



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: DA011362014

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 27 April 2016**

**Decision & Reasons  
Promulgated  
On 23 May 2016**

**Before**

**THE HONOURABLE MR JUSTICE TURNER  
and  
DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**BONNY NGU NKEMAYANG  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Ms A Brocklesby-Weller, Home Office Presenting Officer  
For the Respondent: Ms A Watterson, Counsel instructed by Chase Legal Services

**DECISION AND REASONS**

1. The appellant in this case is the Secretary of State for the Home Department. To avoid confusion we will refer to the Secretary of State and to Mr Nkemayang as the appellant as he was before the First-tier Tribunal.
2. The appellant is a citizen of Cameroon. He was born in 1974 and married a British citizen in Cameroon in 2000. He arrived in the United

Kingdom in January 2003 and then made an application for indefinite leave to remain as a spouse. Not long after that, in 2004, he was convicted of assisting illegal entry for which offence he served a prison sentence of three months. In December of that year his application for indefinite leave to remain was refused. He appealed and that appeal was dismissed. Just a little over a year later, in May 2006, he was arrested by Leicester police and served with illegal entry papers. He was subsequently granted temporary release.

3. He has three children all of whom were born in this country, in May 2001, April 2004 and December 2006 respectively. In December 2008 he was granted indefinite leave to remain. It was not long after that that he was convicted in October 2009 of failing to provide a specimen of breath for analysis. He received an eighteen month suspended prison sentence and a supervision order and was disqualified from driving.
4. In May 2013 he was convicted before a judge and jury at Warwick Crown Court of an offence of burglary and theft against his employers and received a sentence of eighteen months' imprisonment. Following that he was served with a liability to deportation notice on 18 July 2013.
5. The deportation decision was challenged by the appellant by way of appeal to the First-tier Tribunal and that appeal was successful and the decision in that case was promulgated on 3 February 2015. It is against that decision that the Secretary of State appeals before this Tribunal.
6. The appellant is the father of three children, a 7 year old boy and two daughters aged 10 and 13. Unhappily he separated from their mother in 2010. He now lives in Birmingham and they live in Coventry.
7. The background is set out in the decision of the First-tier Judge and the picture painted can be derived from paragraphs 7 to 9 inclusive of the decision. It is worth reading out in full. The evidence came from the appellant, from the mother of the children to whom the appellant is the father and Dr Nkemayang who lives in Worcester.
8. The case for the appellant was set out in a witness statement which he adopted and he said that although he split up from the mother of his children in 2010, they kept on good terms and he had maintained regular contact with them. He said that two at that stage were at primary school and the oldest daughter was at secondary school. He said that he tried to involve himself as much as he could in their upbringing with helping them with school work and their general development and he said that before his prison sentence he used to work nights and it was within that context that the offending took place. He said that he had always been available to help the children, particularly in travelling to and from school before he was sent to prison. He said that he had to take buses in order to transport himself because of the geography as between Birmingham and Coventry. He expressed shame as to his conviction and said that he would be

terrified to lose contact of the children, saying that he would very rarely see them again if he were deported to Cameroon.

