IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00024/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 October 2014	**On 23 December 2014**

Before

THE HONOURABLE MR JUSTICE KING
UPPER TRIBUNAL JUDGE K CRAIG

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AG

Respondent

Representation:
For the Appellant: Mr T Melvin, Home Office Presenting Officer
For the Respondent: Ms N Barnes, 9-12 Bell Yard

DETERMINATION AND REASONS

1. This is an automatic deportation case involving a foreign criminal. It concerns a deportation order directed to the respondent AG, the appellant in the proceedings before the First-tier Tribunal. The order dated 29 November 2013, served on 3rd December 2013, was made by the Secretary of State under section 5 of the Immigration Act 1971 (the 1971 Act) not as an act of discretion but because of the mandatory provisions of section 32(5) of the UK Borders Act 2007 (the 2007 Act). For convenience we shall refer to AG either as AG or as the appellant.

2. The Order was in these terms:

> 'Whereas [AG] is a foreign criminal as defined by section 32(1) of the Borders Act 2007:
>
> The removal of [AG] is, under section 32(4) of that Act, conducive to the public good for the purposes of section 3(5)(a) of the Immigration Act 1971:
>
> The Secretary of State must make an order in respect of a foreign criminal under section 32(5) of the UK Borders Act 2007 (subject to section 33).
>
> Therefore in pursuance of section 5(1) of the Immigration Act 1971, once any Right of Appeal, that may be exercised from within the United Kingdom under section 82(1) of the Nationality, Immigration and Asylum Act 2002 is exhausted, and the said appeal is dismissed … the Secretary of State by this order requires the said [AG] to leave and prohibits him from entering the United Kingdom so long as this order is in force.'

3. There is no right of appeal against the making of the deportation as such but there is a right of appeal against the Secretary of State's decision that section 32(5) applies which AG duly exercised on the grounds that his removal in pursuance of the deportation order would be a breach of his rights under Article 8 of the ECHR and hence came within the exceptions to section 32(5) provided for in section 33 of the 2007 Act. The Secretary of State's written decision dated 3rd December 2013, that section 32(5) applied was served upon AG together with the deportation order.

4. This appeal has come before us as an appeal by the Secretary of State from the determination of the First-tier Tribunal (FtT) allowing AG's appeal. Such an appeal lies to us only on an error of law. It raises, amongst other grounds, an important issue as to the application of paragraph 398(a) of the Immigration Rules where the conviction which rendered the proposed deportee a foreign criminal for the purposes of the 2007 Act, was for less than four years but where the individual concerned has in the past been convicted and received a sentence of at least four years albeit, because of its antiquity, not a conviction and sentence which brought him within the Act.

Background Facts

5. AG is a citizen of Jamaica born on the 30th July 1966. He is now 48 years of age. He first entered the United Kingdom on 18th June 1978 when he was 11 to join his mother. On 23rd April 2003 he was granted indefinite leave to remain in the United Kingdom.

Personal relationships

6. On the 20th November 2004 AG married MG in the United Kingdom. They remain married,

7. During his time in the United Kingdom AG has, in addition to MG, had relationships with two other women, namely MC and SM. He has had children by all three. With MC he has had 3 children, namely two sons and a daughter born between 1986 and 1996. With his now wife, MG he has had two children one born in 1996, the other in 2005, now aged 8. With SM

he has had one child, a son born in 2004, now aged 9. In addition he regards MC's older daughter born in 1983, and MG's older daughter born in 1992 as stepdaughters.

Convictions

8. Between July 1981 and March 2010 AG appeared before the courts in the United Kingdom on thirteen separate occasions for seventeen offences.

9. In July 1981 he was made the subject of a supervision order by the Juvenile Court for theft; in October 1982 before the same court he was given a like order for indecent assault. On 17th October 1985 he was convicted in the Crown Court at Snaresbrook, of rape and sentenced to four years youth custody. In April 1988 he was fined in the Magistrates Court for shoplifting. In August 1989 he was convicted at the Crown Court of assault occasioning actual bodily harm and given a six months suspended sentence order; in March 1991 he was bound over at the Crown Court for wounding. In May 19991 he was fined by the Magistrates Court for possession of a controlled drug and failing to surrender to bail. In January 1992 he was convicted in the Crown Court of criminal damage and ordered to pay compensation. In August 1994 he received an eighteen month probation order from the Magistrates Court for an offence of common assault.

10. In March 1997 AG was sentenced at the Crown Court to a total of two years imprisonment for two drug offences being one of possession with intent to supply and one of possession. On his release he did not re-appear before a court for several years.

11. He next appeared in May 2009 before the magistrates who fined him for possession of a controlled drug, Class B. In February 2010 he appeared again before the magistrates for motoring offences involving driving uninsured and without a licence. He was fined.

