Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02433/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17th June 2015 & 20th July 2015	**On 23rd July 2015**

Before

Mr Justice Green
Upper Tribunal Judge Lindsley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WLG

Respondent

Representation:

For the Appellant: Mr P Deller & Mr L Tarlow, Senior Home Office Presenting Officers

For the Respondent: Mr A Alexander, Counsel, instructed by Lawrence & Co Solicitors

DETERMINATION AND REASONS

Introduction

1. This appeal concerns the rights of those convicted of criminal offences and sentenced to terms of custody of between 12 months and less than four years to avoid deportation by reference to other considerations, such as the rights of children. In particular it concerns the approach that should be adopted to the analysis of the position of such convicted criminal following the coming into force (on 28th July 2014) of the modified

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provisions of paragraphs 388 and 389 of the Immigration Rules and the simultaneous commencement of s.117C of the Nationality, Immigration and Asylum Act 2002 (which was inserted by Section 19 Immigration Act 2014).

2. Because the outcome of this appeal turned upon a consideration of the new Immigration Rules we directed at the oral hearing that further submissions should be made by the Secretary of State, with the claimant to respond if so advised, on a number of points of law. We received helpful written submissions from the Secretary of State and these were expanded upon at a reconvened oral hearing, at which the Respondent to the appeal was represented and made oral submissions.

3. The points that we raised for consideration were as follows:

- Is it argued that SS (Nigeria) v SSHD [2013] EWCA Civ 550 and OH (Serbia) v SSHD [2008] EWCA Civ 694 should continue to impact on the Tribunal's decision-making in the context of an appellant falling for consideration under s.117C (3) and (5) of the Nationality, Immigration and Asylum Act 2002 and paragraph 399 of the Immigration Rules?
- Is the test of "*unduly harsh*" under s.117C (5) of the Nationality, Immigration and Asylum 2002 Act and paragraph 399 of the Immigration Rules one which simply involves focus on the impact of the deportation on the child or partner or is it one which involves a proportionality exercise in which the negative impact of deportation on them is balanced against the public interest/the extent of crimes the appellant has committed?
- Does the Secretary of State perform a proportionality exercise when considering paragraph 398 of the Immigration Rules?
- Does the Secretary of State consider that the test at s.117C (3) and (5) of the Nationality, Immigration and Asylum Act 2002 differs in any way from that at paragraph 399 of the Immigration Rules?

The facts

4. In this appeal the Secretary of State seeks to overturn the judgment of the First-tier Tribunal (the "Tribunal") which allowed the appeal of Mr WLG (henceforth the claimant) finding that on human rights grounds that the Secretary of State was not entitled to make a decision under s.32(5) of the UK Borders Act 2007 to deport the claimant.

5. The claimant first arrived in the United Kingdom in October 2002 and was granted leave to remain as a family visitor for six months. He made an unsuccessful application to remain on the basis of a marriage which subsequently broke down. In June 2007 he made the first of several unsuccessful applications to remain in the UK on the basis of his

relationship with Ms PN, a British citizen. The claimant had met his partner in October 2004 at a point in time when he was going through marital problems with his then spouse. The claimant and Ms N moved in together in May 2005 and have lived together since then. Their child SG was born on 29th December 2006. The claimant also maintains a strong relationship with his partner's daughter, RP, from a previous relationship. The couple have also had a son, TG, born on 28th October 2012.

6. The claimant also has two further British citizen children, KG born on 8th August 2009 and DG born on 19th March 2011, from short-term relationships with Ms LD-W and Ms SA respectively. He maintains contact with both of these children.

7. On 29th March 2007 the claimant was stopped by the police. He was arrested and charged with drug related offences and upon suspicion of being an overstayer. He was served with the relevant papers and was granted temporary admission. On 26th June 2007 an application was made requesting that he be granted further leave to remain as the unmarried partner of a British citizen.

8. This application was refused on 4th July 2008. There was no appeal. In February 2009 the claimant was arrested for possession of drugs. However, it appears that this did not lead to any conviction. In consequence of the fact that he was remanded in custody the claimant failed to report in May 2009 upon two occasions and he was listed as an absconder.

9. On 21st March 2011 the claimant again applied to remain as the unmarried partner of Ms PN. In the course of this application the claimant was convicted of robbery at Harrow Crown Court on 15th July 2011 and sentenced to 12 months imprisonment suspended for 24 months. On 1st August 2011 his application for leave to remain as an unmarried partner was refused with no right of appeal. On 5th March 2013 he was arrested and appeared before Leeds Crown Court on 28th May 2013 and was convicted of perverting the course of justice. He was sentenced to 12 months imprisonment.

10. On 30th August 2013 he was served with a Notice of Liability for automatic deportation. This was re-served on 13th September 2013, and the claimant submitted reasons why he should not be deported based upon Article 8 ECHR.

