**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/02442/2016

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 3 October 2018** | **On 15 October 2018** |

**Before**

**THE HONOURABLE MR JUSTICE DAVIS**
**UPPER TRIBUNAL JUDGE McWILLIAM**

**Between**

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

Appellant

**and**

**ABB**
**(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr T Wilding, Home Office Presenting Officer
For the Respondent: Mr D Sellwood, Counsel, instructed by Duncan Lewis & Co Solicitors (Harrow Office)

**DECISION AND REASONS**

**Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/291)**

We make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. We will refer to the Respondent as the Appellant, as he was before the First-tier Tribunal (the "FTT"). We have anonymised the Appellant because the case involves children.

2. The Appellant is a citizen of Nigeria. His date of birth is 28 March 1980. He arrived here in the UK as a visitor in 1996 at the age of 16. He was arrested on 5 November 2014 and subsequently sentenced to two years imprisonment to run concurrently for two offences of making false representations and six months' imprisonment to run consecutively for possession of an article in the use of fraud.

3. The Secretary of State made a deportation order under Section 5(1) of the 1971 Act on 30 January 2015. On 3 February 2015 the Appellant made a claim for asylum. On 12 September 2015 his asylum claim was refused. That decision was subsequently withdrawn, following an application for judicial review. Another decision was made on 8 February 2016 to refuse the Appellant's claim for asylum. The Secretary of State certified the asylum application under Section 72 of the Nationality Immigration and Asylum Act 2002 (the "2002 Act") seeking to exclude the Appellant from protection on the basis that he had been involved in a serious crime and constituted a danger to the community. In the same decision the Secretary of State maintained the deportation order.

4. The Appellant appealed against the Secretary of State's decision. Judge Owens found that the Appellant was not a danger to the community. She dismissed his appeal on asylum grounds; however, she concluded that deportation would breach the Appellant's right to family life and allowed his appeal under Article 8 of the 1950 Convention on Human Rights. Permission was granted to the Secretary of State by Designated Judge of the First-tier Tribunal McCarthy on 26 July 2018 in respect of the decision of the FTT under Article 8.

*The decision of the FTT*

5. The judge heard evidence from the Appellant, his partner and her child. We shall refer to his partner as "N." She has three children. We shall refer to the children by initials. The eldest child, B, aged 21, gave evidence before the judge. The second child, T, was aged 16. There was no evidence from him. S is the youngest child. Her date of birth is 17 July 2009. She was aged 8 at the time of the hearing before the FTT. The Appellant's appeal under Article 8 ultimately turned on his relationship with S.

6. The judge did not have before her a probation report, current risk assessment or the remarks of the sentencing judge. The judge considered the Appellant's criminality without this evidence and concluded that he posed a low risk of re-offending (and for the purposes of certification he did not constitute a danger to the community). She found that the Appellant gave a full account of the offence and at [40] made the following findings:-

> "… [the Appellant] agreed to assist a friend with the fraud which involved purchasing a car on hire purchase using another person's details and then taking possession of the effectively stolen car to sell on. The Appellant's role was to take delivery of the car and he was being paid £200 for his part in the fraud. It was his friend who was the main perpetrator. When police searched his home there was a document for a second car. The Appellant's evidence is that it was accepted that he was not the main perpetrator. There was only one incident involved and the two counts of dishonestly making false representations related to the same incident and one count of possessing articles in connection with fraud concerned the document in respect of the second car…."

7. The judge took into account a number of factors in favour of the Appellant including; his early guilty plea, he committed what she perceived to be an isolated offence, he was hitherto of good character and had remained out of trouble since March 2016 (his license expired on 5 May 2017). The judge found that the Appellant was remorseful. She accepted that he cooperated with the Probation Service. The judge attached significance to the Appellant having been in a category C prison and accepted that he had used his time in prison productively.

