IAC-HW-MP-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01612/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29th October 2015	**On 21st December 2015**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

UD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Malik, instructed by Thompson & Co. Solicitors
For the Respondent: Mr T Wilding, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Jamaica. The Tribunal makes an anonymity direction pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) as the case involves the interests of minor children. Unless the Upper Tribunal or a court orders otherwise, no report or any proceedings or any form of publication thereof shall directly or indirectly identify the Appellant or the minor children. This prohibition applies to, amongst others, all parties and their representatives.

2. The Appellant, with permission, seeks to appeal the decision of the First-tier Tribunal (Judge Afako) who, in a determination promulgated on 17th March 2015 dismissed her appeal against the decision of the Secretary of State that she was entitled to make a decision under Section 32(5) of the UK Borders Act 2007 to deport the Appellant.

3. The applicant's immigration history can be summarised as follows. In October 1998 the Appellant arrived in the UK as a visitor with six months leave until April 1999. In that month, an application was made for an extension of stay as a student but that application was refused and an appeal was dismissed in 2001. In January 2001 a child, DD, was born and in that year a decree absolute was issued relating to her former spouse, whom she had married in 1995. On 29th May 2001 the Appellant married a British citizen, GD. On 20th June 2001 an application for leave to remain as a spouse was made but that was refused in 2002 with no right of appeal. Subsequently on 10th May 2002 a further application was submitted on Article 8 grounds which was refused by the Secretary of State and an appeal was lodged by the Appellant. At a hearing before the First-tier Tribunal on 22nd September 2005 her appeal was allowed outside of the Rules on Article 8 grounds. The decision of the Tribunal is set out in the papers at [A1] of the Respondent's bundle.

4. In January 2011 the Appellant applied for leave to remain for herself and a son from her former marriage, BC, and they were granted leave to remain in February 2011 until 22nd February 2014. There were other children, DC born in 2001 who was granted discretionary leave until 28th September 2006 on the basis that he was an adult.

5. On 1st February 2013 at the Crown Court the Appellant was convicted of four counts of making a false statement or representations in order to obtain benefit, an obtaining property by deception: two counts of obtaining a money transfer by deception; obtaining an exemption from liability by deception and acquiring, using or possessing criminal property. She was sentenced to nine periods of 30 months' imprisonment to run concurrently; therefore the overall sentence was one of two years and six months. On 28th May 2013 the Appellant was convicted of travelling on a railway without paying a fare and received a fine.

6. The First-tier Tribunal set out the Appellant's criminal offending at paragraphs [36] – [37]. This was an offence described as a series of frauds involving public funds and that over an extended period, the Appellant obtained, along with her co-defendants, over £95,000 of public funds. Some of the claims being made in the names of relatives, including her father-in-law and the sentencing judge described the offending as "a sophisticated and calculated fraud". The First-tier Tribunal Judge described the offences as being "quite serious and caused direct loss to the public". It was also stated that the offences involved, and thus corrupted, a number of people and in one of those cases, one of the victims whose identity was assumed for the purposes of the fraud, the Appellant played what was described as a "key role". The offence caused considerable distress to this victim.

7. In the light of that conviction the Appellant was served with a notice of liability to automatic deportation on 11th September 2013. On 25th July 2014 a deportation order was made against the Appellant. The Appellant submitted reasons why she should not be deported based on Article 8 of the ECHR. Such application was considered by the Secretary of State in the light of the family life with her partner and her children but was rejected in a decision letter dated 25th July 2014. The conclusion reached by the Secretary of State was that the Appellant's removal from the United Kingdom would not cause a disproportionate interference with her right to continue to enjoy family life.

8. The appeal came before the First-tier Tribunal on 16th February 2015. The decision of the Tribunal was promulgated on 17th March 2015. In that decision the judge considered the issues as set out and summarised at [7] based on her family life with her partner and her children; her partner having a particular medical condition. The judge dismissed her appeal under the Immigration Rules and outside the Rules.

9. The Appellant sought permission to appeal that decision based on two specific grounds and permission was granted by the First-tier Tribunal on 21st April 2015 in the following terms:-

> "In terms of the first ground for permission to appeal it is arguable that the judge has misdirected himself by failing to consider the first determination in terms of **Devaseelan [2002] UKAIT 00702**. Although the second ground as to whether the judge failed to properly assess the Appellant's case in light of the probation report where the Appellant was assessed as a low risk of reoffending is weaker, I am disinclined to exclude it."