11. His Article 8 application was considered by the Secretary of State in the light of his family life with his partner and his children but was rejected in a decision letter dated 19th November 2013. The conclusion of the Secretary of State was that the claimant's removal from the United Kingdom would not cause a disproportionate interference with his right to continue enjoying family life.

12. The appeal came before the Tribunal at a hearing on 19th June 2014. The judgment of the Tribunal was promulgated on 19th August 2014. In the interim, on 28th July 2014, amended Immigration Rules relating to deportation came into effect, as did s.117C of the Nationality, Immigration and Asylum Act 2002 inserted by s.119 of Immigration Act 2014.

13. In the present case the Tribunal allowed the appeal holding that, when all relevant factors were taken into account, whilst he could not meet the requirements of the Immigration Rules it would be disproportionate under the general law relating to Article 8 ECHR to deport the claimant. We consider the detailed approach adopted by the Tribunal later in this judgment. It suffices at this juncture to record that the Tribunal applied the version of paragraphs 398 and 399 of the Immigration Rules which predated the coming into effect of the new, amended, version thereafter introduced on 28th July 2014 and omitted any reference to s.117C of the Nationality, Immigration and Asylum Act 2002. This is evident from paragraphs [31ff] of the judgment.

The grounds of appeal advanced by the Secretary of State

14. In this appeal the Secretary of State submits that the First-tier Tribunal erred in the approach adopted to the assessment of the evidence and thereby the First-tier Tribunal misdirected itself.

15. A summary of the errors alleged to have been made is as follows. First, the Judge failed to make findings or give reasons as to whether there were exceptional circumstances that existed which outweighed the public interest in deportation. Secondly, instead of applying an exceptional circumstances approach the Judge wrongly applied a “standalone” Article 8 assessment outside the scope of the Immigration Rules. Thirdly, had the Judge applied a proper exceptional circumstances test he would have found that there were no such circumstances justifying the overturning of the deportation decision. Fourthly, specifically in relation to the Judge’s findings that the claimant posed a low risk of re-offending the Tribunal erred in concluding that this was the only facet of the public interest relevant to criminality which needed to be taken into account. The Judge should have continued to consider other relevant factors which flowed from cases such as *OH (Serbia) v SSHD* [2008] EWCA Civ 694 which included the risk of re-offending; the need to deter foreign criminals from committing serious crimes by leading them to understand that whatever the other circumstances one consequence could be deportation; the need to express the “revulsion” of society by enforcing deportation and thereby in building public confidence in the treatment of foreign citizens who have committed serious crimes; and the need to respect the primary responsibility of the Secretary of State for assessing the public interest in the deportation of criminals.

16. The Grounds also included a criticism that the Tribunal had failed to address itself to the Immigration Act 2014 which inserts a new Part 5A into

the Nationality, Immigration and Asylum act 2002 and in particular a new section 117C. We have set this out below at paragraph [33]. The Secretary of Sate submitted that the two considerations in Section 117C(1) and (2) were of particular significance since these emphasises that deportation of criminals "*is*" in the public interest; and that the more serious the crime the "*greater is the public interest in deportation of the criminal*".

17. It is notable that the Grounds advanced (inconsistently) contained a mixture of arguments based upon the old version of the Immigration Rules and the new s.117C of the Nationality, Immigration and Asylum Act 2002.

The approach to be adopted to this appeal

18. In our view we need to approach this case in the following way. Our first task is to consider whether the Tribunal erred in law. If it did not, then, upon the basis of the Grounds as drafted which are all points of law, the appeal must fail. If, however, we conclude that the Tribunal did err in law then we need to consider whether any error was material, i.e. would have made any significant difference to the outcome and, if it would, whether we should then quash and remake or remit the decision.

Error of law

19. In our judgment, the Tribunal did err in law. This is for the following core reason.

20. The date of promulgation of the judgment was 19th August 2014. As such, it post-dated the coming into force of the amendments to the Immigration Rules brought about by the Immigration Act 2014. The new amended Rules became effective as of 28th July 2014. It is evident from *E v SSHD* [2004] EWCA Civ 49 at paragraph [27] that a measure is promulgated and becomes effective when communicated to the parties. This accords with a basic principle of administrative law of fairness: See generally in relation to notice and fairness: De Smith's, Judicial Review (7th Ed.) paragraphs [7-046ff]. It is also clear from the decision of the Court of Appeal in *YM (Uganda) v SSHD* [2014] EWCA Civ 1292 that the Rules in force from 28th July 2014 apply in any appeal hearing on or after that date, as did s.117C of the Nationality, Immigration and Asylum Act 2002.

21. It follows that because the present judgment was promulgated after the coming into effect of the new rules that it is those new rules that should have been applied and not the preceding version thereof, and that the Tribunal was also obliged to have regard to s.117B and s.117C of the Nationality, Immigration and Asylum Act 2002.