9. He referred to his own medical condition which was not featured in submissions made before me and which is not of central importance to the resolution of this case. He referred to the fact that he had been classed as having a low risk of reoffending and to the rehabilitation courses and training courses which he had attended whilst in prison.
10. Mrs Ndikoum who lives in Coventry again adopted her witness statement and effectively said very much to the First-tier Tribunal Judge as the appellant had done, that they had maintained good relationships, he had helped with the homework and taken them to school on a daily basis and she said that he had continued to travel on a daily basis, looking after the children since his release from prison and she said how harsh the effect would be upon herself and the children if he were deported back to Cameroon, the difficulties they would have in affording travelling out there to see him and again asserting that her assessment was that he had a low risk of re-offending. She concluded by saying that over the years he had shown a real commitment to the children.
11. Finally, Dr Nkemayang said that he is aware that the appellant had played a close and involved role with his children and had travelled tirelessly to help with the school runs and that had continued after release from prison, that he was a committed father and that it would have a terrible impact on the children if they were to lose close contact with him and he too predicted that if he were permitted, the appellant could lead a good and law-abiding life in future despite his earlier convictions.
12. The Secretary of State challenges the decision on two broad grounds. The first is effectively an argument that the First-tier Judge failed adequately to take into account adverse features of the case in relation to the appellant. By way of salient example it is suggested that the judge did not sufficiently give weight to an earlier decision in 2006 by a different judge which was adverse to the credibility of the appellant and the mother of his children. Without descending into detail as to the particular complaints that are made in relation to that aspect of the grounds we have found that there is no merit in it. Looking carefully at the judgment of the judge in the First-tier Tribunal he did identify and resolve any issues concerning credibility of the appellant and the witnesses and we are loathe to interfere with that decision. The judge had the advantage of hearing from those witnesses and coming to a conclusion as to the extent, if any, to which such other factors including the 2006 assessment, should be considered. Accordingly, it is at this stage of the judgment that we reject that ground of appeal and go on to consider, in closer detail, ground 2.
13. Having identified the evidence which had been called by and on behalf of the appellant the judge also set out the submissions of the advocates representing each side and eventually came to that part of his decision

which was entitled “Analysis, Findings and Conclusions”, having set out Section 117C of the 2009 Act or at least referred to it and the relevant paragraphs of Immigration Rules the judge went on to consider the analysis which should be based upon those primary facts.

14. Accordingly, as we have already decided, the primary facts were matters for the judge to determine. The question arises now therefore as to whether those primary facts were properly and appropriately analysed and assessed against the legal background.

15. The analysis comprised the following. With reference to the relevant paragraph 399A(2)(b) of the Immigration Rules the Judge found as follows:

“As to (b) (“unduly harsh” for the children to remain in the UK without the appellant) this is perhaps more debateable. It might be argued that they managed without him before (when he was in prison) and could do so again without undue harshness. True it is that the children did not visit him in prison but that was because he did not want to distress them. It is however telling as to the strength of the relationship that an exception was made prior to Christmas 2013 because Denzel particularly asked to see him and all three children visited. As to the evidence of the appellant and Felicite generally, there were some small discrepancies of detail regarding the taking and fetching of the children from school but as Mr Clapham I think rightly submitted, the important point is that the appellant sees them and supports them in various ways on a more or less daily basis. He is firmly in their lives and they in his. After all, if the gravamen of this case were simply that mother would struggle with childcare arrangements and the taking and fetching of the children to and from school, there would be nothing “unduly harsh” about the matter because such difficulties are unfortunately a common consequence of the breakdown of a marriage where there are children. Whilst noting that a previous Tribunal in 2006 had reservations about the reliability of their evidence and therefore approaching their evidence before me with appropriate caution, I find no reason to doubt the overall picture of a devoted father playing an important role in his children’s lives so far as circumstances permit.

20. It bears noting that the children are now 13, 10 and 7. The eldest child is on the threshold of her teenage years, often a difficult time, and the two younger children are in that very significant stage of development identified by Blake J in **Azimi-Moayed**, namely the seven years from age 4. All of this is compounded in this case by the difficulties mother would undoubtedly face in trying to continue her career (the means of sustenance of herself and the children) as a nurse on the one hand and coping with the various demands of the three children on the other. I found Doctor Nkemayang a credible witness and accept that he would only be able to give the most occasional assistance, given his own family commitments, his work and the fact that he lives at least an hour’s drive away from Coventry in Worcester.

21. None of the children are of course to be blamed for the appellant’s wrongdoing and the professional assessment is that the appellant represents a low risk of reoffending. Therefore one can justifiably say that any concerns about the appellant being a ‘bad influence’ because

of his criminal inclinations can on the available evidence be discounted so that it is possible to say that the children's Section 55 best interests are served by having their father present in their lives on a regular basis. Felicite's witness statement was also eloquent as to that. The effect of the appellant's deportation would be to deprive the children of a father figure for at least ten years, if not permanently. That is a serious matter, compounded in this case, as I have said, by the difficulties and stress I would put upon their mother.

