Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/05849/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 September 2017	**On 18 September 2017**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

S A
[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr David Chirico, Counsel instructed by Wilson Solicitors LLP
For the respondent: Mr Stefan Kotas, a Senior Home Office Presenting Officer

Anonymity order

The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him leave to remain on human rights grounds. The appellant is a citizen of Pakistan.

Background

2. The appellant came to the United Kingdom in 1994 at the age of 14 with his mother, to join his naturalised British citizen father. His father and mother are still in the United Kingdom together. The appellant remains a Pakistani citizen. He last visited Pakistan in 2000, when he was 20.

3. After joining his father here, the appellant was granted first leave to remain, and on 15 April 1996, indefinite leave to remain. He was then 16 years old. In 1996, his brother was born here, and is a British citizen.

4. The appellant continued to have leave to remain until the failure of his appeal against deportation on 28 January 2011, which crystallised the deportation order against him.

5. The appellant got into trouble. From January 2003, when he would have been 22, until May 2008, when he was 27, he was convicted of a number of criminal offences. He was convicted on 6 occasions between 24 January 2003 and 5 October 2006 of 16 offences including one property offence, two offences against the police and Courts, one offence of possession of a Class C drug, and twelve driving-related offences.

6. In the summer of 2006/2007, the appellant committed offences of obtaining property by deception and conspiracy to do so. On 15 May 2008, the appellant was convicted at Harrow Crown Court on two counts, for conspiring to obtain and obtaining property by deception. He was sentenced to 12 months' imprisonment and ordered to pay a total of £1500 compensation.

7. On 5 November 2008, the respondent served a notice of liability to automatic deportation pursuant to section 32 and 33 of the UK Borders Act 2007, and on 10 September 2010, the respondent signed a deportation order.

8. The appellant had a brief relationship at school in 1998 with the woman who later became his wife, and is now his former wife. The couple have had an on/off relationship. Both sets of parents disapproved, and they both married other people, but their marriages failed. The relationship resumed in 2009, at which time the appellant was still lawfully in the United Kingdom. The appellant proposed to his wife on New Year's Eve 2009, and she accepted.

9. The parties married in October 2010, just a few weeks after the deportation order was signed. The appellant's spouse was aware of his status. On 1 August 2012, the appellant's wife gave birth to their child. On 6 September 2012, the respondent detained the appellant for just over a month. He was released on 9 October 2012, but the marriage failed and during 2012, his estranged wife wrote to the Home Office to express 'negative thoughts' about the appellant.

10. In February 2013, the appellant's wife cut off contact with the appellant, and refused to allow contact between the appellant and his son, who was then 6 months old. The appellant lived with his parents and his younger brother. The appellant's wife lived with her own parents. The appellant's wife instigated divorce proceedings and in October 2014, decree absolute was pronounced.

11. Thereafter, it seems that the appellant's former wife lived with her parents and was supported by family (both her own family and the appellant's parents and brother) as she raised their son alone.

12. The couple rekindled their relationship after a chance meeting in April 2016: the appellant's former wife telephoned him and said she wanted to reconcile. Thereafter, contact between the appellant and his son resumed and in May 2016, the appellant's former wife moved back in with him. The couple live with the appellant's parents and his younger brother.

13. The appellant had lived with his son, now 4½ years old, for just 10 months when the appeal was heard by the First-tier Tribunal Judge, but the evidence shows that he made persistent efforts through the family courts for contact during the period when he was not seeing him. The appellant has made repeated attempts to have the deportation order discharged, without success. If excluded now from the United Kingdom, he will not be permitted to return for 10 years, by which time his son will be 15 years old.

14. Evidence from Ms Dymphna Pearce, a social worker, confirmed a good relationship and a strong bond between father and son. Evidence from the child's primary school confirmed that the appellant was on their records as having parental responsibility and was the parent who usually dropped and collected the boy from school. The evidence of the appellant and his partner (whom he has not yet remarried) is that he helps the child with his homework and puts him to bed, as his partner works full time.