22. The law that should have been applied to the facts was accordingly, the new version of paragraph 399 of the Immigration Rules which is materially different to the old version and s.117C of the Nationality, Immigration and

Asylum Act 2002. The Secretary of State is therefore correct in paragraph [8] of her Grounds to point out that the Tribunal failed to direct itself to the new Rules. We can readily understand why the First tier Tribunal applied the old Rules given that the actual hearing of the appeal pre-dated the new Rules but promulgation post-dated them. In these unusual circumstances the Tribunal could have sought either at the hearing or subsequently, but prior to promulgation, submissions upon the application of the new Rules, but regrettably it did not. The principle that the relevant date for the application of the law is the date of promulgation makes sense since even after an oral hearing has finished the Tribunal may still receive new written submissions or evidence (as indeed occurred before the First tier Tribunal) and as such the “hearing” in a broad sense continues. The date upon which it can be said with certainty that the judgment is definitive is the date upon which the final version is communicated to the parties i.e. promulgation.

23. The consequence of this error is that the wrong test was applied to the facts and this means that we must move to the next stage which is to consider the consequences thereof.

Materiality

24. We turn to consider whether the error, which we have identified, was material to the outcome.

25. As a matter of elementary principle, an error of law does not, in and of itself, lead to an appeal being granted. We have to consider whether that error either was or may have been material to the outcome. A Tribunal judgment will be upheld if the final outcome was correct notwithstanding an error. It would, to take an extreme example, be absurd if the Upper Tribunal was required to quash a decision of the First-tier Tribunal which was manifestly correct in its ultimate conclusion simply because the First-tier Tribunal made a minor error as to a matter which was collateral or a mere side wind to the substance of the appeal. Each case will turn upon its own facts. Whether an error is material will depend upon such matters as the centrality of the error to the logic of the reasoning set out in the judgment. It might also depend upon whether the facts found and relied upon by the Tribunal are relevant to the correct test to be applied so that the Upper Tribunal can, relying upon those facts, apply the new test to the facts as found to assess for itself whether they would or might lead to a different outcome. In the present case the error of law went to the core of the legal reasoning in the judgment. However, none of the findings of fact are challenged and we can apply the new rules to those facts in order to see whether the outcome changes.

The new regime post July 2014: Immigration Rules 398 and 399, and, section 117C Nationality, Immigration and Asylum Act 2002

26. We start by setting out the law which the Tribunal should have applied to the facts of the present case.

27. The new paragraphs 398 and 399 of the Immigration Rules ("IR") are set out below with those parts of greatest relevance to the present case emphasised in the italicised text:

"**Deportation and Article 8**

A398. 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.

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.

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".

28. The Secretary of State has expressed her view that the new rules represent a comprehensive guide and that "old" case law under the "old" rules no longer pertains.

29. In McDonald's "Immigration Law and Practice" (2014) at paragraph [16.84] the following is stated:

"16.84. In the IDIs on Criminality Guidance, the Secretary of State explicitly instructs her caseworkers that there is now no obligation to assess Article 8 proportionality issues against authority preceding the implementation of the new Immigration Rules and the changes wrought by the Immigration Act 2014 in respect of decisions made after 28th July 2014:

"Decision-makers must not make decisions on the basis of case law established before commencement of Section 19 of the Immigration Act 2014 (28 July 2014) or refer to such case law in decision letters. Decisions must be taken solely on the basis of the Immigration Rules, which Part 5A of the 2002 Act underpins. The Courts will develop new case law in relation to the public interest statements".

That bold assertion may be seen as having been endorsed by the Court of Appeal decision in *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ 1310 at paragraph [26], in which it was suggested, in respect of the preceding rules, that previous case law of the ECtHR has been subsumed into the Immigration Rules with the effect that a decision maker does not therefore need to give further thought. Consequently there is no error of law by the UT in failing to consider in explicit terms the factors identified in *Uner*. It should be noted that *LC (China)*, *SS (Nigeria)* and *MF (Nigeria)* are very specific to deportation. They all emphasise the great weight to

be attached to the public interest in the deportation of foreign criminals and the importance of the policy in that regard to which effect has been given by Parliament in the UK Borders Act 2007 concerning automatic deportation. In *LC (China)*, Moore-Bick LJ distinguished deportation of foreign criminals with those cases concerned with the removal of person who were in the UK country illegally (Para. 25)".

30. We agree broadly with this general statement. The new rules are different in significant respects so cases decided on their facts under the old rules will not be relevant. However, this does not mean that certain broader statements of principle, for example set out in judgments of the Court of Appeal, do not continue to resonate. We have set out below our conclusion that certain such "high level" statements of principle from "old cases" are still relevant.