22. Thus, taking everything into account, in my assessment it would not be harsh but "unduly harsh" for the children to remain in the UK without the appellant."

The conclusion was that the appeal would be allowed.

16. The relevant law comprises statute and Immigration Rules. The relevant statutory background is to be found in Sections 32 and 33 of the UK Borders Act 2007. Insofar as is relevant to the circumstances in this case Section 32 provides for automatic deportation. It defines a "foreign criminal" as 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. There can be no dispute in this case that the appellant falls into all three of those cases. He is not a British citizen and he has been convicted in the United Kingdom of an offence.
17. Turning to condition (1) or (2), sub-Section (2) is the relevant one which identifies condition (1) is that the person is sentenced to a period of imprisonment of at least twelve months. In this case the appellant was sentenced to eighteen months and therefore falls within these parameters. For the purposes of Section 35A of the Immigration Act 1971 the statute says that the deportation of a foreign criminal is conducive to the public good and finally, in sub-Section (5), the Secretary of State must make a deportation order in respect of a foreign criminal. Accordingly, by the operation of Section 32, subject to exceptions appearing later in the Act, the Secretary of State is under an obligation to make a deportation order.
18. Section 33 of the 2007 Act identifies the exceptions and provides that Section 32, sub-Section (4) and sub-Section (5) do not apply where an exception in this case applies and that is exception (1) 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.
19. The proper approach to the application of the exceptions is further detailed in the Immigration Rules to which we now turn. Paragraph 396 provides:
- "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 s.32 of the UK Borders Act 2007."

Paragraphs 397 and 398 make clear that the Rules aim to encompass rights protected by the European Convention on Human Rights.

Paragraph 397 provides:

“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.”

20. 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. That ambition is reinforced by the heading that follows of “deportation and Article 8” under which the framework of the Rules is set out.

Under paragraph 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

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

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.

21. We turn therefore to those circumstances which were identified as being applicable in the Immigration Rules. Rule 399 provides:

“This paragraph applies where paragraph 398 (b) 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.”

22. Stepping back from the intricate detail of the statutory background and the Immigration Rules it is clear that the central issue which had to be determined by the First-tier Tribunal Judge was whether or not it would be “unduly harsh” for the children to remain in the UK without the person who is to be deported. No one was sensibly arguing that if a deportation order were made that the children would be following their father to Cameroon.
23. It therefore follows that one must have regard to the cases which had been involved in the proper construction of what is meant by “unduly harsh” within the context of the Rules. There was a bifurcation of authority in the Upper Tribunal as to the proper approach which has recently been resolved by the Court of Appeal in the case of **MM (Uganda) v Secretary of State for the Home Department**. That case is as yet unreported. The judgment was made ex tempore but there is a note in relatively full form of the extempore judgment to be found at LTL 21/4/2016. The circumstances of that case were this.
24. The issue arose as to the proper interpretation of “unduly harsh” within the scope of the Immigration Rules and the account given in the short report of the decision of the Court of Appeal is worth setting out in full:

“A Court or Tribunal considering whether deportation would be “unduly harsh” under the Immigration Rules, Rule 399 of the Nationality, Immigration and Asylum Act 2002, Section 117(5) had to have regard to all the circumstances including the deportee’s criminal and immigration history. The more pressing the public interest in removal the harder it was to show the effects of deportation would be “unduly harsh”. Under the Immigration Rules, Rule 399 of Section 117C(5) of the 2002 Act the public interest required a foreign criminal’s deportation unless where he had been sentenced to prison for between one and four years and had a genuine and subsisting relationship with a partner or child, the effect of deportation would be “unduly harsh”. In the first appeal the Secretary of State appealed against the Upper Tribunal’s finding that the respondent, Ugandan national M, should not be deported. M had arrived in the UK in 1990 and had a daughter. He was convicted of supplying class A drugs and received a 22 month prison sentence. He appealed against deportation to the First-tier Tribunal. The First-tier Tribunal applied the old Immigration Rules in error and placed great weight on M’s daughter’s emotional development concluding that deportation would breach Article 8. The Upper Tribunal dismissed the Secretary of State’s appeal finding that although the FtT applied the wrong Rules the error was not material given that the FtT’s standout finding was a devastating impact that deportation would have on the daughter’s emotional development.

