Upper Tribunal
(Immigration and Asylum Chamber)

MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 (IAC)

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 16 June 2015	
	……

Before

UPPER TRIBUNAL JUDGE GRUBB
DEPUTY UPPER TRIBUNAL JUDGE PHILLIPS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAB
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Mr R Davies instructed by Albany Solicitors

1. 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 focus is solely upon an evaluation of the consequences and impact upon the individual concerned.

2. Whether the consequences of deportation will be "unduly harsh" for an individual involves more than "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging" consequences and imposes a considerably more elevated or higher threshold.

3. 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 taking into account of all the circumstances of the individual.

(MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 223 (IAC) at [46] and BM and others (returnees – criminal and non-criminal) DRC CG [2015] UKUT 293 (IAC) at [109] applied.)

DETERMINATION AND REASONS

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 (SI 2005/230). Neither party invited us to rescind the order and we continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

Introduction

2. In this appeal, the Secretary of State appeals against a decision of the First-tier Tribunal (Judge Holder) allowing the appeal of MAB against a decision taken on 6 May 2014 to deport him to the United States of America pursuant to the automatic deportation provisions of the UK Borders Act 2007 on the basis that his deportation would breach Art 8 of the ECHR.

3. The appeal raises an important point of construction concerning the meaning of the phrase "unduly harsh" in para 399 of the Immigration Rules in effect from 28 July 2014 (Statement of Changes in Immigration Rules HC 395 as amended by HC 532).

4. For convenience, we will refer to the parties as they appeared before the First-tier Tribunal.

Background Facts

5. The appellant is a citizen of the United States of America who was born on 30 June 1959. He came to the UK in June 1990 as a visitor. On 23 April 1994, he married a British citizen, ED. On 16 October 1995, he was granted indefinite leave to remain.

6. The appellant and his wife have three children, L born on 1 February 1995, V born on 14 October 1997 and F born on 25 August 2001. They are, therefore, now 20, 17 and 13 years old respectively. They and their mother are British citizens.

7. On 21 May 2013, the appellant, having pleaded guilty, was sentenced at the Aylesbury Crown Court to three years' imprisonment on a number of counts for sexual offences involving children under the age of 13. The appellant was also required to sign the Sex Offenders Register for life and a Sexual Offences Protection

order was imposed for ten years, in effect, severely restricting contact with any female under the age of 16 years.

8. In a letter dated 11 July 2013, the Secretary of State informed the appellant that he was liable to automatic deportation under the UK Borders Act 2007 as a 'foreign criminal'. The appellant submitted a questionnaire in response relying upon Art 8 of the ECHR and, in particular, his relationships with his wife and three children. On 6 May 2014, the Secretary of State made a decision that s.32(5) of the UK Borders Act 2007 applied as the appellant's deportation would not be contrary to Arts 3 or 8 of the ECHR. On 2 May 2014, a deportation order was made against the appellant.

The Appeal

9. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 11 November 2014, Judge Holder allowed the appellant's appeal under Art 8.

10. The judge concluded that the appellant could not succeed under para 399(b) on the basis of a "genuine and subsisting relationship" with his wife as the evidence before the judge was that their marriage had broken down. Likewise, the judge found the appellant could not succeed on the basis of his 'private life' as para 399A did not apply. It was not established that there were "very significant obstacles" to the appellant's integration on return to the USA.

11. However, the judge allowed the appeal as he found that para 399(a) of the Rules did apply. The judge accepted that it would "unduly harsh" for the appellant's children to live in the United States of America and also that it would be unduly harsh for them to remain in the UK if the appellant were deported.

The Appeal to the Upper Tribunal

12. The Secretary of State sought permission to appeal to the Upper Tribunal. Initially, permission was refused by the First-tier Tribunal on 8 December 2014. However, on 23 March 2015 the Upper Tribunal (DUTJ Sheridan) granted the Secretary of State permission to appeal. Thus, the appeal came before us.

Summary of the Submissions

13. Mr Richards, on behalf of the Secretary of State did not challenge the judge's finding that it would be "unduly harsh" for the appellant's children to live in the USA. However, he submitted that the judge's finding that the appellant's deportation would have a "unduly harsh" effect upon the children if they remained in the UK was flawed.

14. First, he submitted that the judge had failed to take into account the public interest in assessing whether it would be "unduly harsh" for the children to remain in the UK without the appellant. He submitted that the judge had wrongly simply looked at the impact upon the children. The question of whether his deportation would be "unduly harsh" could not, Mr Richards submitted, be decided in isolation from the

public interest reflected in the seriousness and nature of the appellant's offending. The magnitude of the public interest was relevant in determining whether any "harsh" consequences were "unduly" so.

15. Secondly, in any event, Mr Richards submitted that the judge had failed to give adequate reasons for his finding that there was "overwhelming evidence" that the separation of the appellant from his children would "have a significant and detrimental effect on them and would not be in their best interests". Mr Richards submitted that the only matter relied upon by the judge was the financial impact upon the family in the UK as the appellant would be "less likely" in the short term to obtain work in the USA whilst he was rebuilding his life. Mr Richards submitted that finding was both inadequately reasoned and irrational.

16. Mr Richards invited us to find a material error of law and set aside the decision.

17. Mr Davies, on behalf of the appellant submitted that the judge had been entitled to find that the impact of the appellant's deportation would be "unduly harsh" upon the children on the basis of the evidence that they were struggling to survive. Further, as we understood Mr Davies' submissions, he did not accept that the "unduly harsh" test required consideration of the public interest. However, he submitted that the judge had done so by considering the public interest when, in an earlier part of his determination, he set out ss.117A-117C of the Nationality, Immigration and Asylum Act 2002 ("NIA Act 2002") and stated that he had taken account of the judge's sentencing remarks. He accepted that the judge had not explicitly referred to the public interest in the relevant passage in his determination concerned with the issue of "unduly harsh" at para 53(iii) but, nonetheless, he submitted the judge had sufficiently considered the public interest.

Discussion

18. The backdrop to this appeal is the automatic deportation provisions in the UK Borders Act 2007 (the "2007 Act") which apply when an individual is a "foreign criminal", i.e. he or she is not a British citizen and has been convicted of an offence and sentenced to a term of imprisonment of, at least, twelve months (see, s.32 of the 2007 Act). A "foreign criminal" is subject to automatic deportation unless one of the "Exceptions" in s.33 of the 2007 Act applies (see, ss.32(5) and 33). For these purposes, the important exception is "Exception 1" in s.33(2), namely where the removal of the foreign criminal pursuant to the deportation order would breach an individual's "Convention rights" protected by the Human Rights Act 1998.