31. The new Immigration Rules differ from the pre-existing Rules in a number of respects. The logic of the ruling of the Court of Appeal in *MF (Nigeria) v SSHD* [2013] EWCA Civ makes clear that the IR provide a comprehensive regime for those subject to deportation by virtue of their criminal record. They make clear that for certain types of person guilty of less serious crimes, that the "very compelling circumstances" test (previously the "exceptional circumstances test") does not apply. Instead, the Secretary of State must apply the criteria relating to family rights and rights of the child in paragraph 399 of the Immigration Rules. The criteria at paragraph 399 differ significantly in the new version of the Rules, and at paragraph 399(a) they place at the heart of the analysis the rights of the child and in particular a test as to whether it would be "*unduly harsh*" for the child either to live in the country to which the person is to be deported or to require the child to remain in the UK without the person who is to be deported.

32. It was thus common ground between all parties before us that the new IR are materially different to the old Rules.

33. The Secretary of State relies also upon section 117C of the Nationality, Immigration and Asylum Act 2002. This addresses the application of Article 8 ECHR. It is given effect to in the new IR. It provides:

'**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.'

34. There are a number of significant points to note about this provision. First, the section is found in Part VA of the Act. Under section 117A this part applies where a "court or tribunal" is required to determine the legality of a decision under Article 8 or section 6 Human Rights Act 1998. It is not an instruction to the Secretary of State. This is because it is intended to be protective of the Secretary of state when she adopts what may appear, during an appellate or judicial process, to be a harsh, deportation orientated, decision. Nonetheless, we consider that the principles in section 117C and in the IR must, logically, reflect the same core principles else the Secretary of State and the courts and tribunals would be applying different rules. Both the Secretary of State and the courts and tribunals are, after all, applying the same Article 8 so there is no reason for section 117C not to reflect principles applicable to decisions makers and courts and tribunals alike. Secondly, the concept of a sliding scale of criminality (in section 117C(2)) and that of undue harshness (in section 117C(5)) are in the same list of Article 8 considerations set out in section 117C and no ranking of prioritisation is given to one or more of the considerations listed therein. This, it seems to us, is relevant to the important issue we address below which is whether the undue harshness test in the IR waters down and weakens the sliding scale test.

Analysis: The structure and reasoning in the judgment of the First tier Tribunal

35. We turn now to consider the reasoning set out in the judgment of the Tribunal in order to decide whether the ultimate determination is consistent with the new test.

36. The starting point is to record the acceptance by the Secretary of State of all of the findings of fact set out in the judgment. This being so the issue, therefore, for us is whether applying the new law to these facts the end result is different. For reasons we set out later in this judgment we conclude that the First-tier Tribunal would have arrived at exactly the same result even had it applied only the new law.

37. The reasoning of the judgment of the Tribunal proceeds in the following way. First (from paragraphs [29ff]), the Tribunal sets out the old law. Under the old paragraph 399 test was not whether it was "*unduly harsh*" to expect a child to leave the UK but whether it was "*unreasonable*" to expect that child to leave the UK. Further, the position of the child became essentially irrelevant if there was a family member who was able to care for the child in the UK. This latter requirement has been removed from the new Rules. It means that a person with a criminal record is not susceptible to deportation simply because there is some other family member able to care for the child in the UK. Whilst the claimant had four British citizen children in the UK it was clear in the present case that all had mothers who could care for them were he deported. It was for this reason, which was clearly no longer applicable and erroneous, that the Tribunal concluded that this claimant could not succeed under paragraph 399 of the Immigration Rules.

38. Looking at the appeal outside of the Immigration Rules the Tribunal addressed itself to the claimant's family life rights (cf. paragraphs [41ff]). The Tribunal considered the duration of the relationship between the claimant and his partner, and the number of children who were British citizens. The Tribunal also recorded that the claimant had two other children who were British citizens by another partner with whom he maintained contact and in whose lives he played an active role. The Tribunal concluded:

> "…we find that family life exists between the Appellant, Ms N and the children. Were the Appellant to be removed from the United Kingdom there would be an interference with this family life".

39. In paragraph [46] the Tribunal considered the broad objectives of the immigration system and the facts relevant to the claimant's criminality. The right of the Secretary of State in law to maintain an effective immigration system of control and to ensure the protection of the general public was acknowledged. This led the Tribunal to examine, in considerable detail, the criminality of the claimant in detail. Between paragraphs [46] – [52] the Tribunal considered the claimant's antecedents and the specific offences for which he had been convicted and it made an assessment as to their overall seriousness. The Tribunal identified and reviewed the sentences imposed. The Tribunal accepted updated information by way of a NOMS report dated 25th September 2013 from the claimant's Offender Manager which described the pattern of offending. The report: "…*gives the general re-offending predictor and the violence predictor over one to two years as low*". The Tribunal took account of the

Judge's sentencing remarks in relation to the last offence of perverting the course of justice. They record the view of the Crown Court Judge that the claimant reacted after panicking and that he pleaded guilty at the first available opportunity. The Tribunal reviewed the conduct of the claimant on licence following the serving of the custodial part of his sentence for perverting the course of justice and recorded that there was no evidence of further offending and a history of compliance with the licence conditions. In paragraph [50] the Tribunal recorded that it had received up to date evidence which post dated the oral hearing but pre-dated promulgation. The First tier Tribunal stated:

> "Following the hearing and in accordance with our directions we received an updated report dated 2 July 2014 from...the Appellant's former Offender Manager. In this report the Appellant was assessed as posing a low risk of re-offending in all areas. Further [the report] noted that since the Appellant's release he had no knowledge of any continued contact with unsuitable associates".