10. Thus the appeal came before the Upper Tribunal. Mr Malik relied upon the two grounds as pleaded and in addition made the following oral submissions. In respect of Ground 1, he submitted that the judge did not take as a starting point the facts found by the First-tier Tribunal in 2005. Thus there was a material error of law in not considering what he described as the "established facts" which were still relevant to the decision to be made under the deportation proceedings. He submitted that Section 117 still required a decision maker to consider the family circumstances. He further submitted that the judge failed properly to consider those findings and that in particular, the Appellant's partner had medical issues and it had not been said that the medical evidence had improved since 2005 and that he continued to suffer from the same medical problems. Thus had the judge looked at the established facts, the outcome would have been to allow the appeal. He conceded that the Appellant's partner had not attended court but submitted that the established facts were that he had a medical condition which had not improved.

11. He submitted that in relation to the circumstances in 2005, the length of the private life of this Appellant was far less and that since that date she had been resident in the United Kingdom for a further ten years. Whilst there had been a criminal conviction since the decision in 2005 and that may be relevant to the balancing exercise, it has no relevance to the facts. He submitted that the conclusion that there were other relatives who care for the children was not supported by the evidence and that the

evidence was that her partner would not be able to look after the children (relying on the findings made in 2005). He submitted that if the court found an error of law based on Ground 1, then evidence would be required from her partner.

12. As to the second ground, he submitted that the judge failed to properly consider the report of the Probation Officer which had stated that she was at a low risk of reoffending. Looking at the determination at [40] the judge went beyond the evidence and thus erred in law.

13. Mr Wilding relied upon the Rule 24 response sent to the Tribunal on 24th April 2015. As to Ground 1, he submitted that the judge was well aware of the previous decision as set out at paragraphs [5] and [67] and whilst the Tribunal was required to consider the previous findings as a starting point, any evidence provided after that time would have to be considered. Ten years had elapsed since the findings of fact made in 2005 and it was open to the judge to consider her circumstances in the light of any changes that had been made during that period including the fact that she had committed a serious criminal offence. He submitted the judge had considered all the evidence and was entitled to reach the conclusions that he did from the evidence that was before him as at the date of the hearing. Subsequently the judge did not misapply the **Devaseelan** principles.

14. As to the second ground, the judge assessed the evidence and made credibility findings. The judge set out the significance of the offence and the amount of money fraudulently claimed and the length of sentence and the mitigation. The judge summarised the Probation Officer's letter at [38] and the First-tier Tribunal Judge identified three significant matters at paragraph [39]. Consequently it was open to the judge to reach the conclusion that the Probation Officer had not engaged with those aspects of the evidence that the judge had set out in the preceding paragraph. Thus the judge properly dealt with the evidence and the judge was entitled to find that in the light of the oral evidence given, the probation report had not dealt with the issue of her failure to accept the offence and her attitude to it.

15. He submitted that the medical issues in relation to the Appellant's husband, had not been specifically raised in the grounds but that if it arguably fell for consideration under the ambit of ground 1 and the issue of the application of the **Devaseelan** principles, the decision of the Tribunal considered all the evidence and the Appellant's partner's circumstances when reaching a decision. The judge made findings of fact open to him that the Appellant's partner had been able to cope well whilst she was in custody as set out in the cumulative findings at paragraphs [48]–[50]. Therefore there was no error of law identified in the approach taken by the First-tier Tribunal judge.

Assessment

16. There are two grounds pleaded and advanced on behalf of the Appellant. I shall consider each ground separately.

Ground 1:

17. Dealing with Ground 1, Mr Malik relied upon the written grounds whereby it was submitted that the judge erred by failing to consider the case of **Devaseelan** and that the factual findings made by the Immigration Judge in 2005 continued to be the starting point despite the change in the legislation. It is further submitted that because the First-tier Tribunal failed to consider the decision of the First-tier Tribunal from 2005 that was a material error of law and that the reference to it at [55] was insufficient.

18. In his oral submissions Mr Malik submitted that the judge erred in law by not considering the established facts from 2005 which were still relevant. In particular, the Appellant's partner's medical condition had not improved and he continued to suffer from the same condition and that in 2005, the Appellant's private and family life was less established then than it was in 2015. He further submitted that whilst there had been a criminal conviction since 2005, it was relevant to the balancing exercise but not to the facts themselves.