8. The judge accepted his explanation for committing the offence. The Appellant's evidence was that he was unemployed. It had become more difficult to for him to work here because of his status. The judge found that the Appellant knew what he was doing was wrong. She accepted that he did not stand to make a large financial gain from his criminal activity. She accepted the Appellant's evidence that he would not re-offend. The judge considered that the Appellant was now fully supported by his partner, N, and was not motivated to commit further crimes.

9. The judge rejected the Appellant's asylum claim. This was advanced on the basis that the Appellant was at risk from his family in Nigeria. The judge decided that, given the length of time that had elapsed, his family was unlikely to be interested in pursuing him. There was no evidence of recent threats. In any event, she found that he could safely relocate within Nigeria. The Appellant advanced a claim late in the day that he was at risk from Boko Haram which was rejected by the judge.

10. The judge found that there was family life between the Appellant and N. The evidence, accepted by the judge, was that N's husband (the biological father of S), moved out of the matrimonial home in September 2014, following an injunction against him resulting from an incident of domestic violence. Since the Appellant's release he had lived with N and S. At the date of the hearing T was living with his biological father and B was at University and no longer living in the family home. The judge found that the Appellant and N were committed to each other and that they eventually wanted to get married.

11. The judge considered the Appellant's relationship with the children. The judge accepted B's evidence that she was fond of the Appellant and supported his application. The judge concluded that their relationship was close but there were no more than the usual emotional bonds between adult relatives and that there was no parental relationship between them. The judge found that the Appellant did not have an ongoing parental relationship with T and that they did not have family life together.

12. The judge found that the Appellant's relationship with S was of a different nature to the relationship he had with B and T. The judge had before her evidence from an independent social worker, Ms Prempeh. Her view was that the Appellant was very much involved in S's life. In her opinion "…..... if [the Appellant] remains in the UK it would help promote stability, identity and emotional wellbeing for S." The judge attached significant weight to this evidence accepting the conclusions of the social worker about the impact of deportation on S.

13. The judge accepted that prior to the Appellant's incarceration N would visit him with S at weekends. S was aged 3 when she was introduced to the Appellant. The judge found that the Appellant and S had a strong relationship before he went to prison. When the Appellant was in custody they visited him twice monthly. At this time N's relationship with S's biological father had broken down and that he did not at that time take on a parental role for S.

14. The judge found that whilst S's biological father had intermittent contact every other weekend with her (at the date of the hearing), the Appellant was involved with her on a day-to-day basis, picking her up from school and attending school meetings and that he was "generally being a part of S's life supporting her with homework and going out as a family". She said that she had to regard "the children's welfare as a primary consideration as well as the Appellant's offending." The judge attached weight to what she described as S's, "turbulent upbringing" with reference to her own biological father and that he had paid little attention to her. She had regard to the hostility between her parents, which had resulted in domestic violence. The judge concluded that the Appellant had been a "stabilising factor "in S's life and he provided childcare when her mother was at work. The judge concluded that the Appellant had a genuine and subsisting parental relationship with S. There is no challenge to this conclusion.

15. The judge found that S would likely experience grief and loss if the Appellant was to disappear from her life and that in the absence of the Appellant, N would not be able to provide S with the same level of support because of her employment and responsibility to her other children. The judge considered the effect of deportation on N, concluding that it would have a significant detrimental effect on her emotional wellbeing and her ability to parent her daughter effectively and that this will be harder because B was away from home. The judge concluded that it was in S's best interests for the Appellant to remain in the UK with her. There is no challenge to this conclusion.

16. The judge concluded that it would be unduly harsh for S to leave the UK with the Appellant. This is not the subject of challenge. By whatever process the judge reached this conclusion, it was in our view an inevitable finding. The judge then identified the separation of the family as the" real issue" in the appeal.

17. The judge at [93] considered the Appellant's circumstances should he return to Nigeria, concluding that he would have no accommodation and no income. It would be difficult for him to find work without family connections and in these circumstances difficult for him to have regular telephone or internet contact with N (and S). The judge accepted that the Appellant had a subjective fear of returning to Nigeria.