40. In paragraph [52] the Tribunal records:

> "The evidence submitted by the respondent confirms that although the Appellant has been found guilty of an offence which attracted a sentence of 12 months there has been no evidence of further re-offending and the risk to the general public has been described as low".

41. The Tribunal thereafter proceeded to consider the best interests of the children, in particular they applied the reasonableness test set out in the Immigration Rules and stated:

> "58. The question therefore is whether it would be reasonable to expect the four children in the appeal before us to go to Jamaica where they have never been and where they would have no security in relation to accommodation. They have always lived in the UK and have no other family ties [t]here. They would be returning with a father who had been out of that country for over 10 years and with a mother (in the case of S and T) who is a British citizen with no employment prospects.
>
> 59. It is clear that the other two children will not accompany the Appellant to Jamaica and to all practical ends the involvement that they have with their father in their lives would almost inevitably diminish if not end altogether. To expect family life between a parent and a child to be maintained by electronic means would not be in the interests of the two children left behind. The children benefit from the involvement in their lives of both parents at present. As we have noted the Appellant has an active role in both their lives.
>
> 60. In the particular circumstances it is clear that the Appellant's partner, Ms N, would not willingly accompany her partner to Jamaica with their two children. There is also the question of her daughter R who is part of this household. She is supported by her mother and is as yet not independent. She retains close ties with her own father. This young person would quite clearly not be able to accompany the family".

42. In paragraphs [61] – [63] the Tribunal pulled the threads of its analysis together and arrived at a final conclusion. In essence the Tribunal found

that the claimant had strong family links with his children such that his removal would be a disproportionate interference with "*his right to continue to enjoy family life with them*" (paragraph [61]). The Tribunal bore in mind the interest that the general public had in the deportation of foreign criminals and that the burden lay upon the claimant to show that the need for deportation was "*outweighed by the fact that he has developed both family and private life*" (paragraph [62]). The Tribunal then assessed the actual level of criminality revealed by the claimant's specific record (paragraph [63]). Ultimately the Tribunal applied a proportionality balancing exercise (paragraph [63]).

Discussion: Application of new rules to facts as found

43. In this section we: set out why the new rules apply to the claimant; set out our view on the relevant principles to be applied following 28th Just 2014; and, we then apply those principles to the facts as found.

(a) The position of the Claimant under the new rules.

44. The new Immigration Rules apply because (on the basis of the facts as found): (a) the claimant claims that his deportation would be contrary to Article 8; (b) he was subject to a sentence between 12 months and less than 4 years imprisonment (paragraph 398(b); and (c) he has a genuine and subsisting parental relationship with children under the age of 18 who are British citizens (paragraph 399(a)(i)).

45. The claimant's family rights with a partner do not arise in this case because he is entitled to rely upon these only where the relationship in question was formed at a time when he was in the UK lawfully and his immigration status was not precarious, which is not the case.

46. The net effect is that the claimant is due to be deported save insofar as it can be established that the rights of the children need to be protected pursuant to paragraph 399(a)(i)(a) and (b).

(b) General observations on the rules

47. A number of points or principle flow from the new rules which are relevant to our decision in this appeal. There are six points we wish to make.

48. **The three categories of seriousness**: First, paragraphs 398(a)-(c) IR identify three different categories of criminality and as such these new rules are intended to reflect and implement section 117C(2) which states that the more serious the crime the greater the public interest in deportation. By identifying three categories of varying seriousness and attaching different rules to them, this statutory principle is given effect to. The first two categories (paragraphs 398(a) and (b)) differentiate between different levels of seriousness of crime by reference to the sentence

imposed (above or below 4 years custody). The third category (paragraph 398(c)) relates to persistent offenders showing a particular disregard for the law.