19. For the purposes of this appeal, the important right is that found in Art 8 namely the right to respect for an individual's "private and family life". As is well-known, any infringement of an individual's right to respect for his private and family life established under Art 8.1 may be justified providing that it is in accordance with the law, for a legitimate aim and is a proportionate interference under Art 8.2. Until 2012, there were no statutory or other legislative provisions which informed the application of Art 8, in particular in the immigration context.

1. *The New Rules*

20. That position changed, however, with effect from 9 July 2012 with the amendment to the Rules by HC 194 which inserted new paragraphs 396–400 into the Rules. These paragraphs, in particular, sought to set out the weight to be given to the public interest in deportation cases where an individual relied upon his private or family life under Art 8 (see MF(Nigeria) v SSHD [2013] EWCA Civ 1192).

21. The new provisions were further amended by HC 532 with effect from 28 July 2014. Those latter provisions apply to all appeals heard on or after 28 July 2014 even if the Secretary of State's decision was made before that date (see JM (Uganda) v SSHD [2014] EWCA Civ 1292).

22. We will focus on the Rules (in particular paras 398 and 399) as in force on 28 July 2014 as they are the applicable ones to this appeal.

23. We begin, however, with para 396 of the Rules which states that:

> "Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with Section 32 of the UK Borders Act 2007."

24. Having set out that presumption, para 397 creates an exception where the individual's removal would breach the Refugee Convention or his human rights protected by the ECHR.

25. Paragraph A398 sets out the scope of the Rules under the heading "Deportation and Article 8" as follows:

> "These rules apply where:
>
> (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
>
> (b) a foreign criminal applies for a deportation order made against him to be revoked."

26. Paragraph 398 sets out the basic framework depending upon the period of imprisonment imposed upon the appellant; differentiating between (1) the most serious where a period of imprisonment is "at least four years"; (2) an intermediate category where the individual has been sentenced to at least twelve months but less than four years' imprisonment; and (3) persistent offenders or those that cause serious harm. Paragraph 398 is in the following terms:

> "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

(a) 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 at least 4 years;

(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; or

(c) the deportation of the person from the UK is conducive to the public good [and in the public interest] because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

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]."

(The square brackets indicate the amendments made by HC 532 from 28 July 2014.)

27. Paragraphs 399 and 399A which are referred to in the concluding part of para 398, deal respectively with an individual's Art 8 claim based upon his family life (with a child or partner) and his private life. Paragraph 399A is not relevant to this appeal and it is unnecessary to set it out. The judge (at paras 56 and 57 of his determination) dismissed the appellant's appeal under 399A on the basis that the appellant could not show "very significant obstacles to his integration" into the USA and that finding is not now challenged.

28. Paragraph 399 provides as follows:

"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 (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) [it would be unduly harsh for the child to live in the country to which the person is to be deported]; and

(b) [it would be unduly harsh for the child to remain in the UK without the person who is to be deported]; 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]."

(Again, the square brackets indicate the amendments made by HC 532 from 28 July 2014.)

29. Paragraph 399(a) deals with the situation where an individual has a "genuine and subsisting parental relationship" with a child who is a British citizen or has lived in the UK continuously for at least 7 years.

30. Paragraph 399(b) deals with the situation where the individual has a "genuine and subsisting relationship with a partner". The latter is not relevant to this appeal because, as the judge found, the appellant's relationship with his wife had broken down and was therefore no longer "subsisting". That finding is not challenged.

31. As will be clear from these provisions, where an individual has been sentenced to a period of imprisonment of less than four years (i.e. para 398(b) or (c) applies) then he or she may rely on para 399 (and para 399A). Where, however, the individual has been sentenced to at least four years' imprisonment then para 399 (and indeed para 399A) cannot apply and para 398 states that the:

> "public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paras 399 and 399A". (emphasis added)

The requirement to establish "very compelling circumstances" also applies, if the individual has been sentenced to a term of imprisonment of less than four years where paras 399 and 399A cannot apply.

32. In MF (Nigeria) v SSHD, the Court of Appeal concluded that the Immigration Rules dealing with Art 8 in effect from 9 July 2012 amounted to a "complete code" (at [44]). The court recognised that there were two stages to be determined: first, does the appellant succeed under either para 399 or 399A; and secondly, if he could not, does he succeed under Art 8, on the basis of the wording then in force, that there are "exceptional circumstances", in the sense of "very compelling reasons", sufficient to outweigh the public interest (at [42] and [43]). The Court of Appeal acknowledged that the second stage entailed the proportionality assessment under Art 8 with which courts and Tribunals were familiar (at [44]) but "great weight" must be given to the public interest in deporting foreign criminals who do not satisfy the requirements of paras 399 or 399A (at [40] and [42]). That approach has been approved and followed by the Court of Appeal in a number of subsequent cases (see, e.g. SSHD v AJ (Angola) [2014] EWCA Civ 1636 and AQ (Nigeria) and others v SSHD [2015] EWCA Civ 250).

33. In our judgment, that analysis is equally applicable to the Rules as amended from 28 July 2014 subject to the changed wording. The deportation rules still represent a "complete code". The structure based on the level of the appellant's offending in particular the period of imprisonment remains. There are a number of changes in phraseology including the replacement of "exceptional circumstances" in the concluding part of para 398 with the phrase we have set out above that there must be "very compelling circumstances over and above those described in paras 399 and 399A". Likewise, the original version of para 399(a) required that:

> "(a) it would not be reasonable to expect the child to leave the UK; and
>
> (b) there is no other family member who is able to care for the child in the UK;..."

34. The amended version of para 399(a), in effect since 28 July 2014, as will be clear from the text we have set out above no longer contains those words but rather enquires whether:

> "(a) it would be unduly harsh for the child to live in the country to which the person is to be deported;
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; ..." (emphasis added)

35. In this appeal, it is accepted that the judge's finding that it would be "unduly harsh" for the appellant's children to live in the USA stand but his decision that it would be "unduly harsh" for the children to remain in the UK without the appellant is challenged by the Secretary of State.