18. The judge attached significance to the fact that the Appellant and N entered a relationship when he had no lawful leave here. At [95] the judge referred to the case of *Lee [2011] EWCA Civ 348*. She conflated this case with *Sanade and others (British children - Zambrano - Dereci) [2012] UKUT 00048*. She quoted paragraph 49 of *Sanade;-*

> '… depending on the circumstances and particularly where the claimant's conduct is persistent and/or very serious the interference with family life may be justified even it involves the separation of the claimant from his family who reasonably wish to continue living in the United Kingdom…

19. The judge also quoted from paragraph 121 of the decision in *Sanade* at [95];-

> "I have also had regard to the comments of Mr Justice Blake, the President of the Tribunal, and Upper Tribunal Judge Jordan who states in Sanade and others: 'The public interest requires us to emphasise that those who use deception to enter or remain in the United Kingdom and then commit very serious offences such as those considered here cannot expect to avoid deportation because they have fathered children who were born here.' They reiterate the principles in Lee that separation may be the consequence of serious criminal conduct."

20. Under the heading of "Presumption in favour of deportation" at paragraphs 61, 62 and 63 the decision of the judge reads:-

> "61….. I first give consideration to the immigration rules in respect of deportation and family and private life because the rules are accepted to be a statement by the Respondent where the balance should be struck between the public interest in deporting foreign criminals to prevent disorder and crime, the need to maintain immigration control and an individual's right to family and private life."

> 62. I find firstly that there is a presumption in favour of deportation. Paragraph 398 of the Immigration Rules states that where an individual is liable to deportation the public interest requires it. I find accordingly that the deportation of foreign criminals is in the public interest. This is also reiterated at s117C (1) of the Nationality, Immigration and Asylum Act 2002. I also note and take into account the numerous legal authorities which emphasise the importance of deporting criminals in order to maintain public security and safety and to deter the commission of crime.
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> 63. In this appeal, I note and take into account that the decision to deport does flows from one very serious offence which shows the appellant's disregard for the law"

21. At paragraph 66 the judge considered a number of factors when "assessing the public interest in deportation". She considered that the Appellant's offending was sufficiently serious for the automatic deportation provisions to become operative, and she repeated the findings that she made relating to the Appellant's criminality.

22. The judge said at [67]:

> "I am in agreement that when assessing the public interest in deportation both the quality of the offending acts and the risk of future repetition of offending are highly relevant. I find that this is confirmed by the express wording of section 117C (2), and by the tiered structure of paragraph 398 with its increasingly exacting thresholds for resisting deportation for those with escalating periods of imprisonment."

23. The judge found that it was an aggravating feature that the Appellant entered the UK as a visitor, but this was mitigated because of his age at the time. She found that it weighed against the Appellant that he did not contact the Home Office when he was an adult and that he had committed offences whilst here unlawfully. At paragraph 69 the judge said, "I note the more pressing the public interest in removal the harder it is to show that the effects of deportation would be unduly harsh." At paragraph 70 she said that risk of re-offending was a relevant factor to take into account.

24. The judge concluded that it would be unduly harsh for S to remain in the UK without the Appellant and went on to allow the appeal under Article 8 as informed by the Immigration Rules at paragraph 399(a) (i) and s.117C (5) of the 2002 Act.

*The Grounds of Appeal*

25. The Secretary of State's original grounds of appeal were distilled in Mr Wilding's skeleton argument on which he relied at the hearing. There are essentially two grounds. The first ground is that there has been a failure to balance the public

interest in deportation and a failure to consider all facets of the public interest. The second ground is, in summary, the judge failed to properly apply the unduly harsh test in accordance with *MM (Uganda) [2016] EWCA Civ 617.* Mr Sellwood relied on the Appellant's response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (the "2008 Rules"). Both representatives made oral submissions.