15. The family still all live together: the appellant's parents, his brother, the appellant himself, and his former wife and his son. The appellant's mother has depression and has been hospitalised, in December 2013, when her illness was particularly acute. She is 50 years old and has diabetes, with some sight loss. There was no medical evidence before the First-tier Tribunal Judge concerning her physical health. The First-tier Tribunal Judge observed that the appellant's mother attended Court with her husband and the appellant's younger brother, and that she walked into Court unaided.

First-tier Tribunal decision

16. The First-tier Tribunal considered all the evidence supplied and the section 55 best interests of the appellant's son, then 4½ years old. The Tribunal did not accept that family life continued to exist between the appellant and his parents and younger brother, though he did accept that there was private life between them. The Tribunal found that the *Kugathas* dependency standard was not reached in the relationships between the appellant and his parents and brother, and in particular the relationship between the appellant and his mother.

17. As regards the appellant and his former wife, now once again his partner, at [41] the Tribunal noted the intermittent nature of their relationship. The appellant's former wife had married him in 2010 in the full knowledge that his status was precarious, as the deportation order had been signed just a month before the parties married. The Tribunal noted that the appellant's former wife was an educated woman and in full-time employment. The Tribunal noted that the appellant's contact proceedings had

been withdrawn in 2016, once the appellant and his former wife were again together as a couple.

18. The Tribunal accepted that there was an extant parental relationship between the appellant and the child from May 2016 up to and including the hearing in March 2017. However, he gave weight to the fact that despite his attempts to seek a contact order, the appellant had played no part in his son's life from the age of 6 months until the reconciliation with his former wife, when the boy was rising 4. The Judge held that the appellant was not his son's sole carer, although he got him up and took him to school in the morning, collected him from school in the evening, and later on gave him supper and put him to bed.

19. The Tribunal considered paragraph 399(a) and (b) of the Immigration Rules: there was no suggestion that the appellant's British citizen child could or should accompany him to Pakistan, since his mother was unwilling to go there.

20. The Tribunal considered, but did not give determinative weight, to the social worker's report. The Tribunal took account of the opinion of Ms Pearce, the social worker, that the relationship between father and child was now strong, but did not accept that the appellant was the child's sole carer: the boy lived with his mother, as he always had done, the only difference being that his father lived in the house as well now, and helped with his care.

21. The Tribunal held at [47]-[48] that the appellant's son had only known his father for less than a year and that his mother had always been there, coping with his upbringing with the support both of her own parents and of the appellant's family in the United Kingdom. All members of the extended family on both sides were very close to the child.

22. Also at [47], the Judge made the odd assertion that 'the child is too young to notice any difference' if the appellant were to be removed. That is, however, tempered by the subsequent assessment that there had indeed been change when the appellant came back into his son's life, and that his son would be able to adapt to losing a father, as he had adapted to gaining one. The test was not whether it was desirable for the appellant to have both parents with him while he grew up, but whether it would be *unduly* harsh if he did not. At [49], the Judge stated that he was 'satisfied that [the boy's] welfare would not be jeopardised with the appellant's absence from his life'.

23. At [50], the Tribunal found that the parties' present relationship had begun in 2016, their marital relationship having ended in 2013, or at the latest, 2014. The 2016 relationship was undertaken when the appellant had no leave and was not lawfully in the United Kingdom. The Tribunal was not satisfied that there would be very significant obstacles to the appellant returning to live in Pakistan, where he lived with his mother up to the age of 14. He found removal to be proportionate and dismissed the appeal.

Grounds of appeal

24. The grounds of appeal are lengthy, as Mr Chirico acknowledged at the hearing. They may be summarised thus:

(a) **Ground 1.** The First-tier Tribunal failed to make any reference to the 'very compelling circumstances' test in paragraph 398 of the Immigration Rules, over and above the factors set out in paragraphs 399-399A thereof. That was a material, disputed issue on which the Tribunal received submissions, but did not make any decision thereon.

(b) **Ground 2.** This ground is primarily a reasons challenge. The appellant asserts that the Tribunal's assessment of the best interests of his 4½ year old child was irrational, particularly having regard to the assertion that the child would not notice any difference in his absence; that the Tribunal erred in concluding that this appellant was not his son's sole carer; and that the Tribunal failed to have regard to the evidence of Mrs Pearce and the school. The appellant also complained of the Tribunal's suggestion that the recent reconciliation between the parties might be for the purposes of enabling the appellant to remain in the United Kingdom.