In the second appeal the appellant Nigerian National, K, appealed against his deportation. He had been living in the UK illegally and had arrived with five dependants. In 2011 he was convicted of fraud and sentenced to twenty months’ imprisonment. He appealed against his deportation to the FtT which found it was in the public interest not to take away the family’s stability. The Upper Tribunal allowed the Secretary of State’s appeal holding that the seriousness of a foreign criminal’s offence should be taken into account in an assessment of whether deporting him would be “unduly harsh” for his wife and children. The issue was whether the seriousness of the offence was relevant when deciding if deportation was “unduly harsh” or

whether **MAB (par 399: “unduly harsh”: US) [2015] UKUT 435 (IAC)** had been correct to find that the phrase did not import a balancing exercise between the public interest in deportation and the effect on the child/partner and that the focus should be exclusively on the effect of the innocent child/partner.”

25. The Court of Appeal held the Immigration Rules were a complete code for assessment of an Article 8 claim with regard to deportation. In both appeals the issue was the meaning of “unduly harsh”. The reference to “unduly harsh” in Section 117C(5) and Rule 399 had the same interpretation. It was an ordinary English expression and its meaning was coloured by its context. That context invited emphasis on two factors, the public interest in removal of foreign criminals and the need for proportionality, Article 8 assessment. The importance of removing a foreign criminal in the public interest was emphasised in Section 117C(1). Under Section 117C(2) it was clear that the more serious the offence committed by a foreign criminal the greater the public interest in deportation. That steered the court towards a proportionality assessment. Accordingly the more pressing the public interest in removal the harder it was to show its effects would be “unduly harsh”. The relevant circumstances included the deportee’s criminal and immigration history. The UT had wrongly decided **MAB, MAB** overruled. 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. Further, in M’s case, the Tribunal had not considered Section 117C(4) only whether M had been lawfully resident in the UK for most of his life and was socially and culturally integrated in the UK, the Secretary of State’s appeal with regard to M was allowed and remitted to the Upper Tribunal. K’s appeal was dismissed.
26. It is clear from that recent decision that it is not appropriate to consider the question of “unduly harsh” solely from the perspective of the impact which deportation would be likely to have upon the children or partner involved. It has to be said that looking at the analysis, findings and conclusions of the decision of the First-tier Tribunal Judge in this case that his approach was based exclusively or virtually exclusively on an assessment of the potential consequences to the children and the appellant’s family. Taking paragraph 22 of the decision in isolation exposes the flaw in the reasoning and I repeat:
- “Thus, taking everything into account, in my assessment it would not just be harsh but “unduly harsh” for the children to remain in the UK without the appellant” [emphasis added].
27. Accordingly we are satisfied that the approach of the First-tier Judge in this case was not sufficient as he simply identified in passing the relevant statutory provisions, cases and Immigration Rules and the arguments advanced by the advocates on each side. It was inherent in the analysis of all that material that consideration should have been given and been seen to have been given to the context of the undue harshness taking into account in the round factors including the criminal convictions of the



appellant and the statutory determination that foreign criminals falling within the relevant parameters of the schedule and the Rules should be deported in the absence of the particular circumstances therein identified. True it is that reference is made to arguments that were put forward on behalf of the appellant and the Secretary of State. None of those arguments in relation to the public interest were identified or articulated full-fledged in the analysis. What therefore is this court to do? It has been urged on behalf of the appellants that the proper course, would be to remit the case to the First-tier Tribunal. We decline to do so on the basis that all the material which we need is contained in the decision of the First-tier Tribunal Judge and out of fairness to the appellant we take it at its high watermark and accept the assessment of the First-tier Tribunal Judge in favour of the appellant where there were disputes as between the appellant and the Secretary of State ventilated in front of the First-tier Judge. Therefore we give the judge's decision the benefit of any doubt in relation to the building blocks. We would also have to bear in mind that the inconvenience and costs and delay inevitably which would be involved in remitting back to the FtT. We are confident that we can make a proper and appropriate decision on the materials that we have without remitting it.