49. **Gradations of seriousness within the 12 months to up to four years sentence range**: Secondly, a difficult question arises which is whether the new IR represent the complete and definitive implementation of the principles in Section 117C such that if (say) the impact of deportation on a child is unduly harsh the criminal may not be deported quite regardless of how serious the criminality was within the range of offences leading to a sentence of between 12 months and up to 4 years. In other words the IR, in identifying different categories of criminal behaviour, must be taken to have fully implemented Section 117C leaving no further room for degrees of criminality to be taken into account. The alternative view is that even within the category of criminals sentenced to between 12 months and less than 4 years there is *still* a further balancing exercise to be performed based upon the facts of the individual criminal subject to threatened deportation. In our judgment this latter view is the correct interpretation. The range and seriousness of criminality reflected in sentences of between 12 months up to less than 4 years may be enormous, especially given that a sentence of just below 4 years may reflect an early guilty plea to an offence with a starting point of circa 6 years (i.e. where a one third credit is given for the early plea). If no account is taken of the gradations of the seriousness of the criminality when determining whether a person is to be deported then IR 398 would not adequately reflect Parliament's clear instruction in Section 117C that the more serious the offence the greater the public interest in deportation. The IR are subordinate measures; they should be construed purposively so as to be consistent with Section 117C and they may be so construed by concluding that inherent within the concept of undue harshness ("*unduly harsh*") in Paragraph 399(a)(ii)(a) and (b), is an instruction from Parliament to balance in a case specific manner the impact on the child or partner with the impact on the public interest. We also consider that this is consistent with Article 8 which Section 117C and IR Paragraph 399(a)(ii)(a) purport to apply. That Article is subject to a proportionality test. In our view it is proportionate to balance the public interest (in favour of deportation) with private rights in a fact sensitive and case specific manner.

50. If we were wrong in these conclusions IR 398 would be a blunt instrument whereby spousal or child rights prevailed regardless of the seriousness of the offence, unless the sentence reached four years (when the "compelling circumstances" test kicked in). It could be argued that this, in actual fact, is the correct interpretation because in any case where the welfare rights of children are involved they are to be treated as a primary concern (as emphasised by the Supreme Court in *ZH (Tanzania) v SSHD ("ZH (Tanzania)")* [2011] UKSC 4 *("ZH (Tanzania)"))* such that it is proper to refrain from <u>overly</u> balancing individual criminality with children's rights. We do not subscribe to this view. In *LC (China) v SSHD* [2014]

EWCA Civ 1310 (“*LC (China)”*) the Court of Appeal was concerned with the old version of IR 398 and with a criminal sentenced to more than 4 years, and due allowance must therefore be given to these facts. However, the Court made an important point about the balance of rights between the public interest in deportation of criminals and children’s rights. The Court held that *ZH (Tanzania)* concerned the view of the Supreme Court about the deportation of persons present illegally; not about the deportation of criminals. Cases involving the latter engaged the very important public interest in the removal of criminals and, whilst in no way underplaying the importance of the rights of children, there was a different and more nuanced balancing exercise to be performed in such cases which placed a greater degree of weigh on the pubic interest (in deportation): see paragraphs [23] – [24]. This supports our conclusions that there is a proportionality, balancing, exercise inherent in cases of sentences of less than 4 years which entails examining the specific facts related to the criminality in issue.

51. **The role of “compelling circumstance”**: A third point to emphasise is that the “compelling circumstances” proviso does not apply to cases such as the present. In the case of the two least serious categories of crime i.e. sentence of 4 years or less (paragraph 398(b)) and/or persistent offenders showing a particular disregard for the law (paragraph 398(c)) the test is based upon the undue harshness criteria. It is evident that it is intended to be materially more difficult for a foreign criminal who has been subject to a 4 years or more sentence to avoid deportation by reference to family rights. In such cases something “*over and above*” such family rights must exist before there can be compelling circumstances which trump the public interest in deportation.

52. **Article 8 considerations are taken account of within the rules**: Fourthly, in our view because we consider that properly construed the statutory framework permits Article 8 to be fully taken into account within the rules there is little if any scope for it to play a role outsider of the IR in a case such as the present. This is also the view of the Home Office. Chapter 13 of the Home Office Immigration Directorate Instructions (“IDI”) in relation to “Criminality Guidance in Article 8 ECHR cases” provides as follows:

> “1.2.3 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 4 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 at paragraph 399 of the Immigration Rules, and the exception on the basis of private life is at paragraph 399A.
>
> 1.2.4 An Article 8 claim from a foreign criminal who has been sentenced to at least 4 years imprisonment will only succeed where there are very compelling circumstances over and above the

circumstances described in the exceptions to deportation at paragraphs 399 and 399A".

53. **The IR govern the consequences of a successful Article 8 ground**: Fifthly, if an Article 8 claim succeeds, within the confines of the IR, then paragraphs 399B and 399C set out the provisions for granting leave to remain. The view of the Home Office, which accords with that of this Tribunal, is that there is no provision to grant leave to remain on the basis of Article 8 to a foreign criminal outside of the Immigration Rules (unless the foreign criminal is an EEA national or deportation is pursued solely upon the basis of an overseas conviction): see IDI paragraphs 1.2.5, 2.6 and 2.7.

