**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00144/2016

**THE IMMIGRATION ACTS**

| **Heard at: Field House** | **Decision & Reasons Promulgated** |
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| **On: 11 December 2018** | **On: 23 January 2019** |

**Before**

**THE HON. MR JUSTICE LANE, PRESIDENT**
**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**LIVIU COJAN**
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms A Weston, instructed by HSR Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Romania, born on 18 October 1980. He claims to have arrived in the United Kingdom in 2002, although there is no evidence of his date of entry. He was issued with an EEA residence card as a non-EEA family member on 17 July 2008 following his marriage to his wife in Romania in September 2007.

2. The appellant was convicted on 7 January 2009 and 31 December 2009 of separate driving offences for which he received a fine and penalty points. On 9 October 2014 he was convicted of two counts of committing an act/ series of acts with intent to pervert the course of justice, for which he was sentenced to 36 months' imprisonment. On 10 February 2015 he was served with a liability for deportation notice and on 2 March 2016 the respondent made a decision to deport him pursuant to regulation 19(3)(b) and regulation 21 of the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations"). Further to representations made by the appellant in response to the deportation decision, a supplementary deportation letter was issued on 29 June 2016.

3. In the deportation decision, the respondent accepted that the evidence produced by the appellant of his employment in the UK was sufficient to demonstrate that he had acquired the right to permanent residence. Accordingly consideration was given to whether his deportation was justified on serious grounds of public policy. The respondent noted that the circumstances of the appellant's offence involved a fatal road traffic collision on 9 November 2012 in which a Renault Laguna pulled onto a dual carriageway in front of two motorcycles and resulted in the death of one of the motorcyclists. The appellant stood trial for causing the death of the victim, but was acquitted of that offence. However, he was convicted on two counts of committing an act/ series of acts with intent to pervert the course of justice in relation to a payment made to a witness in the trial to secure their silence and the concealment or destruction of the Renault Laguna which was seen to have been driven to his garage premises following the collision. It was noted that the appellant was the owner and operator of garage premises close to where the collision occurred and that he also operated a business exporting vehicles to Eastern Europe and it was considered that he had destroyed or concealed the vehicle, so removing the only potential source of evidence which could have identified the driver.

4. The respondent noted that the appellant had been found in an OASys assessment to pose a low risk of harm to the public and a low risk of re-offending, but considered that the offence for which he had been convicted was a serious one as reflected by the sentence. The respondent considered that the appellant posed a significant threat to the safety and security of the public and that his deportation was justified on serious grounds of public policy. It was considered that the appellant's deportation would not prejudice the prospects of his rehabilitation and that the decision to deport him was proportionate and in accordance with the EEA Regulations. The respondent went on to consider Article 8, noting that the appellant claimed to have a family life in the UK with his two children A and B, both of whom were Romanian nationals, and his partner, AC, a Moldovan national. The respondent did not accept that the appellant could meet the requirements of paragraph 399(a) or (b) of the immigration rules as it would not be unduly harsh for his children and partner to accompany him to Romania or to remain in the UK without him. The respondent considered that the appellant could not meet the criteria in paragraph 399A and that there were no very compelling

circumstances outweighing the public interest in his deportation for the purposes of paragraph 398. The respondent concluded that the appellant's deportation would not breach his Article 8 rights under the ECHR.

5. The appellant appealed against that decision and his appeal was heard in the First-tier Tribunal on 28 February 2017 by First-tier Tribunal Judge Goodrich. The appellant and his wife both gave oral evidence before the judge. The judge noted the basic facts, that the appellant and his wife married in September 2007 in Romania, having met when they were very young as their families lived near each other, albeit on different sides of the border between Romania and Moldavia. The appellant had a Masters degree in Economics, acquired in Bucharest, and his wife had a degree in Jurisprudence (Economic law) from Moldova State University and a Diploma in Business Law from the UK. Both worked for, and were directors of, the appellant's company, Europe Vans Ltd. They had two children, A born on 8 January 2008 and B born on 31 October 2012, both of whom were Romanian citizens. The appellant's wife had miscarried a third child shortly after he was sentenced to three years imprisonment.

6. The judge noted that the version of events given to the offender supervisor in the OASys report was not the same as that underpinning the verdicts of the jury and therefore accorded little weigh to the OASys report. She considered that the appellant had very little insight into his crime and that his expression of remorse and regret was in relation to the consequences for himself and his family rather than for his actions. The judge concluded that there was a real and serious risk that the appellant would re-offend and cause serious harm and that the appellant represented a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. The judge considered that the appellant had not established any real integration in the UK until late 2007 when he returned with his wife following their marriage in Romania in 2007 and that the second level of protection applied to him. Having conducted a proportionality assessment, the judge considered that the respondent's decision was justified on the grounds of public policy and was not disproportionate. She accordingly dismissed the appeal under the EEA Regulations.