2. Part 5A, NIA Act 2002

36. In addition to the amendments to the Rules from 28 July 2014, from that date statutory provisions in a new Part 5A of the NIA Act (inserted by s.19 of the Immigration Act 2014) deal, in legislative form for the first time, with the issue of the "public interest" in deportation (s.117C) and other cases (s.117B) where the court or Tribunal is determining whether a decision made under the Immigration Acts breaches Art 8 of the ECHR.

37. Section 117A set out the scope of the new Part 5A headed "Article 8 of the ECHR; Public Interest Considerations" as follows:

> "117A **Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

The consideration listed in s.117B are applicable to all cases and those in s.117C apply only in relation to the deportation of "foreign criminals" as defined in s.117D(2).

38. The generally applicable considerations in s.117B are as follows:

"117B **Article 8: public interest considerations applicable in all cases**

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

39. The considerations applicable specifically in the context of the deportation of foreign criminals are set out in s.117C as follows:-

"117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

40. Section 117D provides the definition of a number of terms used in Part 5A. A "qualifying child" means a person under the age of 18 who is either a British citizen or who has lived in the UK for a continuous period of seven years or more. The definition of "qualifying partner" is also included but is not relevant to this appeal. In addition, s.117D(2) defines "foreign criminal" as person who is not a British citizen, has been convicted of an offence in the United Kingdom and who has been sentenced to a period of imprisonment of at least twelve months or has been convicted of an offence that has caused serious harm or is a persistent offender.

41. The requirement in s.117A to "have regard" to the considerations in s.117B and, if a deportation case, in s.117C means a court or Tribunal must have regard to those considerations in substance even if no explicit reference is made to the statutory provisions (see Dube (ss.117A – 117D) [2015] UKUT 90 (IAC)).

3. Applying the Rules and Part 5A

42. It is clear that the new Rules and Part 5A of the NIA Act 2002 seek to strike a "fair balance" between the competing interests under Art 8 and, in themselves, provide a persuasive statement about the relevant public interest consideration which a court or Tribunal must bring into account in striking the proper balance under Art 8.

Albeit not in the context of deportation, in Haleemudeen v SSHD [2014] EWCA Civ 558, Beatson LJ at [40] said that the new Rules in Appendix FM:

> "...are a central part of the legislative and policy context in which the interests of immigration control are balanced against the interests and rights of people who have come to this country and wish to settle in it. Overall, the Secretary of State's policy as to when an interference with an Article 8 right will be regarded as disproportionate is more particularised in the new Rules than it has previously been."

43. As a consequence, the court or Tribunal is required to give the new Rules (at [47]): "greater weight than as merely a starting point for the consideration of the proportionality of an interference with Article 8 rights" (see also SSHD v SS (Congo) and Others [2015] EWCA Civ 387).

44. The approach is no less true of the specific rules dealing with deportation and an Art 8 claim based upon an individual's private or family life. In MF (Nigeria) the court spoke of "great weight" being given to the public interest (at [40]). In SS (Nigeria) v SSHD [2013] EWCA Civ 550 the court concluded that the strength of the public interest meant that only an individual with a "very strong claim indeed" was likely to succeed under Art 8 (at [55]). In SSHD v AQ (Nigeria), the Court of Appeal, again emphasised the nature of the deportation rules as a "code", the considerable weight to be accorded to the public interest, that the Art 8 exercise required the court or tribunal to look through "the lens" of the new Rules and that it was likely to be an error of law to fail to do so. Sales LJ (with whom Sullivan LJ and Newey J agreed) said this (at [39]-[40]):

> "39. The fact that the new rules are intended to operate as a comprehensive code is significant, because it means that an official or a tribunal should seek to take account of any Convention rights of an appellant through the lens of the new rules themselves, rather than looking to apply Convention rights for themselves in a free-standing way outside the new rules. This feature of the new rules makes the decision-making framework in relation to foreign criminals different from that in relation to other parts of the Immigration Rules, where the Secretary of State retains a general discretion outside the Rules in exercise of which, in some circumstances, decisions may need to be made in order to accommodate certain claims for leave to remain on the basis of Convention rights, as explained in *Huang* and *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin).
>
> 40. The requirement that claims by appellants who are foreign criminals for leave to remain, based on the Convention rights of themselves or their partners, relations or children, should be assessed under the new rules and through their lens is important, as the Court of Appeal in *MF (Nigeria)* has emphasised. It seeks to ensure uniformity of approach between different officials, tribunals and courts who have to assess such claims, in the interests of fair and equal treatment of different appellants with similar cases on the facts. In this regard, the new rules also serve as a safeguard in relation to rights of appellants under Article 14 to equal treatment within the scope of Article 8. The requirement of assessment through the lens of the new rules also seeks to ensure that decisions are made in a way that is properly informed by the considerable weight to be given to the public interest in deportation of foreign criminals, as declared by Parliament in the 2007 Act and reinforced by the Secretary of State (as the relevant Minister with responsibility for operation of the immigration system), so as to promote public confidence in that system in this sensitive area."

45. The structural approach in MF (Nigeria) remains, as we have seen, in effect. The court or tribunal must apply the rules and there is, at least potentially, a two-stage approach.

46. First, at Stage 1 the court or tribunal must consider whether the individual can succeed under para 399 or 399A.

47. Secondly, if an individual cannot succeed under para 399 or 399A either because those provisions are not applicable because he has been sentenced to a term of imprisonment of at least four years or because the relevant requirements of those rules are not met, the court or tribunal should move to consider Stage 2. That second stage is to consider the issue of proportionality on the basis that only "very compelling circumstances over and beyond those falling within para 399 or para 399A" can outweigh the public interest.

48. That later assessment is made under the Rules. It is, as we have seen, to be made through the "lens" of the Rules requiring a consideration of what factors exist and whether taken together they amount to "very compelling" circumstances over and above those in paras 399 and 399A. It requires a careful assessment of the reasons why the individual cannot otherwise succeed under the Rules. It requires the balancing exercise inherent in proportionality to be carried out but with due weight given to the public interest. However, in determining that issue, the considerations set out in Part 5A of the NIA Act 2002 must be taken into account so far as relevant. In other words, Part 5A of the NIA Act 2002 only becomes relevant at Stage 2 when the court or tribunal is considering the issue of proportionality. That approach was approved by the Upper Tribunal in Chege (section 117D – Article 8 – approach) [2015] UKUT 165 (IAC)) and with which we respectfully agree. Part 5A has no relevance to Stage 1.