54. **The weight to be attached to the rights of children**: Sixthly, even though we consider that there is a balancing exercise to be performed within the 12 months to up to 4 years sentence category that does not mean that the children's interests are to be given less than considerable weight. Section 55 of the Borders, Citizenship and Immigration Act 2009 imposes a statutory obligation to have regard to the need to safeguard and promote the welfare of children who are in the UK and this means that the best interests of a child will be a "primary consideration in deportation cases": See IDI paragraph 1.3.1. IDI paragraph 1.3.2 constitutes an instruction to decision makers to take account of all of the information and evidence provided in respect of the best interests of a child in the UK in the context of the application of the private and family life exceptions to deportation. Further, section 71 of the Immigration Act 2014 states: "For the avoidance of doubt, this Act does not limit any duty imposed on the Secretary of State or any other person by section 55 of the Borders, Citizenship and Immigration Act 2009 (duty regarding the welfare of children)". The placing of the interests of the child at the head of the list of relevant considerations, albeit that it does not always out-trump other considerations, was emphasised by the Supreme Court in *ZH (Tanzania)* (ibid.) and in particular at paragraphs [25], [26] and [46]. The net effect of our construction of the IR is not intended to down play the importance of children's right; it is simply to ensure that they are nonetheless placed into the balancing scales, along with the also strong public interest in deportation. This seems to us to be consistent with the principle in *LC (China)* (ibid.) referred to at paragraph [50].

(c) The application of the rules to the facts as found: balancing the public interest in deportation against the rights of the children

55. With these observations in mind we turn to apply the relevant principles to the facts as found. We have already observed that the facts of this case are not in dispute. We have paid very careful attention to these facts and we have also reviewed the file carefully to identify the more detailed basis which underpins the First-tier Tribunal findings.

56. In the present case it follows from the above that the claimant is to be deported unless the rights of the children trump the strong public interest consideration reflected in the Immigration Rules and in section 117C of the Nationality, Immigration and Asylum Act 2002 that deportation is conducive to the public interest. We must consider whether it would be "*unduly harsh*" to require the children of the claimant to live in the country to which he is to be deported and whether it would be unduly harsh for the child to remain in the UK without him.

57. We have explained above that the concept of undue harshness involves a fact sensitive balancing of the child's interests with the public interest in deportation.

58. The Home Office in the IDI gives a number of examples of factors which may be relevant to the balancing exercise: whether the criminal is a repeat offender; the criminal's ability to speak English; the criminal's financial independence; and whether any relationship formed with a partner occurred at a point in time when the criminal was present unlawfully or with a precarious immigration status. An additional, and indeed important, factor in our judgment is the seriousness of the offending within the 4 year sentence bracket since this range reflects a wide range of offending and might very well reflect significant differences in the risk posed by the individual concerned to society at large. Pre-sentence reports routinely assess the risk posed by individuals to the public and it is clear that within this sentencing range there may be individuals who present vastly different levels of threat.

59. Section 2.5 IDI provides as follows:

> "2.5 Unduly harsh
>
> 2.5.1 This section should be read in conjunction with the child guidance at section 3 and the partner guidance at section 4.
>
> 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".
>
> 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.

2.5.5 It will usually be more difficult for a foreign criminal to show that the effect of deportation on a partner will be unduly harsh if the relationship was formed while the foreign criminal was in the UK unlawfully or with precarious immigration status because his family life will be less capable of outweighing the public interest than if he was in the UK with lawful, settled immigration status.

2.5.6 Section 117B(2) of the 2002 Act states that it is in the public interest that those who seek to remain in the UK are able to speak English. If a foreign criminal cannot demonstrate that he is able to speak English, it will be more difficult for him to show that the effect of deportation on his qualifying partner or qualifying child will be unduly harsh. There is no prescribed standard of English which must be met here and no prescribed evidence which must be submitted. Decision-makers should consider all available information, though less weight will be given to claims unsubstantiated by original, independent and verifiable documentary evidence. Indications that a foreign criminal can speak English may include:

- evidence of citizenship (e.g. a passport) of a country where English is the (or a) main or official language;

- evidence of an academic qualification that was taught in English;

evidence of passing an English language test;

- evidence that he has been interviewed (e.g. in connection with an asylum claim) or given evidence at an appeal hearing in English.

2.5.7 Section 117B(3) of the 2002 Act states that it is in the public interest that those who seek to remain in the UK are financially independent. If a foreign criminal cannot demonstrate that he is financially independent, it will be more difficult for him to show that the effect of deportation on his qualifying partner or qualifying child will be unduly harsh. Financial independence here means not being a burden on the taxpayer. It includes not having access to income-related benefits or tax credits, on the basis of the foreign criminal’s income or savings or those of his partner, but not those of a third party. There is no prescribed financial threshold which must be met and no prescribed evidence which must be submitted. Decision-makers should consider all available information, though less weight will be given to claims unsubstantiated by original, independent and verifiable documentary evidence, e.g. from an employer or regulated financial institution.”