19. The findings of fact made by the Tribunal in 2005 are set out in the determination exhibited at A1 of the Respondent's bundle. The findings are set out at paragraphs [4.1-4.1.4]. They can be briefly summarised as follows:-

    (a) The judge found that she had first arrived in 1998 and had married a British citizen in May 2001. The judge found that she had no leave to remain when she became married and had her children and was well aware of her immigration status and also that her partner knew of it [4.3].

    (b) At [4.4] he found that she had lived in the UK for seven years and had five children for whom she was the main carer.

    (c) At [4.7], he made reference to the Appellant's husband's medical condition; that it was diagnosed in 2001 which required a liver transplant in March 2003. He found that his function had remained stable after several relapses because he now depended on daily medication.

    (d) The judge also found that whilst it had been stated there was no adequate healthcare in Jamaica, he found that to be unreliable at [4.7].

    (e) As to matters of dependency at [4.8] the judge found that there was no medical evidence that her husband was completely dependent on his wife for care or that he required the care both had attempted to show she provided. He found that there was no medical evidence to confirm that he required 24 hour care and no medical evidence to support the claim that he needed the Appellant to help him to take his medicine and to care for him.

    (f) He found that he was emotionally dependent on his wife.

    (g) The judge appeared to accept that ideal medical care would be ongoing clinical visits.

(h) The judge also found that there had been no medical evidence as to the availability of appropriate healthcare in Jamaica being provided before the Tribunal.

(i) The judge found that there were insurmountable obstacles to her husband joining her in Jamaica if required to leave.

(j) At [4.11] he found that they were a close-knit family who had been together for five years and found that Mr D was not working and therefore could not support his wife's application to settle if one was made.

(k) At [4.12] the judge found that he would be in no condition to take responsibility for caring for the Appellant's children.

(l) At [4.13] he considered the impact of removal and found it to be unreasonable.

20. The decision in **Devaseelan [2002] UKAIT 00702** concerned a human rights appeal which followed an asylum appeal on the same issues. The Tribunal stated that in such circumstances, the first Tribunal's decision stands as an assessment of the claim the Appellant was making at the time of that first determination. The Tribunal set out various principles including that the decision is always a starting point but that facts since then could always be considered.

21. Whilst the judge did not specifically make reference to the case of **Devaseelan**, it is clear from reading the determination as a whole, that he was plainly aware of the previous decision and the findings of fact made in 2005. At paragraph [5] he set out her immigration history and at paragraphs [55] and [57] the judge made specific reference to the determination and the previous findings of fact. The grounds do not demonstrate that even if the findings of fact I have summarised above were the starting point that it was not open to the judge to consider the evidence at the date of the hearing in 2015, some ten years later, which were given in a wholly different context.

22. The judge had found in 2005 that the Appellant was the main carer of the children. However the judge was entitled to consider the change in the family's circumstances from the evidence since that finding was made. The judge was plainly aware that she had been the children's main carer and began his consideration of the evidence from that starting point. However the appellant had committed a serious criminal offence leading to her incarceration and therefore her role as the main carer had changed as a result of her criminal conviction and her consequent incarceration. It was therefore open to the judge to find that whilst it had been said that her imprisonment would put the care of the children in jeopardy, that the family had supported the children and that no serious adverse effects had been reported (see finding at [37]). Furthermore at [45] it was open to the judge to find that the "reality that has emerged from the evidence is that both girls have been looked after by their father and other family members while their mother was in prison. It had not been shown that this occasioned any harm to them." The judge went on to state

> "The Social Services did not become involved with the family as a consequence of the absence of their mother. Despite their awareness of their limitations, the combination of the Appellant's husband, niece, sons and other relations have managed to support the girls. There appears to be a sufficient number of relatives in this country, of both sexes who can support the children and the Appellant's husband."

Thus the judge did consider the change in the Appellant's circumstances since the hearing in 2005.

23. The judge also properly identified her length of residence and that she had established a private and family life in the UK and proceeded on that basis in reaching the decision in 2015.

24. Whilst the judge found there to be "exceptional circumstances" in 2005, the circumstances then were wholly different. The decision made in 2005 was against the background of an application for leave to remain outside of the Rules and was not a deportation case which involves fundamentally different concepts including the strong public interest in the deportation of foreign criminals now underpinning the legislation to be applied. The judge was plainly aware of this and properly took this into account at [55]. That it would lead to family members being split is a matter contemplated in cases of deportation (see **AD Lee v SSHD [2011] EWCA Civ 345**).

