Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00554/2014**
DA/00555/2014
DA/00556/2014
DA/00557/2014
DA/00558/2014
DA/00559/2014
DA/00560/2014
DA/00568/2014
DA/00569/2014

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 8 February 2018	**On 18 April 2018**

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MNG, YM, HM, HM, HM, MM, SM, MNM, IMM
(ANONYMITY ORDER MADE)

Respondents

Representation:

For the Appellant: Mr I Richards, Senior Home Office Presenting Officer.
For the Respondents: Mr Bandegani, instructed by Hoole & Co Solicitors (Brighton)

DETERMINATION AND REASONS

1. This is the Secretary of State's appeal against a decision of the First-tier Tribunal allowing the appeals of the respondents. I shall refer to the first respondent as "the claimant". The other respondents are members of the claimant's family.

2. The claimant arrived in the United Kingdom on 26 October 2006 with his wife (the second respondent) and three of their children (the fifth, sixth and seventh respondents). They claimed asylum. They were joined by their two eldest children (the third and fourth respondents) in 2009. Their other four children were born in the United Kingdom. The asylum claim that they made on arrival was refused. The appeal against that refusal was dismissed. On 1 September 2008 the claimant was convicted of obtaining leave by deception and assisting unlawful immigration. There were four offences. The claimant was sentenced to fifteen months imprisonment in respect of each offence, with the sentences to run concurrently. As a result of these offences the Secretary of State decided to make a deportation order against the claimant and against the other respondents as his family members. The order was made under the automatic deportation provisions of the UK Borders Act 2007, on 13 March 2014.

3. On appeal against the deportation order, the First-tier Tribunal examined the history of the claimant and the other members of his family, and the evidence before them, in some detail. The claimant has significant sight and mental health difficulties. His wife also has significant mental health difficulties. The whole family has significantly integrated into the local community. The First-tier Tribunal concluded at para 26(b)(ii) that:

> "A crystal clear picture was painted of a very special and talented family, treasured by all who know and deal with them, the children being the examples to their peers."

4. Further, the eldest child was described by the First-tier Tribunal in the following way:

> "A quite exceptional young woman who has outstanding results in her studies to date and has gone a very long way to help others less fortunate than herself… she is studying AS levels at school and has prospects of study at Oxford and a career in medicine."

5. The First-tier Tribunal allowed the appeal of all the respondents under the immigration rules, finding that it would not be reasonable to expect three of the respondents (the three children who had arrived with the claimant and his wife and had therefore lived in the United Kingdom for more than seven years at the date of the Secretary of State's decision) to leave the

United Kingdom and that there was no family member other than the claimant and his wife able to care for them in the United Kingdom.

6. It is accepted that in doing so, the First-tier Tribunal erred in law. It applied paragraph 399(a) of the Statement of Changes in Immigration Rules, HC 395 (as amended) as it was prior to 28 July 2014. It should instead have had regard to that paragraph as in effect on and after 28 July 2014. The question is no longer whether "it would be reasonable to expect the child to leave the United Kingdom", but rather whether "it would be unduly harsh for the child to live in the country to which the person is to be deported".

7. The decision that there had been an error of law in the First-tier Tribunal's determination was made by the Upper Tribunal following a hearing on 31 March 2015. The hearing was then adjourned to allow fuller argument on what should be the outcome of the appeal. There was a further hearing on 16 June 2015, following which the Upper Tribunal issued its decision, again allowing the appeals by the claimant and his family members. The Tribunal began by setting out the facts as found in the First-tier Tribunal, and went on to consider submissions made to it on the meaning of "unduly harsh" in paragraph 399. It cited and followed MAB (para 399; "unduly harsh") [2015] UKUT 435. That was a decision of the Upper Tribunal constituted in the same way as for the appeal being determined. That was to the effect that the word "unduly":

> "… requires that the impact upon the individual concerned be "inordinately" harsh… the impact would be "unduly large" or "excessive" …. It is necessarily fact-sensitive but is focused on the impact on the individual (whether child or partner) concerned."

8. Applying this test to the facts revealed by the evidence, the Upper Tribunal held that it would be unduly harsh to expect the fifth, sixth and seventh respondents to return to Afghanistan and that the appeals of their parents therefore had to be allowed; it would then be "wholly disproportionate" to require the other respondents to be separated from the family unit and returned (or in the case of those born in the United Kingdom, relocated) to Afghanistan. Those were the reasons why the Upper Tribunal substituted a determination allowing the appeals.

9. The Secretary of State sought permission to appeal to the Court of Appeal. Permission was refused by the Tribunal, but granted by the Court of Appeal following its decision in MM (Uganda) and another v SSHD [2016] EWCA Civ 450. As the latter decision made clear, in assessing whether deportation would be "unduly harsh" it is necessary to take into account the conduct to which the deportation decision is a response, for only so will it be possible to determine what is or is not "due" or "undue". By consent, the appeal to the Court of Appeal was allowed and the appeal

was remitted to this Tribunal for redetermination. It came before me at the Cardiff Civil Justice Centre on 8 February 2018.

10. There have been factual developments since the appeal was last before this Tribunal. The eldest of the claimant's children is now a British citizen, so is not liable to deportation in any event. The claimant himself is now blind in both eyes. Each of his family members has of course, now been in the United Kingdom for a further period of time.

11. As required by MM, I consider the seriousness of the offences of which the claimant was convicted. They strike at the heart of immigration law and control, and were properly subject to the level of punishment imposed. On the other hand, they are not at the utmost level of seriousness, they are unlikely to be repeated, and there is no reason to suppose that by reason of them the claimant is a person who poses any risk to the community in the United Kingdom now. I set against the public interest in securing the deportation of the claimant and his family, the strongly positive findings of the First-tier Tribunal, and the subsequent factual developments.

12. Although it is clear that, as the Court of Appeal noted, the Upper Tribunal erred in law in failing to take into account how serious the claimant's offending was, when that matter is looked at in the context of the facts of this case as a whole, it rather assists the claimant and his family than otherwise. That is to say, the reasoning process adopted by the Upper Tribunal previously ignored the circumstances of the offence, whereas when they are taken into account it is seen that this case falls towards the lower end of those cases in which the public interest requires deportation. Looking at the matter in the round as I do, I reach the conclusion that it would be unduly harsh to require those of the claimant's children who had been in the United Kingdom for more than seven years at the date of the decision to live in Afghanistan. In the circumstances, it follows, for the reasons given by the Upper Tribunal in its previous determination, and set out above, that the appeals of the claimant and all the other respondents now fall to be allowed. The appeal of the respondent who has become a British citizen falls to be allowed for that reason in addition. My decision on the appeals brought to the First-tier Tribunal is accordingly that they all be allowed.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 13 April 2018.