The grounds clarify that it is not, and never has been, the appellant's case that his father is his sole carer and to that extent, the Tribunal's finding to that effect is said to be irrational and unsupported by any submission by Mr Chirico on the appellant's behalf.

(c) **Ground 3.** The appellant contends that it was not open to the Tribunal to find that the appellant's wife would be able to cope without him and that, therefore, it would not be unduly harsh to expect her to remain in the United Kingdom without him. The appellant contends that the evidence before the Tribunal was to the contrary effect; the appellant's child now had a special educational needs diagnosis and if the appellant were not in the United Kingdom, she would have to give up work, which would have a wider social effect as she is herself a special needs teacher.

(d) **Ground 4.** The appellant argues that it was not open to the Tribunal to find that the appellant did not enjoy family life with his mother. In particular, the Judge erred in taking into account his own observation of the mother at the First-tier Tribunal hearing, and in preferring that to the report by the social worker; failed to consider that the appellant's mother had brought him up until he was 14; placed too much emphasis on his finding that the mother was not an old woman, at 50 years of age; and gave insufficient weight to the medical evidence of Dr Gupta that the appellant's mother had serious mental health problems which had resulted in her being an in-patient on at least one occasion. The appellant observes that the finding that there was 'no medical report about [the mother's] condition' is erroneous in fact, as there was before the Tribunal a report from Dr Gupta about her mental health.

Permission to appeal

25. Permission to appeal was granted by First-tier Tribunal Judge Adams, for the following reasons:

> "2. It is arguable that in coming to his conclusions the Tribunal failed to find whether there were any very compelling circumstances that would render his deportation disproportionate. Further, it is an arguable error of law that in coming to his conclusions in relation to the test interests of the child, the Tribunal's findings are inadequate for the reasons referred to in ground 2 of the application. It is also an arguable error of law that the Tribunal did not give adequate reasons for finding the appellant's partner would be able to cope without him and did not take note of the fact that it would impact on society if his mother had to give up work. In addition, the Tribunal made findings in relation to the appellant's mother based on his own opinion. He did not take note of the medical evidence before him."

26. The effect of the grant of permission is that all grounds may be argued.

Rule 24 Reply

27. The respondent opposed the grant of permission. Her opposition may be summarised as follows:

(a) She relied on the decisions in *Hashem Ali*, *NE-A,* and *ZP (India) v Secretary of State for the Home Department* [2015] EWCA Civ 596, arguing that the 'very compelling circumstances' test was a proportionality exercise in which the appellant must demonstrate circumstances at the 'very compelling' level which outweighed the public interest in deportation. She relied on *AD Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348 and *Danso v Secretary of State for the Home Department* [2015] EWCA Civ 596. The prescribed period of 10 years would run only from the appellant's actual departure from the United Kingdom and the period of good behaviour since sentence was of no relevance to that.

(b) As regards the section 55 best interests of the child and the 399(a) test, the grounds were no more than a disagreement with the Tribunal's findings. The Tribunal had been entitled to give weight to the brevity of the father-son relationship on the facts of this application.

(c) The Tribunal had given clear reasons for finding that the appellant's former wife would be able to cope in his absence if he was removed.

(d) The Tribunal had not erred in finding that the appellant had failed to discharge the burden upon him of showing that family life still existed between the appellant and his mother. There was no corroborative evidence and the appellant's grounds relied on the strength of the pre-1994 bond between mother and son, before they both rejoined his father in the United Kingdom. The appellant's mother's mental illness was of no assistance to him without *Kugathas* dependency, and her needs had been met by her husband, son and others while the appellant was in prison.

Upper Tribunal hearing

28. At the beginning of the hearing, Mr Chirico handed up a document described as 'note for hearing' which was in effect both an addendum to his 21 March 2017 skeleton argument, and his reply to the respondent's Rule 24 Reply. This document is really no more than a joinder of issue on the respondent's Rule 24 Reply arguments. I have had regard to it but there is no need to set it out in detail here.

