to be full of remorse for being involved in criminal activity, and his assertion that he will never do anything illegal again in this country. The genuineness of this assertion is significantly undermined by the Appellant's recent criminal conviction. The First-tier Tribunal noted that the Appellant had not re-offended since his release on 02 December 2009 and took account of the content of a pre-sentence report indicating the Appellant was at low risk of offending. The PNC report however indicated that the burglary offence was committed on 06 April 2014, some 4 months before the Appellant's First-tier Tribunal hearing. In light of the Appellant's recent criminal conviction I can attach little weight to the pre-sentence report. I have not been provided with a pre-sentence report relating to the Appellant's most recent offence.

28. I note that the Appellant does not appear to have ever resided lawfully in the UK (his grant of Temporary Admission does not mean that the Appellant was lawfully admitted into the UK). His relationship with his partner was established when the Appellant was not lawfully present. Both he and his partner were aware of his precarious immigration position.

29. In her statement dated 18 August 2014 the Appellant's partner claimed she felt extremely stressed and depressed. She claimed she could not function as a human being and saw her whole world collapsing. She was having constant nightmares but tried to pull herself together for the sake of their children. She claimed she was put on antidepressants at the time. No medical evidence was however provided to the first-tier Tribunal to support the partner's claimed depression and her claim to be receiving antidepressants. At the resumed hearing the partner again claimed that she was depressed but was able to manage for the sake of the children. No medical evidence to support the partner's alleged depression has been provided, despite the passing of almost 2

years since the first-tier Tribunal hearing. Whilst I accept that the partner is stressed, both as a result of the incarceration of her husband, the need to care for three children on her own, and the uncertainty surrounding her husband's immigration status, I am not prepared to accept, in the absence of any medical evidence, that she is incapable of functioning as a human being. In reaching this conclusion I take account of the fact that she continues to work as a market trader, albeit that this is now restricted to weekend work. I accept also that the partner may experience greater difficulty in continuing her employment as a sole trader in the absence of the Appellant, who undertook a great deal of childcare. The partner however is in receipt of child tax credits, working tax credits and child benefit. No doubt if unable to undertake employment as a result of an absence of childcare support she and the family would be entitled to benefits on the basis of her unemployment, although I appreciate that this would place greater financial strain on the government and is therefore a factor that carries in the Appellant's favour. The Appellant's partner is not alone as she has a sister in the UK, although her sister appears to have care needs of her own, and friends in the UK. It was not suggested that the Appellant's deportation would render his family destitute, or that their safety and welfare would be compromised.

30. I am satisfied that it would be in the children's best interests for the Appellant to remain in the United Kingdom. Despite the Appellant being a poor role model he has acted as a loving and devoted father. Although not a paramount consideration, the children's best interests are a primary consideration to which I attach significant weight. This is a very relevant factor weighing in the Appellant's favour when assessing the proportionality of the decision in respect of the relationships between him and his children and the manner in which they are affected.

31. There is however very limited information relating to the actual impact of the Appellant's deportation on the children. It is surprising that no further evidence from the oldest daughter's school has been provided. There is consequently no independent evidence describing the likely impact on the child of her father's removal from this country. The children are all healthy although the oldest daughter may be suffering from asthma. The youngest two children are not yet in school. The Appellant's partner said that her oldest daughter likes school, although she was subject to some bullying from her friends. Once again, there is no evidence from the school itself. The Appellant's partner indicated that she had commissioned an independent social worker to write a report on the interaction between the various family members and to comment on the likely impact of the deportation decision on the children. Following the Appellant's arrest and incarceration no report has been commissioned. There is no medical evidence, such as a letter or report from a GP, indicating that the children either require particular assistance or support, or that they are experiencing any medical or mental health issues. I fully accept that the decision to deport the Appellant has already had an adverse impact on the children's generally happiness, particularly with respect to the oldest child. It is only natural for the

children to feel anguish and heartache at the prospect of being separated from their father.

32. I fully accept that normal family relationships between spouses and between a parent and his minor children cannot be maintained through remote or periodic forms of communication or contact. Although separating the Appellant from his partner and children will clearly undermine the strength and nature of these familial relationships there is no evidence to indicate that all communication between the Appellant and his family would be severed. No evidence was produced suggesting that Internet communication was not available in Guinea. There is no reason why the Appellant could not continue to speak to his children and his partner by telephone, as he already does with his oldest child living in Guinea. Contact could, alternatively, also be maintained through periodic visits by the partner and her children to Guinea. She has already returned to Guinea twice, in 2011 and 2014. Whilst I accept that the partner has a genuine fear of permanently residing in Guinea due to the possibility that her daughters could be subjected to FGM, I am not satisfied that they would be exposed to any real risk of this occurring in the context of a short visit to the Appellant. The partner has not offered any rational reason as to how her children would come to be targeted during a short visit to see only the Appellant.

33. Having holistic regard to the evidence before me I am not satisfied that the Appellant has shown that, on the balance of probabilities, it would be 'unduly harsh' for the children to remain in the UK without him, having regard to the seriousness of the Appellant's offending and his appalling immigration history. In reaching this conclusion I take account of the fact that the Appellant's partner is able to care for and provide for her children, that the children are all in good health, and that the Appellant would still have some, albeit much more limited form of contact with his children. The serious impact on the family life relationships is unfortunately a consequence of the Appellant's criminal behaviour, set against his appalling immigration history.

34. Under paragraph 399(b)(i) the relationship between the Appellant and his partner must have been formed at a time when the Appellant was in the UK lawfully and his immigration status was not precarious. The Appellant has never been in the UK lawfully and his immigration status has always been precarious. For these reasons the Appellant cannot meet the requirements of paragraph 399. In any event, and for the reasons already given, I am not satisfied it would be unduly harsh for the Appellant's partner to remain in the United Kingdom without him. There is very limited evidence of her claim to depression, and although life may well become more difficult in the Appellant's absence, there is insufficient evidence before me to suggest that MS would be unable to provide for her and her children's safety and welfare.

35. In assessing whether there are "very compelling circumstances" over and above those described in paragraph 399 and 399A I have taken into account the

relevant considerations in section 117B. I am satisfied that the Appellant is fluent in English and, were he given permission to work, he would be able to do so. I take into account that the maintenance of effective immigration controls is in the public interest. The Appellant's relationship with his partner was formed at a time when he was in the United Kingdom unlawfully and I therefore attach little weight to that relationship, as required by s.117B(4). In relation to the considerations in s.117C, I take into account that deportation of foreign criminals is in the public interest, and that the more serious the offence committed by the foreign criminal, the greater is the public interest in his deportation. I have already indicated that the Appellant's two offences are serious. With respect to s.117C(5) I have already found that the effect of the Appellant's deportation on his partner and children not be unduly harsh. Having regard to all these factors cumulatively, I find there are no very compelling circumstances over and above those described in paragraph 399 and 399A.

36. I consequently dismiss the appeal.

Notice of Decision

The First-tier Tribunal made a material error of law. The decision has been remade, and the Appellant's appeal on human rights grounds is dismissed.

Direction Regarding Anonymity – Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

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

Signed Date 19 July 2016

Upper Tribunal Judge Blum