7. The judge then went on to consider Article 8. With regard to paragraph 399(a) she noted that only A had lived in the UK for over seven years. She considered that it was in A's best interests to remain in the UK with her father, but that it would not be unduly harsh for her to live in Romania or to remain in the UK without him. With regard to paragraph 399(b) the judge considered that it would not be unduly harsh for the appellant's wife to live in Romania or to remain in the UK without him. The judge considered that the criteria in paragraph 399A were not met and that the appellant's deportation would not breach Article 8. She accordingly also dismissed the appeal on Article 8 grounds.

8. The appellant sought permission to appeal to the Upper Tribunal on the following grounds: that the judge had applied the incorrect test when

considering whether the respondent's decision was justified on grounds of public policy; that the judge had made an incorrect assessment of the best interests of the appellant's children, in particular the eldest child A who was over the age of seven, and had wrongly applied a test of undue harshness; that the judge had failed to consider the effect on the public purse of the appellant having to close his business; that the judge had failed to conclude that the imperative grounds applied; and that the judge had failed to give appropriate weight to the fact that the appellant's offending did not include drugs or violence.

9. Permission to appeal was refused in the First-tier Tribunal and the Upper Tribunal. However, in a "Cart" challenge to the Administrative Court, the appellant sought to judicially review the refusal to grant permission on the grounds that the First-tier Tribunal and Upper Tribunal had failed to consider the cases of MK (section 55 – Tribunal options) [2015] UKUT 223 and MAB (para 399; "unduly harsh") [2015] UKUT 435 and had erred in their consideration of the 'unduly harsh' test.

10. The grant of permission by the High Court contains the following observations:

> "The AoS of the SSWP supports a decision by me that remits the matter back to the UT.
>
> It is clear that the FTJ did not consider, let alone apply, the CA decision in MM (even though that has since been held by another constitution of the CA in MA to be wrongly decided, but should nevertheless be followed). This looks like an error of law.
>
> The consequences of removal would be so momentous for the claimant that I can safely say that there is a compelling reason for an appeal to be heard"

11. The reference in the grant to the acknowledgment of service from the Secretary of State for Work and Pensions is, to say the least, puzzling, given that the respondent in this appeal is the Secretary of State for the Home Department. We are not aware of any AoS having been filed by that Secretary of State in connection with this judicial review.

12. The High Court's bald statement of fact regarding the consequences of removal being "so momentous" for the claimant was presumably intended to satisfy CPR 54(7). This requires the High Court to grant permission only if it is satisfied that either:

> "(i) the claim raises an important point of principle or practice; or
>
> (ii) there is some other compelling reason to hear it."

13. In Thakrar v SSHD (Cart JR; Art 8: value to community) [2018] UKUT 336 (IAC), the Upper Tribunal pointed out that the mere assertion by a person that his or her removal would violate Article 8 cannot, without more, satisfy CPR 54.7A(7)(b) because otherwise the intention of the CPR (and the Supreme Court) to impose a restriction on this type of judicial review would be lost. In

the instant case, it is unclear what consequences the High Court had in mind and whether these were being taken entirely on the basis of the appellant's own contentions, or by reference to what the First-tier Tribunal Judge had found.

14. Be that as it may, the grant of permission was on a different basis to the appellant's grounds of challenge, namely that the First-tier Tribunal had failed to consider and apply the Court of Appeal decision in MM (Uganda) & Anor v Secretary of State for the Home Department (Rev 1) [2016] EWCA Civ 617. Since that basis had not featured in the grounds of permission to appeal to the Upper Tribunal, it is difficult to see how the decision of the Upper Tribunal, in refusing permission, could have been "wrong in law", as required by CPR 54.7A(7(a). In fact, a reading of MM (Uganda) shows that case was the antithesis of the arguments made in the grounds seeking judicial review, since MM held that the public interest has to be taken into account as part of the 'unduly harsh' test, contrary to the approach taken in MAB.

15. For these reasons, the High Court's grant of permission was, with respect, misconceived. Nevertheless, it led to the Upper Tribunal's decision refusing permission being quashed and permission to appeal being granted by the Upper Tribunal on 24 April 2018.

16. The matter then came before us to determine whether the First-tier Tribunal had erred in law in its decision.

**Appeal hearing and submissions**

17. In view of the fact that caselaw had since moved on, with the Supreme Court's judgment in KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent) [2018] UKSC 53, we decided it was necessary to permit Ms Weston to pursue the challenge on the basis of the law as explained in that case.