49. Thirdly, it is also clear that if an individual can establish that either para 399 or para 399A applies to him, that in itself resolves the Art 8 issue in his favour. Only if an individual cannot show that either para 399 or para 399A applies should a court go on and consider stage 2 and carry out the balancing exercising required for proportionality under the "very compelling circumstances" test in para 398 together with Part 5A of the NIA Act 2002. If the individual succeeds under para 399 or 399A then his deportation will breach Art 8 of the ECHR (see, MF (Nigeria) at [35] and [46]; AQ (Nigeria) at [36] and SS (Congo) at [45]). If either para 399 or para 399A applies the circumstances of the appellant are such as to outweigh the public interest in deportation. In our judgment, in paras 399 and para 399A of the Rules the Secretary of State has identified a number of circumstances where a particular matrix of facts when established outweigh the public interest in deportation. That, in our view, is also clear from the structure of the Immigration Rules, in particular the inter-relationship between para 398 and paras 399 and 399A and is also the position accepted by the Secretary of State in her own Immigration Directorate Instructions (IDIs) - *Chapter 13: Criminality Guidance in Article 8 ECHR cases* (Version 5.0, 28 July 2014). At para 1.2.3, it is stated:

> "Paragraph 398 of the Immigration Rules sets out the criminality thresholds. An Article 8 claim from a foreign criminal who has not been sentenced to at least four years' imprisonment will succeed if the requirements of an exception to deportation are met. The exceptions to deportation on the basis of family life are set out in paragraph 399 of the Immigration Rules, and the exception on the basis of private life is at paragraph 399A." (our emphasis).

4. 'Unduly Harsh'

50. We now turn to consider the specific issue of the proper meaning of "unduly harsh" in para 399(a). Those words are, as we have already noted, also found in s.117C(5) setting out 'Exception 2' where the proposed deportee has a genuine and subsisting parental relationship with a qualifying child and the effect of his deportation on the child would be "unduly harsh". Mr Richards submitted that whether the effect of deportation was "unduly harsh" required a context and that context was the individual's offending and the public interest reflected in its seriousness, society's expression of revulsion at serious criminality and the deterrent effect on other foreign nationals committing offences. Mr Richards submitted that the words "unduly" had a sense of unfairness to the individual and required an evaluation of whether the consequences were or were not 'due' to that individual. Mr Richards submitted that even though deportation might have very harsh consequences, whether it was "unduly harsh" could only be determined by looking at the magnitude of the public interest furthered by the individual's deportation. He submitted that the more serious the crime the greater must be the consequences for them to be properly characterised "unduly" harsh.

51. In support of his submissions, Mr Richards referred to the relevant IDI, *Chapter 13: Criminality Guidance in Article 8 ECHR Cases* (version 5.0, 28 July 2014) at paras 2.5.2 to 2.5.4 where the Secretary of State's view as to meaning of "unduly harsh" is set out.

52. At paragraph 2.5.2 the IDI adopts the Oxford English Dictionary definition as follows:

> "2.5.2 When considering the public interest statements, words must be given their ordinary meanings. The Oxford English dictionary defines "unduly" as "excessively" and "harsh" as "severe, cruel"."

53. Then at paras 2.5.3 and 2.5.4, the Secretary of State sets out her position, essentially consistent with the submission made by Mr Richard, that the public interest must be factored into an assessment of whether the impact on a child (or partner) is "unduly harsh":

> "2.5.3 The effect of deportation on a qualifying partner or a qualifying child must be considered in the context of the foreign criminal's immigration and criminal history. The greater the public interest in deportation, the stronger the countervailing factors need to be to succeed. The impact of deportation on a partner or child can be harsh, even very harsh, without being unduly harsh, depending on the extent of the public interest in deportation and of the family life affected.

> 2.5.4 For example, it will usually be more difficult for a foreign criminal who has been sentenced more than once to a period of imprisonment of at least 12 months but less than four years to demonstrate that the effect of deportation would be unduly harsh than for a foreign criminal who has been convicted of a single offence, because repeat offending increases the public interest in deportation and so requires a stronger claim to respect for family life in order to outweigh it."

54. The same point is made at 3.5.2 where it is stated:

> "3.5.2 When considering whether the effect on a child of deporting a foreign criminal is unduly harsh, the strength of the family life claim, including the best interests of the child, must be balanced against the public interest in deportation. As a general principle, the greater the public interest in deportation the foreign criminal, the more harsh the effect of deportation must be on the child before it is considered unduly harsh."

55. In his skeleton argument, Mr Davies relied upon two passages in determinations of the Upper Tribunal in MK (Section 55 – Tribunal options) Sierra Leone [2015] UKUT 223 (IAC) at [46] and BM and Others (returnees – criminal and non-criminal) DRC CG [2015] UKUT 293 (IAC) at [109] to counter the Secretary of State's position.

56. In MK, the UT was considering the two questions in para 399(a), namely whether it would be "unduly harsh" for the appellant's children to live in the country to which he was to be deported and, secondly whether it would be unduly harsh for the children to remain in the UK without the appellant.

57. At [46], the Chamber President (McCloskey J) said this about the "unduly harsh" test:

> "The determination of the two questions which we have posed in [44](d) above requires an evaluative assessment on the part of the Tribunal. This is to be contrasted with a fact finding exercise. By way of self-direction, we are mindful that *"unduly harsh"* does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antitheses of pleasant or comfortable. Furthermore, the addition of the adverb "*unduly"* raises an already elevated standard still higher."

58. Having done so, the UT determined that it would be "unduly harsh" in the following terms:

> "Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasons or right thinking person would consider this anything less that cruel."

59. In that passage, the President made no reference to the public interest and was clearly not engaged in a balancing exercise weighing the public interest against the consequences to the children of living in the appellant's own country but rather was simply focusing on the interests of the children.