28. Looking at the way in which the courts have assessed the way in which the statute and the Rules have to be construed we have reached the clear conclusion that the only correct resolution of this case is to uphold the decision of the Secretary of State to deport. These cases are invariably sad but we have to bear in mind that Section 55 has to be looked at in the context and through the lens of the statutory scheme and the best interests of the child have to be observed against that background. This is a case in which the First-tier Tribunal Judge made no mention in an assessment of what is "unduly harsh" to the need to send out a general deterrent message to people who are not British in this country that they must not commit serious offences and the threat of deportation is an important tool in addressing that particular issue. There is also the sense of public revulsion, the idea that those who are foreign to this country can commit offences whilst they are living in this country and can, by deploying arguments in relation to their family, evade what would otherwise be regarded as the natural consequences of their offending.
29. I have already set out the arguments and analysis relating to matters in favour of the appellant in this case. I do not propose to repeat them on the basis that to do so would simply extend the length of this judgment without adding anything to it but I would note that this court accepts in its entirety all the primary findings of fact which the First-tier Tribunal Judge made as to the extent of the relationship. Bearing in mind however that this is an appellant who does not live under the same roof as his family, who lives a considerable distance away, who himself has necessarily spent a considerable time separated from his children as a result of his offending and the prison sentence which followed, the balancing act with relation to what is "unduly harsh" is not met so as to provide an exception in this

case. Accordingly, we reach the clear conclusion that on these circumstances the deportation order remains.

30. We have also had our attention drawn to paragraph 23 of the judgment which identifies the following:

“I would therefore allow the appellant’s appeal under the Immigration Rules with regard to paragraph 399(a). I add for the sake of completeness that had it been necessary to look at exceptional or very compelling circumstances breaching respect for family life under Article 8, I would have found, for similar reasons, that exception 2 at Section 117C(5) of the 2002 Act applied so that the public interest did not require the appellant’s deportation.”

31. With all due respect we reject that conclusion having reached the view as we do that it was not “unduly harsh” for the children to remain in the UK without the appellant. It must follow as a matter of logic in the context of the facts of this case that we would also reject the conclusion that there were other exceptional or very compelling circumstances beyond those.

32. In the aftermath of delivering judgment in this case certain further points were made on behalf of the appellant. My intention during the course of the judgment as I hoped had been made clear was to make sure it did not extend to an inordinate length by repeating material that was set out in the decision of the First-tier Tribunal Judge and accepting that all those findings made in favour of the appellant would be taken at their highest. The following points had been made that in the balancing exercise of what is or is not “unduly harsh” some recognition should be placed upon the fact that this was a sentence of eighteen months within the range of one to four years which is the category we are dealing with here that some time has passed since the commission of the offence and the release of the appellant from prison during which time he has kept out of trouble and a recognition that the evidence accepted by the First-tier Tribunal and accepted by us that the risk of reoffending is low, should be combined with a consideration of the potential that, as a result of his medical condition, the appellant will have a reduced life expectancy which will therefore increase the element of “undue hardship” which concerns the test to be imported in this case. These are matters which taken into account in full do not amount to a redressing of the balance that has to be struck between the public interest and the interests if the children and family in this case. Regardless of the emphasis and re-emphasis on these points, our decision remains the same.

### **Notice of Decision**

The Secretary of State’s appeal is allowed. The decision of the Secretary of State stands.

No anonymity direction is made.

Signed Sir Mark Turner

Date 4<sup>th</sup> May 2016

Mr Justice Turner