29. That is the basis on which this appeal came before the Upper Tribunal.

Submissions

30. I received oral submissions from the parties at the hearing. For the appellant, Mr Chirico relied on his skeleton argument of March 2017 and on the Note already mentioned. He argued that the appellant's offence was an old conviction and the sentences imposed (12 months concurrent on two counts) were short. The respondent's continuing failure to revoke the deportation order would cause family breakup which, he contended, would impact directly on the best interests of the appellant's son. There had been a 3-year delay by the respondent in making a decision on the appellant's application to revoke the deportation decision, which had made matters worse. The First-tier Tribunal had not made any cumulative assessment of private and family life in this case, which was an error of law.

31. The Tribunal had, in fact, failed to engage with the evidence before it and taken a very negative approach to the reconciliation between these parents, which was a good thing, for them and for their child. The Home Office had not disputed the medical evidence regarding the appellant's mother, nor her oral evidence. The appellant's former wife had flight-related anxiety which meant that she could not travel to Pakistan with him.

32. For the respondent, Mr Kotas said that adequate explanation had been given on the *Kugathas* point in the First-tier Tribunal decision, and the finding that there was no extant family life between this appellant as an adult, and his mother, father, or brother was one which was open to the Tribunal to make, on the evidence before it. Mr Kotas observed that there was no challenge in the grounds of appeal to the finding by the First-tier Tribunal that there were no significant obstacles to the appellant's reintegration in Pakistan if he were to be returned there.

33. As regards the section 55 best interests of the appellant's child, it was not perverse for the Tribunal to have concluded that the primary parent here was the appellant's former wife, who had always been there for their child. The appellant had been absent from his child's life for the first 3 years and the relationship between the parents was not consistent, but off/on over a number of years.

34. Mr Kotas noted that the First-tier Tribunal had applied an erroneous approach to the "unduly harsh" test relying (albeit not expressly) on the guidance in the Upper Tribunal decision in *MAB* (para 399; "unduly harsh") [2015] UKUT 435 (IAC), which had subsequently been disapproved by the Court of Appeal in *MM (Uganda) & Anor v Secretary of State for the Home Department* [2016] EWCA Civ 617. Mr Kotas argued,

however, that this error was in the appellant's favour and immaterial to the outcome of the appeal, since even with his criminality out of account, the appeal failed on paragraph 399 before the First-tier Tribunal.

35. The only area of real concern in the grounds of appeal was the First-tier Tribunal's omission to deal expressly with the 'very compelling circumstances' exception in paragraph 398, with regard to Part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended). The Upper Tribunal should consider what might be the content of any compelling exceptional circumstances relied upon here: it appeared that the factors relied upon were private and family life, which could be given little weight under section 117B of the 2002 Act, particularly as the parties had married after the signing of the deportation order, with the appellant's former wife well aware of his status.

36. Mr Kotas relied on the decision of the Court of Appeal in *SS (Nigeria) v Secretary of State for the Home Department [*2013] EWCA Civ 550 in which the factual matrix was arguably similar to the present appeal. The appellant in *SS (Nigeria)* had not succeeded. Lord Justice Laws, giving the decision of the Court in that case had said that the public interest in deportation could only be displaced by a very strong claim indeed under Article 8 ECHR.

37. In reply, Mr Chirico explained that the appellant's case on 'very compelling circumstances' related to his age on arrival in the United Kingdom (14) and to the 22 years he spent here, 16 of them lawfully. Unless the Tribunal could entirely exclude the possibility of an immigration Judge allowing the appeal, which the appellant argued was perverse, then it was material that the Tribunal had omitted to consider very compelling circumstances. The respondent had to show that it was not material, and that, in these circumstances, was a very high bar for her to overcome.

38. As regards the ability of the appellant's former wife to cope in his absence, there was evidence before the Tribunal that she had not found it easy. The independent social worker's report was helpful to the appellant on this point. The appellant would rely on [38] in *Hesham Ali,* and argued that it would be unduly harsh for the appellant's former wife and child to remain in the United Kingdom without him, and that the best interests of the child required his father to remain. The First-tier Tribunal's decision at [45] did not even consider that argument.