60. At [47] McCloskey J turned to consider whether it would be unduly harsh for the children to remain in the UK without the appellant – the issue raised in this appeal. He said this:

> "The final question is whether it would be unduly harsh for either child to remain in the United Kingdom without the Appellant. This is a different question from that considered in [46] above. We have identified a range of facts and considerations bearing on this issue. Once again, an evaluative judgment on the part of the Tribunal is required. In performing this exercise we view everything in the round. The appellant plays an important role in the lives of both children concerned particularly that of his step son. He is the provider of stability, security, emotional support and financial support to both children. We have rehearsed above the various benefits and advantages which he brings to the lives of both children, coupled with his personal attributer and merits. We remind ourselves of section 55 of the 2009 Act. We acknowledge the distinction between harsh and unduly harsh. We remind ourselves again of the potency of the main public interest in play, emphasised most recently by the Court of Appeal in SSHD v MA (Somalia) [2015] EWCA Civ 1192. The outcome of our careful reflections in this difficult and borderline case and in an exercise bereft of bright luminous lines is as follows. Balancing all of the facts and factors, our conclusion is that the severity of the impact on the children's lives of the Appellant's abrupt exit with all that would flow therefrom would be of such proportions as to be unduly harsh."

61. Whilst McCloskey J did refer to "public interest in play", the focus of his reasoning is, again, firmly upon the effects upon the children of remaining in the UK without the appellant. We do not understand McCloskey J to have reached his conclusion that that would be "unduly harsh" based upon the balancing exercise which Mr Richards invites us to adopt. Rather, the focus was upon the "severity of the impact" on the children such that it was "unduly harsh" applying the "elevated" or "heightened" standard which McCloskey J recognised and applied in [46] of the determination. In neither paragraph, in particular in para 46 where the adverb "unduly" is defined, does McCloskey J adopt the approach urged upon us by Mr Richards.

62. In BM and Others the Upper Tribunal was considering 'Exception 2' in s.117C(5) of the NIA Act 2002. At [109], reflecting what was said in [46] in MK, McCloskey J said this:

> "Given the invocation of "*Exception 2*", we must assess the likely impact of the Appellant's deportation on his spouse. In order for the exception to apply, the impact must qualify as "*unduly harsh*". We consider that this does not equate with uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging. Rather, it poses a considerably more elevated threshold. "*Harsh*", in this context, denotes something severe, or bleak, the antithesis of pleasant or comfortable. Furthermore, the addition of the advert "*unduly*" raises an already elevated standard still higher. The members of the family unit in question are but two. We acknowledge the likelihood of this changing in the very near future, while adding that section 55 of the Borders, Citizenship an Immigration Act 2009 has no application to a child *en ventre sa mere*."

63. Again, we detect no suggestion that the term "unduly" in itself incorporates a balancing exercise taking into account the public interest in assessing whether the consequences to the child (or partner) is "unduly" harsh.

64. At [110] McCloskey J gave his reasons for concluding that the appellant could not succeed under Art 8 as follows:

> "We accept that life will be very difficult for a young, single mother who will have the additional burden of grieving her husband's departure abroad in circumstances where the prospects of future reunification are unfavourable. However, these we consider to be typical effects of a husband's deportation and Parliament has decreed that cases of this kind are insufficient to outweigh the public interest. Furthermore, we take into account the availability of strong family support to the Appellant's spouse, as we have found above. To this we add that she is a graduate who has evidently been in regular employment and it is, therefore, predictable that she will be able to support herself and her child. We do not overlook the duration of this relationship or its various qualities, all of which we have acknowledged above. However, our conclusion is, balancing all of the relevant facts and factors, that the statutory public interest must prevail by some measure. Accordingly, this Appellant's appeal under Article 8 ECHR fails."

65. We acknowledge that here McCloskey J referred to "balancing of all the relevant facts and factors" and stated that the "statutory public interest" must prevail by some measure. Here, of course, McCloskey J was considering that appellant's claim under Art 8 at the second stage in MF (Nigeria). He was not considering the application of para 399. At that second stage, it is inherent in the assessment of proportionality that the public interest must be taken into account in assessing whether there are "very compelling circumstances" (in deportation cases) or "exceptional circumstances" (in other cases) to outweigh that public interest. In our judgment, nothing in [110] detracts from the approach set out in [109] to the phrase "unduly harsh" which was also applied in MK. What is said in [110] related, in our view, to an assessment at Stage 2 and, it is noticeable, that the Upper Tribunal made no specific finding on whether Exception 2 applies.

66. In short, therefore, nothing in MK or BM and Others supports, in our judgment, Mr Richards' submission that inherent in the adverb "unduly" is a consideration not only of the impact upon the child (or partner) but also the public interest reflected in the individual's offending. In our judgment, the approach set out in [46] of MK and [109] of BM and Others reflects the correct approach to the phrase "unduly harsh" in para 399(a).

67. Whilst we have considered the Secretary of State's own view in her own IDI of the phrase's meaning, it is obvious that that view cannot assist to interpret the phrase "unduly harsh" in s.117C(5) of the NIA Act 2002. Parliament's intention must be discerned from the wording of the statute together with any admissible interpretive material which does not, in our judgment, include the Secretary of State's IDI. Further, we have not found the IDI relevant in interpreting the phrase in para 399 of the Rules. It is established law that an IDI or statement by the Secretary of State cannot affect the plain and ordinary meaning of the words in the Immigration Rules (see Mahad v Entry Clearance Officer [2009] UKSC 16). In our judgment, the plain meaning of the word is, as the Upper Tribunal stated in MK and BM and Others.

68. In any event, even if there was an ambiguity in the meaning of the words, the Secretary of State's guidance cannot be used as an interpretive tool so as to resolve an

ambiguity against an individual. In Pokhriyal v SSHD [2013] EWCA Civ 1568 the Court of Appeal recognised that there was a qualification to the approach in Mahad [42} that:

> "if there is ambiguity in Immigration Rules and the Secretary of State publicly declares that he/she will adopt the more lenient interpretation then the Tribunals and courts may hold the Secretary of State to that assurance."

69. Here, of course, the Secretary of State's interpretation is not "more lenient" but is properly viewed as being more stringent. The Court of Appeal accepted that an IDI could not be used to reach an interpretation was more stringent. At [43], Jackson LJ (with whom Longmore and Voss LJJ agreed) said:

> "I do not think it is possible for the Secretary of State to rely upon extraneous material in order to persuade a court or Tribunal to construe the Rules more harshly or to resolve an ambiguity in the government's favour. The Secretary of State holds all the cards. The Secretary of State drafts the Immigration Rules; the Secretary of State issues IDIs and guidance statements; the Secretary of State authorises the public statements made by his/her officials. The Secretary of State cannot toughen up the Rules otherwise than by making formal amendments and laying them before parliament. That follows from the Supreme Court's reasoning in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33; [2012] 1 WLR 2208."