26. Mr Sellwood submitted that the grounds as advanced in the skeleton argument were wider than those in the original grounds. There is no need for us to engage with this in any detail. In our view the grounds were sufficiently widely drafted to cover the issues raised by Mr Wilding in his skeleton argument pertaining to the public interest and the judge's evaluation of Article 8. We do however observe that the original grounds disclosed a misunderstanding of the decision in so far as they challenged the decision to allow the appeal "outside" of the Rules. In this case the appeal was allowed by the judge under Article 8 as informed by the Rules (para. 399 (a) (ii) (b) and s.117C (5) of the 2002 Act).

*Conclusions*

27. The grounds must be considered in the light of there being no challenge by the Secretary of State to the primary findings of fact made by the judge. The judge accepted that the Appellant, N and B were credible witnesses and she accepted the evidence of the social worker. There was no significant challenge to the Appellant's evidence advanced before the FTT. The judge took a generous view of the Appellant's evidence about his criminality. She referred to a single offence whilst he had been convicted of three separate counts on an indictment. This is likely to be because she took the view that offences related to the same car and the same incident. We take into account that the Appellant was convicted of three offences and received a sentence which could suggest that the sentencing judge did not accept the mitigation he advanced before Judge Owens and which she accepted. However, this is not challenged or even touched upon in the grounds. In any event, any such challenge would be very difficult to make out in the absence of a Probation or OASys report or the judge's sentencing remarks. No such evidence was before the FTT. It is our view, expressed to Mr Wilding at the conclusion of the hearing, that the Secretary of State's failure to produce such evidence was unsatisfactory. There was no application by either party before the FTT to adjourn to obtain this evidence and no challenge to the judge having proceeded to hear the case without it.

28. The grounds are inter-linked, and we will engage with them as one. The judge set out the legislative framework (s.117C of the 2002 Act and paragraph 399 of the Rules) at [18] to [21] of the decision. There is no need for us to set it out in full in our decision. Dealing with the assessment of "unduly harsh" and the interpretation of it, the court in *MM* found that the assessment in *MAB (para 399; "unduly harsh") USA [2015] UKUT 00435* was wrong. From *MM* (see paras. 24 and 25) we know that decision- makers must take into account the seriousness of the deportee's offending and immigration history along with any other relevant circumstances. Section 117C

(5) of the 2002 Act must be read in the context of section 117C (1) and (2) which emphasise the important public interest in deporting foreign criminals and the fact that the more serious the offence/s, the greater the public interest in deportation. What is required is an assessment of the public interest and the need for a proportionate assessment of the interference with Article 8 rights as opposed to a child-centred assessment. The more pressing the public interest in removal, the harder it will be to show that the effect on the child would be unduly harsh and what is due or undue depends on all the circumstances.

29. What is clear from [80] of the decision of the FTT is that the judge misdirected herself on the law insofar as she purported to have regard to, amongst other cases, *MAB*. This was an error. However, when read as a whole, we are satisfied that the judge ultimately conducted an unduly harsh assessment which is compliant with what the Court of Appeal said the test is in *MM*. The judge at [96] listed a number of factors on which she relied and concluded that it would be unduly harsh for S to remain in the UK without the Appellant. If that paragraph is considered in isolation we would have no hesitation in concluding that the judge materially erred. However, when it is read together with the decision as a whole particularly at [62], [63], [67], [69], and [95] we are in no doubt that the judge had in the forefront of her mind the public interest in deportation. At [69] the judge stated that the more pressing the public interest in removal the harder it will be to show that the effect of deportation would be unduly harsh. This undermines the argument that she applied a MAB test and did not evaluate an assessment of proportionality.