39. The appellant also maintained his argument concerning extended family life with the other adults in the appellant's birth family.

The Immigration Rules

40. The Immigration Rules, so far as relevant to this appeal, are as follows:

> "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 and in the public interest 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*.

399. This paragraph applies where paragraph 398 (b) or (c) 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 … *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; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; *and*
(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; *and*
(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –
(a) the person has been lawfully resident in the UK for most of his life; and
(b) he is socially and culturally integrated in the UK; and
(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported." *[Emphasis added]*

Discussion

41. The appellant is a person to whom paragraph 398(b) applies and the respondent, and therefore the First-tier Tribunal, are required to consider the provisions of paragraphs 399 and paragraph 399A. Only if neither of those paragraphs avails the appellant does the question in paragraph 398 of the existence of "very compelling circumstances over and above those described in paragraphs 399 and 399A" arise. The appellant's primary case is that it does arise, and much of the argument before me concerned the absence of a "very compelling circumstances" finding in the decision.

42. I begin, therefore, by dealing with grounds 2 and 3, which engage with the First-Tier Tribunal's reasoning under paragraphs 399 and 399A. I note, as Mr Kotas observed, that the grounds of appeal do not challenge the finding that there are no 'very significant obstacles' to the appellant's integration into Pakistan. To the extent that such argument has been raised in the appellant's skeleton argument, or in argument before me, it is irrelevant since there was no application to amend the grounds. If the appellant cannot bring himself within sub-paragraph 399A(c) then his argument under paragraph 399A must fail and the Tribunal did not err in so holding.

43. I return, therefore, to the challenges under paragraph 399(a) and (b). It is not disputed that as British citizens, the appellant's former wife and his son cannot be required or expected to live in Pakistan, and that the appellant's former wife is not willing to go there, or to allow their son to do so. Despite the misgivings expressed by the Tribunal in his decision, the respondent does not seek to assert that the appellant's relationship with his former wife and/or their child is not genuine or subsisting.

44. Therefore, for the purposes of this decision, the determinative question is whether it would be *unduly* harsh for the appellant's former wife or his child to remain in the United Kingdom without him. At [42]-[51] in the decision, the First-tier Tribunal gave reasons for finding that it would not be unduly harsh for the appellant's former wife, or his child, to remain in the United Kingdom without him. She had coped without him for over 3 years, the relationship having broken down when the baby was 6 months old, but not resumed until he was rising 4.

45. The appellant says that the Tribunal failed to give adequate weight to the social worker's report. The weight to be given to expert evidence is for the fact-finding Tribunal, and its findings of fact thereon can be displaced only in the circumstances set out by Lord Justice Brooke in *R (Iran)* at [90], that is to say, the findings must be contrary to evidence, perverse, *Wednesbury* unreasonable, or incomprehensible to the reviewing Judge. The First-tier Tribunal's findings under paragraph 399 are none of those things, and it was open to the Judge to find that the social worker's report was not determinative of the issue of undue harshness. This, therefore, is a case where neither paragraphs 399 or 399A of the Rules avail the appellant.

46. One returns, therefore, to consider whether at the date of hearing there were 'very compelling circumstances' over and above those provided for in paragraphs 399 or 399A, which outweigh the public interest in deportation. That is a high standard, and well beyond the 'not doomed to fail' test advanced by Mr Chirico in argument at the hearing. It cannot be met by consideration of the social consequences of the appellant's former wife giving up her job as a special needs teacher, nor by consideration of the relationship between the appellant and his child, or his former wife, both of which are provided for in paragraphs 399 and/or 399A.

47. There remains the question of private and family life between the appellant and his parents and younger brother. All of the members of his family group are now adults. The appellant cannot be heard to say that the bond he had with his mother when a child, before he lived in a household with his father, meets the *Kugathas* test: the point about *Kugathas* dependency is that it is between adults, because there is always dependency between a minor child and his parents. It is right, as the First-tier Tribunal recognised, that the appellant lives in a joint family household with his parents, brother, his former wife and his child. However, the head of that family household is the appellant's father, and it was unarguably open to the First-tier Tribunal Judge to consider that the appellant's father was the primary resource for his mother.