70. In our judgment, Mr Richard's submissions, if correct, would result in any ambiguity in the meaning of the phrase "unduly harsh" being resolved "more harshly" in the "government's favour" which is precisely what the Court of Appeal said was impermissible.

71. Further, in our view, it is not necessary to interpret the word "unduly" so as to necessarily implant a balancing exercise as put forward by Mr Richards in his submissions and the IDI. It is clear to us that the Secretary of State has, in paras 399 and 399A, set out in detail the number of circumstances where the particular factual matrix has led the Secretary of State to conclude that the public interest in deportation (providing the individual has not been sentenced to at least four years' imprisonment) is outweighed by those circumstances. The policy in para 399 focuses upon the effect upon children (para 339(a)) or a partner (para 399(b)). The wording of the provision, in itself, reflects that focus: "unduly harsh for the child". It seems to us, contrary to Mr Richards' submissions, that the issue of "unduly harsh" is treated as an isolated issue focusing on the individual child or partner affected by the appellant's deportation. It is only if neither para 399 nor para 399A applies that the Rules contemplate the decision maker carrying out a balancing exercise for themselves applying the "very compelling circumstances" rubric and, since Part 5A of the NIA Act 2002 came into force, including the considerations set out in s.117C and s.117B. There is no place for a balancing exercise to be carried out repetitively at both Stage 1 and Stage 2: rather, as all the case law recognises albeit prior to the 28 July 2014 amendments, that is carried out at Stage 2.

72. We do not accept the effect of Mr Richards' submission that the amendment to para 399 from 28 July 2014, when the word "reasonable" was replaced with the phrase

"unduly harsh", changed the nature of the exercise required of the decision maker under para 399. Mr Richards accepted the issue of whether it would be "reasonable" for a child to live in the deportee's country or remain in the UK without the deportee did not involve an assessment of the "public interest". We had also never understood it to require that. We do not consider that the replacement of "reasonableness" with "unduly harsh" had changed the approach to the Rules. Now, as then, the focus is on the impact upon the individual child (or partner). That said, we accept that the amendment has made some changes, for example phrase "unduly harsh" is intended, and may well, impose a heightened hurdle from that of "reasonableness" which was part of the Rules between 9 July 2012 and 28 July 2014. That is, in our judgment, reflected in [46] of MK and [109] of BM and Others. In our judgment, albeit to add a gloss of our own, the word "unduly" requires that the impact upon the individual concerned be 'inordinately' harsh. By that we mean that the impact would be "unusually large" or "excessive". We do not intend that to be a definition but rather a 'gloss' to assist decision makers applying para 399, indeed, s.117C(5). That is, as the Tribunal recognised in MK at [46] "an evaluative assessment" but bearing in mind the "elevated" or "heightened" standard that must be applied. It is necessarily fact sensitive but is focussed upon the impact on the individual (whether child or partner) concerned.

73. In reaching our view, we note that the very same phrase "unduly harsh" is a term familiar in refugee law as part of the "internal relocation" issue. An individual who is at real risk of persecution in his or her home area cannot be expected to internally relocate within his own country if to do so would be "unduly harsh". It may be entirely coincidental that the very same phrase has been incorporated into the Rules and legislation dealing with deportation. However, it is worth noting that in the context of refugee law the phrase "unduly harsh" focuses upon the circumstances of the individual concerned within their own country (see, e.g. Januzi v SSHD [2006] UKHL 5). There is no balancing exercise but rather an "evaluative" exercise as to whether an individual cannot be expected to move and live within their own country because of the impact upon him or her. That is a similar evaluative exercise to that which we consider is required under para 399 and s.117C(5) transposed to whether an individual can be expected to move with the deportee to the latter's own country or remain in the UK without the deportee. The words are well-known and very familiar in the refugee area. It would not be prudent, in our judgment, for there to be two different approaches to the very same phrase, "unduly harsh", in two immigration contexts. That should be avoided if at all possible.

74. With that in mind, we turn to the Judge's decision in respect of para 399(a).

5. The Judge's Decision

75. Turning now to the judge's reasoning which can be found at para 53(iii) of his determination as follows:

> "I find that it would be unduly harsh for them to remain in the United Kingdom should the Appellant be deported to the United States given that the overwhelming evidence is that being separated from him in that way would, in effect, have a significant an

> detrimental effect on them and would not be in their best interests. It is not only their evidence but also the evidence of their mother (who, perhaps, has every reason not to favour the Appellant) and their grandmother.
>
> Whilst [the appellant's wife] is able and willing to care for her children in the United Kingdom, it appears to be a fact of life that she struggles financially in the process. The Appellant is able and willing to financially support his family. It is likely that he has a job to go to in the United Kingdom. It is less likely in the short term that he will be able to offer financial assistance to them from the United States as he would have to rebuild a life from scratch.
>
> These are children that need to have the opportunity to rebuild their relationship with their father. I find, that this cannot be satisfactorily achieved if the Appellant is living in the United States; ..."

76. In our judgment, for the reasons we have given above, Judge Holder did not fall into error by failing to consider the public interest in reaching his finding that it would be "unduly harsh" for the appellant's children to remain in the UK whilst he was deported to the USA. (Strictly the eldest child is not under 18 years old and so para 399(a) (and s.117C(5)) does not apply to her. But for these purposes we are content, and nothing to the contrary was suggested to us, to treat the 3 children in the same way.) For those reasons, we reject Mr Richards' first submission challenging the judge's decision.

77. Mr Richards' second submission was that the judge had given inadequate reasons for his finding that it would be "unduly harsh" for the children to remain here without the appellant and that finding was irrational. In particular, the Judge did not set out the "overwhelming evidence" which showed that there was a "significant and detrimental effect" on the appellant's children so that it was not in their best interests if the appellant were deported to the USA.