25. Mr Malik also relied upon the findings made in 2005 concerning her partner's medical condition. I observe that the Appellant's husband did not attend the hearing and consequently did not give oral evidence before the Tribunal (see paragraph [18] of the determination). Nevertheless the judge plainly proceeded on the basis of the "unchallenged evidence" that her partner had a liver condition for which he had received a transplant in 2003 (see paragraph [7]). Contrary to the written grounds, the findings made by the Tribunal in 2005 did not show complete dependency on the Appellant as the judge found at paragraph [4.8] of the First-tier Tribunal decision and set out at [57] of the present determination.

26. Furthermore the First-tier Tribunal in 2005 found that there was no evidence to show that his condition could be or could not be treated in Jamaica whereas in the proceedings in 2015 the judge found as a fact that there was material before him to demonstrate that his condition could be managed in Jamaica. The judge was entitled to consider what had happened in the ten years since the decision and properly considered the evidence before the Tribunal at the date of the hearing.

27. At paragraphs [47-50] the judge analysed the evidence concerning the Appellant's partner. At [47] the judge summarised his condition noting that in August 2013 his condition had not deteriorated and that in December 2013 that overall the health trend was satisfactory and that he did not exhibit any symptoms referable to his liver. At [48] the judge found that the medical assessments had been made whilst the Appellant was in custody. The judge considered this to be significant because it had shown that during the period that she was in custody, her husband's condition had not deteriorated. The judge made reference to the fact that none of the medical reports expressed concern that the Appellants' domestic circumstances were having

an adverse impact on her husband's health although the judge recorded that the Appellant had sought to portray that her absence was damaging to her husband's health. The judge rejected that as not being supported by the evidence [see 48]. The judge made reference to the Appellant's husband having missed one previous medical appointment but that appeared to be because he was managing well and that there was no medical evidence to confirm that he had returned to drinking alcohol. Thus the judge concluded that "it is difficult to accept in these circumstances that the Appellant's absence would have the claimed serious adverse impact on her husband's health."

28. At [49] the judge took into account the change from 2005, whereby he had not been working. The judge noted that he had been working intermittently in 2013 demonstrating that he was able to function economically. The judge found he was able to drive and was therefore "able to live a relatively active life despite his condition" and that there were no concerns from Social Services about the children's welfare arising from their mother's absence. At [50] the judge found that there was no evidence produced to show that if necessary medication or medical expertise would not be available in Jamaica and in the alternative, there was no evidence that he could not travel to visit his wife there.

29. Consequently the grounds do not demonstrate any error of law in the judge's approach to the fact-finding exercise by failing to properly consider the determination of the previous Tribunal in 2005. Whilst the written grounds at paragraph 9 appear to submit that because the judge in 2005 had found that her husband was unable to look after the children and thus paragraph 399 was satisfied, that ignores the evidence that was before the judge ten years later that demonstrate to the contrary; that he had been able to care for the children in the absence of their mother (see findings of fact at [37, 45, 46 and 49]). The grounds therefore do not demonstrate that the findings of fact made by the judge were not open to him on the evidence that was before the First-tier Tribunal.

Ground 2:

30. Dealing with Ground 2, it is asserted in the grounds that the Immigration Judge failed to properly assess the Appellant's case in light of the probation report that she was at a low risk of reoffending and that the judge materially erred in law by failing to provide reasons for departing from the conclusion in the said report.

31. In his oral submissions Mr Malik referred to the report of 3rd June 2014. He submitted that in the findings of fact reached by the judge at [40] the judge went beyond the evidence and therefore erred in law.