30. That the starting point for the judge was that deportation is in the public interest is borne out of what she stated at [62] under the heading "Presumption in favour of deportation". From the last sentence of this paragraph it is clear to us that the FTT took into account the need to deter foreign nationals from committing offences in this country. In respect of the weight to be given to public revulsion, the Supreme Court has since made it clear in *Hesham Ali* [*2016] UKSC* 60 that the language of "public revulsion" is best avoided in this context: see the judgment of Lord Wilson JSC, at para. 70.

31. Paragraph [95] is an expression of the judge's understanding that the public interest could result in the separation of a family. Although she conflated *Lee* and *Sanade what* she understood from the decisions is that "tragic consequences" could follow from an Appellant's bad behaviour. The Appellant in *Lee* had committed a very serious drug related offence and received a custodial sentence of seven years. Under the present legislative framework, he would have to establish "very compelling circumstances over and above those described in paragraphs 399 and 399A" (see paragraph 398 of the Rules). The Court of Appeal upheld the decision of the UT to dismiss the Appellant's appeal in *Lee* and stated at [27]; -

> "Sometimes the balance between its justification and its consequences falls the other way, but whether it does so is a question for an immigration judge. Unless he has made a mistake of law in reaching his conclusion –

and we readily accept that this may include an error of approach – his decision is final ……".

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32. Mr Wilding made oral submissions relating to the findings of the judge at [93]. We find that there is no tension between the findings of the judge regarding the Appellant's claim for asylum, including those at [46] relating to relocation, and the statement of the judge at [93] when considering Article 8. The judge was entitled to conclude that, notwithstanding relocation may be reasonable or safe, difficulties would be encountered by the Appellant which in turn may have an impact on his ability to contact his family in the UK. The judge was entitled to take the view that this was material to the assessment of unduly harsh.

33. Mr Wilding raised the case of *Gurung [2012] EWCA Civ 62* in his skeleton argument and expanded on this in oral submissions. However, in our view the decision of the FTT is not a determination which has the appearance of a search for reasons for not deporting the Appellant. We find that the FTT properly identified that there was a need to make an inquiry into whether, despite the statutory policy of automatic deportation, article 8 of the Convention would be violated by its implementation. This is made out by what the judge said at [61]; "a balance had to be struck between the public interest in deporting criminals …. and an individual's right to family and private life." The various factors to be weighed on each side of the balance were in our view properly incorporated into the decision under various headings under the umbrella heading of "Findings and Reasons." It would have been preferable if the findings had been more comprehensively drawn together at [96], but this does not amount to an error of substance. The judge engaged with the public interest mainly but not exclusively under the discrete heading "Presumption in favour of deportation." We are satisfied that the conclusions she reached were properly factored into the assessment of proportionality. The judge properly evaluated the evidence and conducted a balancing exercise, taking proper account of the public interest. It is fair to say that any error arising from the judge's self-direction in respect of *MAB* is not of substance because ultimately the judge factored into the assessment of unduly harsh the public interest in deportation, taking into account the relevant Rules and the applicable statutory framework.

34. It follows from the unchallenged findings of the judge that she was entitled to conclude that the harsh consequences of deportation are not justified in this particular case. A close family unit comprising of the Appellant, N and S would be split up, very much contrary to the latter's best interests. She will lose a father through no fault of her own. N will lose a partner and she will be forced into single-parenthood. As found by the judge the Appellant committed a one-off offence, the seriousness of which is mitigated by the facts of his case as identified by the judge. There is a low risk of him ever doing anything similar again. The FTT was reasonably entitled to come to those conclusions in the light of the evidence before it. It cannot be said that the determination was irrational. The judge was entitled to conclude that separation would be unduly harsh in the light of the circumstances in this case. It is our view that the Tribunal reached a permissible conclusion

35. For all the above reasons the judge has not materially erred. The decision to allow the Appellant's appeal under Article 8 is maintained.

**Notice of Decision**

The Secretary of State's appeal is dismissed.

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

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 *Joanna McWilliam* Date 10 October 2018

Upper Tribunal Judge McWilliam