18. It was Ms Weston's submission that First-tier Tribunal Judge Goodrich had erred in law by adopting a global approach under the heading of 'proportionality' and then importing that assessment, which was made in the context of the EEA Regulations, into the Article 8 analysis. She submitted that the judge had applied too high a test when considering the best interests of A, in particular when considering at [84] whether A's best interests would be 'irrevocably harmed' if she were to go to Romania. She submitted that the judge had taken that wrongful formation of the best interests test and weighed it up against the seriousness of the appellant's offending, at [86] to [89], contrary to the decision in KO. The judge had failed to factor in to her consideration of 'unduly harsh' the impact of A being uprooted from her life in the UK or of being separated from her father, but had focussed solely on whether her mother could function economically without the appellant. Ms Weston submitted that [113] of the judge's decision was particularly problematic as the judge had directly imported the previous proportionality balancing exercise into her 'unduly harsh' assessment and it was difficult to

see why she had found that the appellant's deportation would not be unduly harsh on A. Ms Weston submitted that the judge's decision ought accordingly to be set aside and re-made.

19. Mr Whitwell submitted that the judge's decision was more compartmentalised than the appellant was claiming. The judge had properly assessed the best interests of the children and had not factored the public interest and the appellant's offending into the unduly harsh assessment. In any event it could not be said, on the facts before the judge, that the appellant's deportation would be unduly harsh on A, and the finding to that effect was open to the judge.

20. In response Ms Weston submitted that in the absence of any self-direction by the judge on the meaning of 'unduly harsh' the only indication of how she assessed the matter was the language she used, which was the wrong language.

**Consideration and findings**.

21. We are not persuaded by Ms Weston's arguments and we consider there to be nothing in the judge's approach to the question of A's best interests and the unduly harsh test which is inconsistent with the approach advocated in KO. The judge's decision, as Mr Whitwell submitted, was clearly compartmentalised and we find no merit in the suggestion that her consideration of the children's best interests or of the 'unduly harsh' matter was infected by a consideration of the public interest.

22. Turning first to the best interests consideration, we do not agree that the judge set too high a bar or applied too high a test or the wrong test, as Ms Weston submitted. The judge undertook a detailed consideration of the best interests of A, at [81] to [85], and had regard to all relevant matters, including friendships, language, education, health, family and culture. The judge's focus was plainly solely on the interests of the children, particularly A, with no regard to extraneous factors such as public interest considerations. The judge's reference at [81] to there being no evidence that the appellant's wife was unable to cope with the children when he was in prison was a perfectly valid consideration, contrary to Ms Weston's submission, as it clearly impacted upon the children. The judge's comment at [84], that A's best interests would not be irrevocably harmed if she were to go to Romania, was, likewise, a perfectly valid comment. Contrary to Ms Weston's submissions, such comments were plainly not a test applied by the judge, but were simply observations about A's circumstances in the UK and the circumstances in which she would find herself in Romania if she were to accompany the appellant there. Plainly the judge concluded that A's best interests would be to remain in the UK with both parents, but that she would equally be able to adjust to life in Romania if the choice was for the family to relocate there. There was nothing wrong in such a conclusion and the judge was entitled to conclude as such.

23. As for the 'unduly harsh' question, for the purposes of paragraph 399 of the immigration rules, it is clear that the judge's assessment at [99] to [106] was made solely by reference to the children's circumstances and to those of their mother, with no regard to the appellant's offending or to wider public interest considerations. The judge considered the family's circumstances "in the real world" in which the children lived, in accordance with the approach advocated in KO, and took full account of the family's EU rights as part of that consideration, as is evident at [105]. There is no suggestion in the judge's findings that she referred back to anything other than the best interests assessment previously made in relation to the EEA Regulations.

24. At [100], when assessing 'unduly harsh' in the context of A accompanying the appellant back to Romania, the judge considered the circumstances of the entire family returning there, and the impact on A in particular. The judge was clearly referring to the findings previously made in the latter part of [84] in regard to the circumstances A would encounter in Romania and how she would cope in terms of friendships, culture and education. There is nothing in the judge's wording at [100] to suggest that she was incorporating any of the findings made at [86] to [90] on proportionality under the EEA Regulations. The same applies to the judge's findings at [101].