32. I have considered the submissions made. The judge set out the circumstances of the index offence at [36] and [37] and the contents of the presentence report that had been provided at the time of sentencing. At paragraphs [38] to [40], the First-tier Tribunal Judge considered the evidence since that date which was in the form of a

letter of 3rd June 2014. The judge summarised the letter at [38] and reached the following conclusions at paragraphs [38] to [40]. I shall set out those paragraphs:-

> "[38] The additional evaluation of the Appellant after the sentencing is a short form letter dated 3rd June 2014, from Jennifer Tucker, the Probation Officer in charge of the Appellant at the time. It is said that the Appellant has engaged with the Probation Service, and continues to show a high level of commitment and motivation to address her offending behaviour including through thinking skills. The letter states that the Appellant recognises that her actions would have a detrimental effect on her future. It is said that she has made progress to improve her thinking skills, including victim empathy.
>
> [39] Under cross-examination at the hearing, it was rather troubling the Appellant continued to maintain that when she did what she did, she thought she was helping. She said she'd explained to the court that she did not profit from the crime and that her brother-in-law had claimed the benefits. The difficulty with this line of defence is that not only was this rejected by the trial court, and by the offending manager, that it demonstrates that the Appellant does not quite grasp the true nature of her offences which are a fraud on the public purse. As is pointed out in the presentence report, the monies had in fact been paid into the Appellant's account. Even if the monies had indeed been transferred direct to others without personal gain for the Appellant (a proposition for which she has not adduced evidence) she was still wholly responsible for defrauding the public. I note that the only discount in her sentence was given on account of her children not because of the nature of her role in the crimes, which were found to be at the highest end of responsibility.
>
> [40] In a short report the Probation Officer has not engaged with this aspect of the Appellant's attitude to her offending, for which she appears to be still raising exculpatory points which were rejected by the sentencing judge. Although I do note that she acted either with or for the benefit of other family members, including her father-in-law and brother-in-law, the use to which the monies were put does not diminish her culpability; the parties were either non-existent or were not entitled to the monies. The fact the probation report does not deal with this aspect of the Appellant's partial denial of responsibility leaves questions about the reliability of the assessment that she is at a low risk of reoffending."

33. It is plain from reading the relevant paragraphs as set out above that the judge did assess the Appellant's case in the light of the probation report but was entitled to do so in the light of all the evidence that was before the Tribunal. The judge identified aspects of the Appellant's evidence which undermined the contents of the report. At [39] the judge referred to the evidence that had been elicited during cross-examination concerning the offence, the circumstances of it and her attitude towards it. The judge found that her account was "troubling" and that she had continued to maintain her lack of culpability in the offences themselves. The judge went on to consider her evidence and her explanation to the Tribunal concerning the circumstances of the offence and it was wholly open to the judge to consider that this evidence was not only rejected by the trial judge but also by the offending manager and that it demonstrated that she had no acceptance or understanding of the true nature of her offences. Consequently on the evidence before the First-tier Tribunal it was open to the judge to reach the conclusion that the short letter from the Probation

Officer did not consider this aspect of the Appellant's attitude towards her offending which included her partial and continuing denial of responsibility. In those circumstances the judge was entitled to reach the conclusion that he could not place weight or reliance upon the conclusion that she was at a low risk of reoffending. It is of note that no OASys Report was provided to set out the risk or how it had been calculated or on what particular evidence.

34. Consequently I am satisfied that the grounds do not demonstrate any arguable error of law in the judge's conclusions in relation to the probation report.

35. At the conclusion of the advocate's submissions, I pointed out to them that whilst the judge had properly applied Section 117 (and Exception 2) the judge had applied the wrong Rule and that the amended Rules became effective as of 28th July 2014 (see **YM (Uganda) v SSHD [2014] EWCA Civ 1292**).I therefore invited the submissions from each of the advocates.

36. Mr Wilding on behalf of the Secretary of State submitted that the issue that the judge was required to consider was properly identified at [54] as to whether the effect on the Appellant's children and her husband of her removal was "unduly harsh". The judge had identified this as the key issue and the findings of fact, which were properly made on the evidence dealt with the issues under the new Rules thus any error in applying the wrong Rule was not material. He submitted that the grounds did not set out any challenge to the assessment of whether it was "unduly harsh" and that the judge's reasoning was clear on this point. The findings of fact were fully open to the judge to make and the judge dealt with all the issues arising and therefore it has not been demonstrated that those findings of fact were not open to the judge to make and thus there was no material error of law.

37. Mr Malik submitted that the family circumstances were bleak and that if the judge had properly considered the decision of the First-tier Tribunal made in 2005 the judge would have been led to the conclusion that it would be unduly harsh for the Appellant to be removed from the United Kingdom and her family members. Those factors identified from the 2005 determination were that there were three minor children and that the judge failed to take that into account.

38. As to the Rules themselves, Mr Malik conceded that the Appellant could not meet 399(b)(i) relating to the Appellant's partner.