78. In our judgment, this submission is well-founded. Whilst we accept that it may well not have been in the children's "best interests" to be separated from the appellant if he were deported to the USA, we are simply unable to discern what the "overwhelming evidence" was that his deportation would have a "significant and detrimental affect" upon them. One of the appellant's children is a young adult, aged 19 at the date of the hearing. Another child was aged 17. The third child is somewhat younger, being 13 years old. However, the only basis upon which the judge considered that it would be "unduly harsh" for them to remain in the UK is that their mother, with whom they live, but from whom the appellant is now estranged, "struggles financially". The fact of the matter is that the children's mother is in employment as a school dinner lady and cleaner. The evidence was that, although the appellant's parents in the UK were elderly and lived on modest pensions, they try to assist the children's mother when possible within their limited means. The appellant's mother and the children survived without any income from the appellant during the time he was in prison and the evidence before the judge was that he was not currently employed even if he had a job offer. There was no basis for the judge to infer that the appellant as a 55 year old man returning to the USA (even though he had not been there since 1990) would be unlikely, at least in the short term,

to find employment and provide financial assistance if it was needed from the USA. As we have said, the family has survived without any income from him in the immediate past since his conviction in February 2013.

79. It is not clear whether in para 53(iii), the judge took into account any difficulty the children might have in visiting their father in the USA. As we have said, one child is already an adult and a second child will be shortly. There was no evidence that their mother would object to them visiting the appellant in the USA or that there would be any immigration difficulty in them doing so. There would, of course, be financial implications. It may well be that the means of the family would not allow frequent visits but, in our judgment, the evidence did not establish that the visit to America would be prohibitively expensive in the foreseeable future. Between any visits, children of this age could meaningfully remain in contact with their father through such means as Skype which has revolutionised face-to-face communication between family members over great distances in recent years.

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'.

81. For those reasons, the judge's decision to allow the appellant's appeal under Art 8 involved the making of an error of law and cannot stand. We set the decision aside and move to remake the decision.

Remaking the Decision

82. Both representatives invited us to remake the decision under Art 8 on the material before us if we were satisfied that the judge's decision could not stand. We turn then to remake the decision under Art 8. We do so in two-stages. The decision under Art 8 must be made through the "lens" of the Rules (see SSHD v AJ (Angola)).

83. First, we consider paras 399 and 399A of the Rules. As we have already determined, the appellant cannot succeed under para 399(a) on the basis of his relationship with his two minor children. Although it would be unduly harsh for his children to move to the USA, it is not unduly harsh for them to remain in the UK whilst he is deported to the USA. Before the judge it was accepted the appellant could not succeed under para 399(b) on the basis of his (now former) relationship with his wife. The judge's decision that the requirements of para 399A are not met is not challenged. The appellant can, therefore, only succeed in his claim under Art 8 if there are "very

compelling circumstances over and above" those in para 399 to outweigh the public interest in deportation.

84. Secondly, we turn to consider Art 8 applying the five-stage test in Razgar [2004] UKHL 27, in particular the issue of proportionality under the rubric of "very compelling circumstances" in para 398.

85. We accept that the appellant has established family life with his three children, L, V and F who are now aged, respectively, 20, 17 and 13 years of age. It was accepted before the judge that the appellant's relationship with his wife had broken down and family life that once existed between them, plainly in our judgment, no longer exists.

86. In addition, the appellant has been in the UK since 1990 and has, no doubt, built up a private life in the UK. The appellant has, therefore, been resident in the UK for 25 years since he left the USA. He is now 56 years old. The evidence before the judge was that all his immediate family members reside in the UK including his elderly parents. The evidence was that he has no immediate family members residing in the USA. The appellant has, for a number of years, worked in the haulage industry although he does not at present but has an offer of employment in the future.

87. Consequently, whilst we accept that the appellant has family life with his three children, we do not accept that he has family life with his now estranged wife or with his parents. As regards the latter, the appellant's mother gave evidence at the hearing and she did not suggest that they were financially or otherwise dependent upon the appellant. They had modest pension and, indeed, they financially assisted EB whenever possible from their limited means. The evidence does not establish that the 'close ties' exist beyond that normally found between elderly parents and their son in the absence of any solid evidence of dependency or reliance sufficient to establish 'family life' with his elderly parents (see, e.g. Kugathas v SSHD [2003] EWCA Civ 31 and Singh and Singh v SSHD [2015] EWCA Civ 630, especially at [24]-[26]).

88. Judge Holder accepted, as must we, that it would be "unduly harsh" for the appellant's children to relocate to live with him in the USA. The evidence from the appellant's mother was that they could not afford to travel to the USA. There was also evidence of the financial difficulties that the appellant's children would face visiting the appellant in the USA.

89. Although we were not taken to any specific evidence, we also accept that the appellant has established private life over the 25 year period of his residence in the UK.

90. For these reasons, we are satisfied that the appellant's deportation would interfere with his family and private life in the UK so as to engage Art 8.1 of the ECHR.

91. The crucial issue in this appeal is whether that interference is justified in the public interest given the appellant's offending under Art 8.2. There is no doubt that the decision is in accordance with the law and for a legitimate aim, namely the

prevention of disorder or crime and for the protection of the rights and freedoms of others as well as the economic well-being of the country.

92. Approaching the issue of proportionality, as we have already indicated, para 398 makes clear that the public interest in deportation, given that the appellant cannot satisfy either the requirements of para 399 or 399A, can only be outweighed by "very compelling circumstances" above those described in para 399 and para 399A.

93. That demonstrates that the public interest is entitled to be given "great weight" and the deportation of a foreign criminal falling within the automatic deportation provisions of the UK Borders Act 2007 is proposed. These very compelling circumstances "require, in our judgment, a very strong claim indeed to outweigh the public interest" (see, for example SS (Nigeria) v SSHD).

94. In AJ (Angola) at [40] Sales LJ stated that:

> "The requirement of assessment through the lens of the new Rules also seeks to ensure the decisions are made in a way that is properly informed by the considerable weight to be given to the public interest in deportation of foreign criminals, as declared by parliament in the 2007 Act and reinforced by the Secretary of State (as the relevant Minister with responsibility for operation of the immigration system), so as to promote public confidence in that system in this sensitive area."

95. Considering whether there are "very compelling circumstances", we must consider the best interests of the appellant's two minor children as a "primary" consideration but those best interests may be outweighed by sufficiently weighty matters of the public interest (see ZH (Tanzania) v SSHD [2011] UKSC 4). At [26] Lady Hale JSC said:

> "This does not mean (as it would do in other context) that identifying their best interests would lead inextricably to a decision in conformity with those interests. Provided that the Tribunal did not treat any other considerations as inherently more significant than the best interests of the children, it could conclude that the strength of the other considerations outweighed them."