48. The First-tier Tribunal did take account of the mental health evidence regarding the mother. The inelegant observation by the Judge that there was 'no medical evidence' about her condition, read in context, plainly refers to the lack of any evidence to

corroborate the account of her physical health (diabetes and sight loss). That is the only context in which how she walked into Court (on the arm of her husband and brother) can have been relevant. I have not seen any medical evidence about the mother's physical health but given the other family support she has, and the lack of *Kugathas* family life between her and the appellant, I am satisfied that the First-tier Tribunal did not err in considering that the private life which the appellant has with his other family members was insufficient to outweigh the public interest in deportation of this appellant.

49. Mr Chirico argues that the appellant's last offence was a long time ago and the sentence only 12 months, and that he has been rehabilitated since 2008. I am guided by the judgment of Lord Justice Moore-Bick in *Danso*, giving the judgment of the Court, at [20]:

> "20. … I should not wish to diminish the importance of rehabilitation. It may be that in a few cases it will amount to an important factor, but the fact is that there is nothing unusual about the appellant's case. … It must be borne in mind, however, that the protection of the public from harm by way of future offending is only one of the factors that makes it conducive to the public good to deport criminals. Other factors include the need to mark the public's revulsion at the offender's conduct and the need to deter others from acting in a similar way. Fortunately, rehabilitation of the kind exhibited by the appellant in this case is not uncommon and cannot in my view contribute greatly to the existence of the very compelling circumstances required to outweigh the public interest in deportation. …
>
> 22. …I have sought to identify the factors on which the appellant can rely as militating against his deportation. None of them is unusual either in nature or degree; nor could it possibly be said that taken together they amount to very compelling circumstances of a kind that could outweigh the public interest in deportation."

50. That is also the position in this appeal. The circumstances relied upon, both within paragraphs 399 and 399A, and over and above the circumstances provided for in those paragraphs, are not unusual. This young man came to the United Kingdom as a teenager; got into trouble up to and including the 1-year sentence on two offences in 2008, when he was 28 years old; and has stayed out of trouble since then. He has an intermittent relationship with his former wife, and a brief but affectionate relationship with his very young son, both of which were properly considered by the First-tier Tribunal, as was his relationship with his parents and brother. Even taken together, nothing in his narrative amounts to very compelling circumstances of a kind which could outweigh the statutorily reinforced public interest in deportation of foreign criminals.

51. I deal finally, and for completeness, with the *MAB* error of law posited by Mr Kotas at the hearing, but not presaged either in the grounds of appeal or by way of a cross-appeal. The First-tier Tribunal at [46], when assessing whether the appellant's removal would have unduly harsh effects on his son, erred in a self-direction that the appellant's criminality should not form part of the proportionality assessment made.

52. That was the approach in *MAB*, disapproved by the Court of Appeal at [26] in *MM (Uganda)*. The proper approach was identified by the Upper Tribunal in *KMO* (section 117 - unduly harsh) [2015] UKUT 543 (IAC):

> *"The Immigration Rules, when applied in the context of the deportation of a foreign criminal, are a complete code. Where an assessment is required to be made as to whether a person meets the requirements of para 399 of the Immigration Rules, as that comprises an assessment of that person's claim under article 8 of the ECHR, it is necessary to have regard, in making that assessment, to the matters to which the Tribunal must have regard as a consequence of the provisions of s117C. In particular, those include that the more serious the offence committed, the greater is the public interest in deportation of a foreign criminal. Therefore, the word "unduly" in the phrase "unduly harsh" requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh."*

53. In *MM (Uganda)*, Lord Justice Laws, giving the judgment of the Court, held in terms that the *MAB* approach was wrong and that

> "26. …The expression "unduly harsh" in section 117C(5) and Rule 399(a) and (b) requires regard to be had to all the circumstances including the criminal's immigration and criminal history."

The error made is in the appellant's favour and is, therefore, immaterial to the outcome of this appeal, since even with that error, the appeal was dismissed.

DECISION

54. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of an error on a point of law.
I do not set aside the decision but order that it shall stand.

Date: 14 September 2017 Signed *Judith AJC Gleeson*

Upper Tribunal Judge Gleeson