60. We note that in paragraph 2.5.2 the Secretary of State has prayed in aid the Oxford English Dictionary and she has cherry picked from the list of cognate expressions therein those at the most severe end of the scale. The dictionary also defines “harsh” as “unpleasant”, “jarring to the

senses", "grim" and "unpalatable". During the reconvened hearing it was submitted to us that this cherry picking was deliberate and intended to convey the Secretary of State's view that in the statutory context "harsh" was to assume its most extreme meaning. On the facts of this case we are not called upon to express a view on the question: how harsh is "harsh"? We flag it, however, as a potentially significant issue for another case on more marginal facts. We are not therefore in this case either endorsing or rejecting the Secretary of State's interpretation of "harsh" as set out in paragraph 2.5.2 (*supra*).

61. The following reflects our assessment of the facts.

62. First, so far as the children are concerned the claimant has four children with British citizenship. He has a strong parental relationship with those children. If he were to be deported to Jamaica the children would, in all practical reality, lose contact with him. It has been found that they would not travel with him as their mothers have work, secure accommodation and other family commitments in the UK (including in the case of his partner a child by a previous relationship who remains a dependent part of her household whilst she continues her studies but also has contact with her birth father) and that they would lose the benefit of his significant presence in their lives as a parent if he were deported. It would clearly therefore not be in their best interests.

63. It would clearly therefore not be in the children's best interests if the Claimant were removed. He is actively and regularly involved in all of their lives as a hands-on father who provides care whilst their mothers work and study and is a key part of their lives at other times. The children are aged two, four, five and eight years old, and therefore very young, making the physical relationship between them and the Claimant all the more essential. All three mothers have experienced time when the Claimant was not able to have this physical contact with their mutual children whilst he was imprisoned and have given evidence of negative impact on their children, and how they struggled to provide the love and attention of two parents during this period of time. The mother of KG sets out in her letter that K directly expressed his father's physical absence as rejection of him saying: "*Mummy have I been naughty, is that why daddy doesn't want to see me*?" He feared that he had been abandoned, and his nursery expressed concerns about his behaviour. The Claimant's deportation would reduce the income of his partner and the other mothers of his children by removing the free child-care he currently provides, and thus negatively impact on the children's well-being in this way. The children could not travel to have contact via visits without their mothers who would not have the funds for the flights, and given the Claimant's own lack of qualifications it is most unlikely he would be in a position to find well paid work to fund multiple flights for the children and their three mothers.

64. Secondly, this brings us to the next question. The test of undue harshness involves a wider, more rounded, assessment which takes into

account the degree and nature of the criminality. As to this the level of criminality engaged in by the claimant is at the lowest end of the least serious category. He was sentenced to 12 months custody. He is assessed as of low risk and is not a proven recidivist. He demonstrated remorse. He appears to have responded positively to his punishment. We can see nothing in these particular facts which would warrant a conclusion that the Tribunals end result was wrong. The Claimant is also able to speak fluent English as this is his first language and is financially independent as his wife is in full-time employment with Ealing Adult Social Services as a Senior Day Care Worker, and supports him whilst he provides care for their two young children. He therefore can demonstrate that the matters to which it is necessary to have regard under section 117B of the Nationality, Immigration and Asylum Act 2002 are favourable to him.

65. It follows from the facts as found by the First-tier Tribunal that, upon the application of the new Immigration Rules, the decision of the Tribunal should be maintained as the claimant was entitled to succeed under the exception paragraph 399(a) of the Immigration Rules and in accordance with s.117C of the Nationality, Immigration and Asylum Act 2002.

66. We add one final rider: The Claimant prevails on the facts as they have presently been found. If further criminal acts are perpetrated the balance could change. A consequence of this judgment is that a criminal with a strong familial relationship does not acquire permanent immunity from deportation.

67. For all these reasons the appeal is refused.

Postscript

68. By way of postscript we wish to emphasise that our analysis in this judgment relates only to cases of criminality falling within the 12 months to up to 4 years sentencing category. We are conscious that there are difficult questions of both law and practice which arise in other circumstances and we therefore do not purport to express a view on other types of case.

69. By way of example we identify two types of case where different considerations might apply. First, cases of lesser criminality that do not lead to a 12 month custodial sentence. IR 398 does not cover this situation. However, that does not mean that Article 8 does not apply. Logic would suggest that the balancing exercise might (depending upon the facts) be more favourable to the criminal since this is consistent with the overarching section 117C(2) the corollary of which is that the less serious the offence the weaker is the public interest in deportation. Quite how this would work in practice when balanced against family rights is, however, beyond the remit of this judgment. Secondly, in the case of criminals who received sentences of 4 years or more, where the compelling circumstances test applies, there will in future cases be complicated

questions balancing the strong(er) public interest in deportation with the (still important) interests of the welfare of the child which Parliament has (through section 55: see paragraph [54] above) instructed the Secretary of State and the courts and tribunals to pay particular regard to. Balancing all of these interests under the rubric of “compelling circumstances” will be a different exercise to that we have undertaken in this case. Again, this exercise is not for us.

Signed Date 22/07/2015

Mr Justice Green