96. The public interest reflected in an appellant's offending may be a sufficiently weighty "other consideration" to outweigh the children's best interests.

97. Although we do not agree with the judge that there is "overwhelming evidence" of a "significant and detrimental effect" upon the appellant's children if the appellant were deported, we see no reason to depart from his finding that the appellant's deportation would not be in the children's "best interests". They would be deprived of regular and frequent direct contact with him. That would be equally true of L, aged 20 although, of course, not being a minor her "best interests" are strictly not engaged as a relevant criterion. However, the impact upon her is also relevant. We accept that the appellant's deportation will, therefore, restrict direct contact between the appellant and his three children. We do not accept, however, that it will deprive them of contact altogether. We do not accept that the family's finances will prohibit visits by the appellant's children to the USA. The appellant has previously been gainfully employed in the UK and we see nothing in the evidence to suggest that he

could not in due course obtain employment in the USA which, together with any financial support from the children's mother and paternal grandparents, could provide opportunities for them to visit him in the USA. In addition, although not a substitute for direct contact, modern internet video platforms such as Skype and FaceTime (together with social media sites) permits regular and frequent interactions – including face-to-face communications via the internet - on a regular and frequent basis.

98. As regards the appellant's private life, Judge Holder did not accept that there were "very significant obstacles" to the appellant's integration into the USA despite the fact that he had spent, at that time, approximately 24 years outside the USA in this country. That finding is not challenged and we accept it.

99. In carrying out our assessment of proportionality, we must have regard to the factors set out in Part 5A of the NIA Act 2002, in particular in a deportation case to those in s.117C. We do so as follows.

100. First, the deportation of the appellant as a "foreign criminal" is in the public interest (s.117C(1)).

101. Secondly, the more serious the offence committed by the foreign criminal the greater the public interest in his deportation. The public interest is reflected in the well-known three facets, namely the seriousness of the offence, the expression of society's revulsion at serial criminal offending; and in deterring those from committing serious offences, (see, e.g. OH (Serbia) v SSHD [2008] EWCA Civ 694). We have already noted, the recent case law emphasising the "considerable weight" to be given to the public interest under the statutory regime stated by Parliament in the 2007 Act and under the Immigration Rules.

102. In this case, the appellant was convicted of a number of serious sexual offences against young children who were friends of his youngest daughter. He was sentenced to a period of three years' imprisonment concurrently on each account. In her sentencing remarks, the sentencing judge had no doubt that the appellant had "created an environment in which [the children] felt comfortable with you." Although the appellant had initially accepted when interviewed for the PSR that he had a sexual interest in pre-pubescent girls, he subsequently denied that, but the sentencing judge accepted that he did have such a sexual interest. The PSR stated that the appellant posed a "high risk of harm – sexual assaults of pre-pubescent girls". The judge accepted that was correct. The judge considered that the appellant should undertake a treatment programme which, the evidence before Judge Holder was, that he intended to participate in a Thames Valley Sex Offender course in January 2015. We were not told at the hearing whether he had done so and were not shown any document relating to such a course.

103. The judge went on to require the appellant to sign the Sex Offenders Register for life and disqualified him indefinitely for working with children. The judge also imposed a Sexual Offences Protection Order which, in essence, prevented any unsupervised

contact or communication with any female under the age of 16 without the consent of that child's parents or guardian who had full knowledge of the appellant's conviction and the local police protection unit had given its approval.

104. There is no doubt, in our judgment, that the appellant's offending was very serious indeed.

105. Thirdly, s.117C(3) of the NIA Act 2002 states that, in the case of a foreign criminal such as the appellant who has not been sentenced to a period of imprisonment of four years or more, "the public interest requires [that individual's] deportation unless Exception 1 or Exception 2 applies."

106. Exception 1 in s.117C(4) does not apply. It requires that the appellant has lived lawfully in the UK for most of his life. The appellant has not done so having only lived in the UK for 25 of the 55 years of his life and, apart from initial leave as a visitor, he was only granted ILR on 16 October 1995. In any event, Judge Holder's finding, which has not been challenged, was that there were not "very significant obstacles" to the appellant's integration into the USA.

107. Likewise, Exception 2 in s.117C(5) cannot apply as, although the appellant has a "genuine and subsisting relationship" with each of his (two) children under the age of 18, as we have already found, the effect of his deportation would not be "unduly harsh" upon them. Whilst it would be unduly harsh for them to go to the USA to live, it would not be unduly harsh for them to remain in the UK following the appellant's deportation.

108. Fourthly, we must also have regard to any relevant factors under s.117B. We note that the maintenance of effective immigration control is in the public interest. We also note that it is in the public interest that an individual speaks English as does the appellant. Likewise, it is in the public interest that an individual is financially independent. We accept that, in due course, the appellant will be employed if he remained in the UK as, indeed we have already found, he will in all likelihood, on return to the USA. We accept that the appellant's private life has been, at least largely, established at a time when his immigration status was not precarious following the grant of ILR in October 1995.

109. In truth, the circumstance relied upon by the appellant in this appeal to demonstrate "very compelling circumstances" do not rise "over and above" those described in para 399(a), namely that it would be unduly harsh upon his children for him to be deported or para 399A namely that there would be "very significant obstacles to his integration" into the USA. The substance of the appellant's claim is, in effect, that his circumstances fall within either para 399(a) or 399A. As Judge Holder found in relation to the latter and we find in relation to the former, the appellant cannot succeed under either of those provisions.

110. Given the seriousness of the appellant's offending, taking into account all the circumstances we have set out above, we are not satisfied that there are "very compelling circumstances over and above" those in para 399(a) and para 399A such

as to outweigh the significant and considerable weight which must be given to the public interest in this appeal.

111. Thus, we are satisfied that any interference with the appellant's private and family life is proportionate on the basis that it is not established that there are "very compelling circumstances" to outweigh the public interest.

112. The appellant has failed to establish a breach of Art 8 of the ECHR.

Decision

113. The decision of the First-tier Tribunal to allow the appellant's appeal under Art 8 involved the making of an error of law. We set aside that decision.

114. We remake the decision dismissing the appellant's appeal under Art 8 of the ECHR.

Signed

A Grubb
Judge of the Upper Tribunal

TO THE RESPONDENT
FEE AWARD

There is no fee award.

Signed

A Grubb
Judge of the Upper Tribunal