39. As to materiality, he submitted that the judge did not consider the family's circumstances in the light of what had been previously established and therefore paragraph [54] dealing with the test under Section 117 did not properly dispose of the appeal. Therefore as the judge did not take into account the circumstances by applying the approach in **Devaseelan,** the decision of the judge was wrong and that it would be "unduly harsh" for the Appellant to be removed from the United Kingdom.

40. As set out above neither advocate had identified that the Tribunal had not applied the amended Rules which had become effective as of 28th July 2014 but the parties were given the opportunity to address that issue.

41. I therefore have to consider whether the error was material to the outcome as an error of law does not in itself lead to a decision being set aside and an appeal being granted. I have to consider whether the error either was, or may have been, material to the outcome. A decision of the First-tier Tribunal may be upheld if the final outcome was correct notwithstanding an error and whether an error is material will depend upon matters as to the centrality of the error to the reasoning set out in the judgment. It is also dependent upon whether the facts relied upon and found by the Tribunal were relevant to the correct test to be applied so that the Upper Tribunal can assess whether they might or would lead to a different outcome.

42. The judge identified that the length of the sentence was one of two years six months and therefore paragraph 398(b) applied. The judge therefore had to consider whether she met paragraph 399 or 399A. On the findings made by the judge, the Appellant could not meet paragraph 399A in light of the findings made at [53]; the Appellant had not been lawfully resident in the UK for most of her life, nor could it be said that there were very significant obstacles to her integration bearing in mind the findings of fact made that she had arrived in the UK at the age of 33, that she had lived in her previous country of residence for most of her life and had previously worked and raised a family there and still had family relations in that country.

43. It was also conceded by Mr Malik that she could not meet the requirements of paragraph 399(b) and that whilst she had a genuine and subsisting relationship with a partner who was in the UK and a British citizen, it could not be established that the relationship was formed at a time when the person was in the UK lawfully and that their immigration status was not precarious in the light of the findings made by the judge in 2005 and in 2015. Furthermore in relation to 399(b)(ii) the judge found that in the light of the findings of fact made that it would not be unduly harsh for her partner to live in the country to which she was to be deported because there were not compelling circumstances over and above those described in paragraph EX.2 of Appendix FM. The judge found that notwithstanding his medical condition the availability of medical care in Jamaica was available to him for the reasons set out at paragraphs {47-50]. The judge did not find that there would be any significant difficulties faced by the applicant or her partner continuing their family life outside of the UK. In any event, even if it would be unduly harsh for her husband to live in Jamaica, the findings of fact made by the judge did not demonstrate that paragraph 399(b)(iii) were met, namely that it would be unduly harsh for that partner to remain in the UK without the person who is to be deported. The judge properly considered this in the light of the medical circumstances at paragraph [47 to 48]; the judge found that he was able to function economically [49], he was able to lead an active life despite his condition and that at [45] it would not be unduly harsh for him to remain in the UK without his partner.

44. Thus in the light of that concession, and the findings of fact made by the First-tier Tribunal, the only relevant Rule was that of paragraph 399(a), (and Exception 2) namely, that the person has a genuine and subsisting parental relationship with a child under the age of 18 who is in the UK and is a British citizen.

45. There are two limbs to be met:-

    (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.

45. As to the first limb, the judge properly identified at [30] that the "criteria" within the Rules which must be satisfied in order for the parental relationship to outweigh the public interest and that the criteria, reflected the duty to have regard to the children's best interests. Whilst the judge at [31] considered it in the context of reasonableness, in the finding made at [31] the judge considered that it would not be reasonable to expect the children to leave the UK given their ties to their country and in the case of one of the children their education and the fact that there would be a lack of proper arrangements for them in Jamaica. Therefore the judge's findings in that respect would have satisfied paragraph 399(a)(ii)(a).

46. However the second limb still had to be satisfied and the judge would have to have considered whether it would be unduly harsh for the child to remain in the UK without the person who is to be deported.

47. Whilst the judge did not consider this under the Rules the judge considered this issue comprehensively when considering Article 8 outside of the Rules from paragraph [34] onwards and made findings upon this issue as to whether it would be unduly harsh for the children to remain in the UK without the Appellant.

48. The findings in this respect can be summarised as follows:-

    (a) At paragraphs [31] to [32] the judge found that there were other relatives (including the children's elder siblings and older cousins) who had helped look after the children while the Appellant was in prison and could continue to do so in the Appellant's absence.