25. At [101] the judge considered the concept of 'unduly harsh' in the context of A remaining in the UK and being separated from the appellant. Ms Weston criticised the judge's findings in that paragraph, submitting that the language used in the last sentence, namely "bleak or inordinately or excessively so" was wrong when considering domestic Article 8 issues. We do not agree. The judge was simply applying the wording used in the relevant caselaw. In MK at [46] the Upper Tribunal considered that "*"Harsh" in this context, denotes something severe, or bleak*" and clearly meant that to apply to both limbs of paragraph 399(a), (a) and (b), in the foreign as well as the domestic context, albeit focussing on the foreign element in that case. That wording was repeated in MAB where the Upper Tribunal's headnote at [3] states:

> "The consequences for an individual will be "harsh" if they are "severe" or "bleak" and they will be "unduly" so if they are 'inordinately' or 'excessively' harsh…"

And the Tribunal said at [80]:

> "In our judgment, Judge Holder erred in law by failing to give adequate reasons and in reaching an irrational conclusion that the impact upon the appellant's children of remaining in the UK was "unduly harsh". Further, in our judgment, the evidence did not establish that the consequence of his deportation for them remaining in the UK was "unduly harsh". Applying the meaning of "unduly harsh" set out in MK that it does not equate with "uncomfortable, inconvenient, undesirable or merely difficult" circumstances, we have no doubt that the circumstances identified by the judge could not be equated to "unduly harsh" consequences for the children. It could not properly be established that the effect on them of the appellant's deportation was excessive, inordinate or severe. The only proper finding, and one we make, is that the effect on the children has not been established to be 'unduly harsh'."

26. The wording was then referred to by the Supreme Court in KO and specifically at [33] when considering the case of KO himself, and endorsed at [35]. Given that Judge Goodrich clearly adopted the wording from the relevant jurisprudence we do not understand why Ms Weston takes issue with it. In any event the judge clearly adopted the correct approach, and took account of all relevant factors in relation to A. As for Ms Weston's submission that the judge had focussed only on welfare and economic issues in relation to A rather than the impact upon her of losing her relationship with the appellant, we disagree and note that the judge made very clear reference to the A's close relationship with the appellant and the impact of separation.

27. Finally, Ms Weston submitted that [113] of the judge's decision was particularly problematic as it was clear that the judge was importing her assessment directly from the proportionality balance made in relation to the EEA Regulations, and therefore included the public interest and the appellant's criminality as part of the balancing exercise. However we find that argument to be misconceived as [113] was not part of the "unduly harsh" assessment. The judge's findings on "unduly harsh" for the purposes of paragraph 399(a) ended at [101] and her findings for the purposes of paragraph 399(b) ended at [106]. The judge then considered paragraph 399A at [107] to [108]. At [111] and [112] the judge considered the equivalent provisions in section 117C of the NIAA 2002. The judge's consideration at [113], whilst it could have been more clearly expressed, was the "compelling circumstances" consideration in paragraph 398.

28. The judge's use of the words "such as to compel an outcome in the appellant's favour" was not, as Ms Weston submitted, an importation of the "compelling circumstances" consideration into the "unduly harsh" assessment, but was in fact the judge's consideration of whether there were compelling circumstances over above the unduly harsh and other assessments in paragraph 399 and 399A. That was clearly what the judge meant in her penultimate sentence "*So far as Article 8 is concerned I do not consider that the impact of the decision on all concerned is unduly harsh or is such as to compel an outcome in the appellant's favour*". Accordingly, at that point the judge was fully and properly entitled to take account of the appellant's criminality and all other matters relevant to the public interest and was perfectly entitled to import into that decision the findings previously made from [86] to [90] under her proportionality assessment within the EEA Regulations when considering whether there were such compelling circumstances. For the reasons properly given she was entitled to conclude that there were not.

29. We do not agree, therefore, with the assertion in the grounds seeking permission, or in the observations accompanying the grant of permission to bring the judicial review, that the First-tier Tribunal judge failed to take into consideration relevant caselaw or relevant matters or that she adopted an incorrect approach or more stringent test in considering the best interests of the children, particularly A, and in assessing the unduly harsh question. On the contrary, the judge's approach was entirely consistent with the approach in KO; it took account of the "real world" situation and focussed on the interests of the

children, in particular A, and the judge's conclusions were fully and properly open to her on the facts and evidence before her.

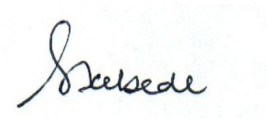
30. For all of these reasons we find no errors of law in the judge's decision and we uphold the decision.

**DECISION**

31. The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. The appeal is accordingly dismissed and the decision of the First-tier Tribunal dismissing LC's appeal stands.

**Anonymity**

The anonymity order previously made is hereby revoked. The principle of open justice requires the appellant to be named.

Signed 
Upper Tribunal Judge Kebede Dated: 10 January 2019