    (b) At paragraphs [41] to [46], at [41] the judge identified "the key focus is therefore on the impact of removal on her children whose interests are a primary consideration and her partner."

    (c) The judge considered the circumstances individually for the relevant children, B, D and K. In respect of B at [42] the judge found that he had limited leave to remain but that his stay in the UK was not contingent on his mother's presence, that the evidence was that he had stopped attending school and was not at college and was about to move out of the house. The judge found that he was making his own decisions and that "it cannot be said that his interests in a life with his mother should prevail."

In her absence, he would be supported by his older siblings and other relatives including his stepfather.

(d) The judge identified the circumstances of K and D were different at [43]. The judge took into account that the children would no doubt be affected by their mother's absence but stated "the key question is whether their best interests in receiving the continuing support of their mother alongside that of their father overrides the public interest in their mother's deportation." In considering that issue the judge took into account the following factors, namely that they were still young, that they would be left in a predominantly male household ill-equipped to raise them and took into account letters from their father and sibling though neither were present at the hearing or gave evidence. The judge remarked at [44] that it was "somewhat surprising" that the Appellant did not adduce specific professional evidence to advance the children's circumstances and noted that there were no detailed reports of the children's respective schools [44]. The judge took into account the documents from the academy relating to D and disruptive behaviour but found that they related to the period from September 2015 and the judge observed that the period of time was when the Appellant was in fact out of prison and that it had not been demonstrated that D's problems were linked to the prospects of her mother's deportation.

(e) At [45] the judge recorded that

> "the reality that has emerged from the evidence is that both girls have been looked after by their father and other family members while their mother was in prison. It has not been shown that this occasioned any harm to them. Social Services did not become involved with the family as a consequence of the absence of their mother. Despite their awareness of their limitations, the combination of the Appellant's husband, niece, sons and other relations have managed to support the girls. There appears to be a sufficient number of relatives in this country, of both sexes, who could support the children and the Appellant's husband."

(f) As to K the judge found that there was no doubt that she would affected adversely by the decision to remove her mother.

(g) At [54] the judge considered Section 117C(5) and the following question, "Would the effect on the Appellant's daughters and her husband of her removal be unduly harsh?" The judge considered that this was at the "heart of the proportionality question as the genuine subsisting relationships of the UK family members has already been accepted by the Respondent."

49. The findings made at paragraphs [55 to 58] should be read with the earlier identified findings made when considering the children and the Appellant's partner. The judge properly considered the earlier findings made in 2005 and for the reasons that I have given was entitled to find that the circumstances were different in that the context of the proceedings were different and that the Appellant had come before the

Tribunal as a serious offender whose case fell to be determined against the context of the clear statutory stipulations as to the weight to be accorded to the public interest in the deportation of a foreign criminal. The judge properly reminded himself that against this there was a statutory duty to take into account the children's best interests as a primary consideration. The judge made reference to the fact that

> "... in the absence of serious offending by the Appellant, the situation of the children might well have outweighed any public interest in their mother's deportation had she merely been an overstayer or had she committed a less serious crime. I have found the children are in fact able to benefit from support of an extended family."

That would also include their father.

50. I have set out at length the findings of fact made by the First-tier Tribunal Judge. Whilst Mr Malik sought to submit when relying upon Ground 1 that the judge's findings of fact did not properly take as the starting point the material findings made by the judge in 2005, for the reasons that I have given earlier in the determination, I did not find that ground to have merit. Consequently I am satisfied that the findings of fact that were made by the judge were open to him on the evidence before him. I bear in mind that the judge had the advantage of seeing the Appellant give evidence. Mr Malik did not attempt to take the Tribunal through the statements and evidence to show that such evidence was incapable of justifying the judge's conclusions.

51. As I have set out earlier it is necessary to apply the Rules to those facts to assess whether they might or would lead to a different outcome. I am satisfied that had the judge applied paragraph 399(a) that the outcome would not have been any different in the light of those findings of fact that were made. Neither party either produced copies of the decisions of ***KMO (Section 117 – unduly harsh) Nigeria [2015] UKUT 00543*** and ***MAB*** *(paragraph 399, "unduly harsh") USA [2015] 435 (IAC)* or made any submissions relating to the contents of those decisions. In MAB (para 399; "unduly harsh") USA [2015] UKUT 435 (IAC), the Upper Tribunal (Upper Tribunal Judge Grubb and Deputy Upper Tribunal Judge Phillips) held that the phrase " *unduly harsh*" in para 399 of the Rules and s.117C(5) of the 2002 Act does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual (whether child or partner of the deportee). The Tribunal held that the focus is solely upon an evaluation of the consequences and impact upon the individual concerned. However, the Upper Tribunal took a different view in **KMO** .In reaching his decision, Judge Southern considered and dealt with (at [8]-[25]) the reasoning of the panel in **MAB** in reaching its conclusion. Whilst I am not bound by either decision of the Upper Tribunal I prefer the decision of **KMO** in the light of the detailed consideration of the issues set out in that determination.

52. In **KMO** the construction of the phrase "unduly harsh" was considered by the Upper Tribunal. As in this appeal, the Upper Tribunal was only concerned with paragraph 399 and not 399A and the assessment as to whether 399 applied in an assessment whether deportation would result in an infringement of Article 8 rights. In that decision the Tribunal considered that paragraph 399 (and 399A), are concerned with the public interest question because the overriding presumption of the Rules as

recited in paragraph 396 is that where a person is liable to deportation, the presumption shall be that the public interest requires deportation. Therefore the public interest question inhabits paragraph 399 as it does in paragraph 398 (see [14]).

53. At [17] the Upper Tribunal found that there was nothing in the Rules or statute to eliminate from an assessment of what is "unduly harsh" consideration of the seriousness of the offence committed (see [17]) which is reinforced by the fact that categorisation of a foreign criminal can also arise on the basis of persistent offending (see [18]). Thus at [19] the Upper Tribunal considered the phrase "unduly harsh" which plainly anticipates an evaluation being required.

54. Therefore the conclusion reached at [24] was that the word "unduly" in the phrase "unduly harsh" requires consideration of whether in the light of the seriousness of the offence committed by the foreign criminal and the public interest considerations that come into play, the impact on the children or partner of the person being deported is inordinately or excessively harsh.

55. The question identified by the Upper Tribunal in **KMO** at [33] whether it would be unduly harsh for the children to remain in the UK without their father (in the present case the mother) identified that the question must be addressed in the light of the circumstances as a whole, paying regard in particular to the factors the Tribunal must take into account as a consequence of Section 117 of the 2002 Act. Whilst the Tribunal did not have the advantage of the decision in **KMO**, it is plain from reading the determination as a whole that the relevant question that was addressed by the First-tier Tribunal, namely whether it would be unduly harsh for the children to remain in the UK without their mother, was properly considered in the light of the circumstances as a whole and by considering properly the public interest. Whilst the determination took into account that it would be in the best interests of the children to maintain a parental relationship with both parents, that was not a complete answer to the question identified in **KMO** because the judge noted that a balance had to be struck between that important consideration and the powerful public interest consideration in play (see paragraphs [55] and [56]).

56. Thus the First-tier Tribunal did take into account the relevant considerations when reaching an overall view of whether it would be unduly harsh for the Appellant to be removed with the children remaining in the United Kingdom and adopted and applied the correct approach as set out in **KMO**.

57. Whilst the judge applied the wrong Rule, when considering the determination in the light of the findings of fact which were made and properly open to the Tribunal to so make, it has not been demonstrated that the error was material and that the facts relied upon by the judge were properly considered and were relevant to the correct test to be applied. The Rules contemplate separation as being a possible outcome of deportation proceedings and thus it is not sufficient to say that it is "harsh" to separate the parties involved. Separation is an inevitable feature of deportation as recognised under the Immigration Rules and primary legislation and it is also reflected in the jurisprudence (see **AD Lee v SSHD [2011] EWCA Civ 345**) and that

the nature of a deportation order is that, however tragically, it will sometimes break up families, with the inevitable adverse consequences on any children of the family. Furthermore it is not sufficient for the Appellant to point to the fact that the Appellant has a genuine and subsisting relationship with a child under 18 who is a British citizen, as overlaying those features of the case is the requirement for separation to be unduly harsh. The evidence before the judge did not establish the existence of unduly harsh consequences if the Appellant was deported and that they would have to remain in the United Kingdom.

58. Thus in the light of those findings, the decision reached is not materially affected by the structural error in approach taken by the judge in relation to his assessment.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The decision shall stand.

Signed Date

Upper Tribunal Judge Reeds

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 their 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.