12. Finally, on 4th March 2010, at the Crown Court at Warwick he was sentenced to twenty one months imprisonment for one offence of being knowingly concerned in the importation of a controlled drug of Class B, cannabis. He had pleaded guilty to this offence. In passing sentence the Judge observed that for a payment of £1800, AG had agreed to bring into the country a quantity of cannabis weighing 16.9 kg which he said he believed to be half that amount. The Judge took into account the plea of guilty, the explanation that the offence had been committed to raise money to pay off debts, and AG's comparatively better recent record. The Judge observed that AG had been working quite hard of late, had recently passed a forklift driver test and there was work available.

13. AG was released on licence under the supervision of the probation service in January 2011 which continued until his sentence expiry on 3rd December 2011.

<u>The statutory scheme for the automatic deportation of foreign criminals</u>

14. A deportation order under section 5 of the 1971 Act can be made only if the person is '*liable to deportation'* under section 3(5) or (6) of the 1971 Act (see the opening words of section 5(1)). For present purposes the material 'liability provision' is that set out in section 3(5)(a) of the 1971 Act providing that a person who is not a British citizen is liable to deportation from the United Kingdom if '(a) the Secretary of State *deems his deportation to be conducive to the public good'*. It follows for present purposes that a determination that '*the deportation of the person is conducive to the public good'* is a necessary prerequisite before a deportation

order can be made. The use of the word '*deems*' in section 3(5)(a) indicates an assessment by the Secretary of State. However section 32(4) of the 2007 Act removes the need for such a considered assessment by the Secretary of State in the case of a 'foreign criminal' as defined by the 2007 Act and in effect substitutes the determination of Parliament that the deportation of a foreign criminal is 'public good conducive'. Thus section 32(4) provides that 'for the purposes of section 3(5)(a) of the Immigration Act 1971 ..., *the deportation of a foreign criminal is conducive to the public good'*.

15. The effect of section (1) and (2) of the 2007 Act is that for present purposes a 'foreign criminal' is a person who is not a British citizen who is convicted of an offence and who is sentenced to a sentence of at least 12 months.

16. In this case as has been set out above, AG had been convicted of a number of offences in the United Kingdom but the chronology of these offences is important since it was common ground before us that the 2007 Act which was passed on the 30th August 2007 and came into force on the 1st August 2008, applies only to those who have been convicted after the passing of the Act or who were convicted before that date but at the time of commencement were in custody awaiting or serving a sentence or whose sentence was suspended. See section 59 of the Act and the decision of the Court of Appeal in AT (Pakistan) v SSHD [2010] EWCA Civ 567 at paragraphs 7-10.

17. The chronology shows AG had been convicted of an offence of rape on 17th October 1985 and sentenced to four years youth custody, but given this was well before the passing of the 2007 Act, this conviction, albeit involving a sentence of at least 12 months, could not have triggered the automatic deportation provisions of the 2007 Act. More particularly and material to this appeal, this conviction could not have given rise to the *automatic* determination under section 32(4) of the 2007 Act that the claimant's deportation '*is conducive to the public good'* for the purposes of section 3(5)(a) of the 1971 Act and hence for the purposes of the making of a deportation order under section 5 of the 1971 Act.

18. In fact of AG's series of convictions in this country the *only* conviction which triggered the statutory determination under section 32(4) of the 2007 Act that his deportation was conducive to the public good, was that of the 4th March 2010 when he was sentenced to 21 months imprisonment for drug importation. See paragraph 12 above.

19. That this was the conviction - and the *only* conviction – to which in this case the Secretary of State had regard for the purposes of making the deportation order signed on 29th November 2013 on the grounds that AG's deportation was conducive to the public good, can be seen from the very terms of the Deportation Order itself. See paragraph 2 above. The Secretary of State was not purporting to make an independent assessment of whether the claimant's deportation was conducive to the public good but was applying the automatic provisions of section 32(4) of the 2007 Act which could have been triggered by only the 2010 conviction. Put another way, these terms make clear that the Secretary of State was not purporting to make a discretionary deportation under section 5 of the 1971 Act by reference to her own assessment that the claimant's deportation was conducive to the public good, but was making an automatic order under section 5 pursuant to section 32(5).

The section 32(5) obligation to make a deportation order: subject to section 33 Exceptions

20. Section 32(5) then provides that the Secretary of State 'must' make a deportation order in respect of a 'foreign criminal' but this obligation is subject to the Exceptions provided for in section 33. This present case is concerned with Exception 1 by reference to which section 33 provides that 'section 32(5) does not apply' where removal of the foreign criminal in pursuance of the deportation order would breach 'a person's Convention rights' under the ECHR (see section 33 (1) and (2)(a)). It is, as already indicated, specifically concerned with the appellant's claim that his deportation would be contrary to his convention rights under Article 8 ('the right to respect for private and family life').

21. It is to be noted that section 33(7) of the 2007 Act makes clear that the application of an Exception does not prevent the making of a deportation order by the Secretary of State under section 5 of the 1971 Act as an act of discretion although in the case of the application of Exception 1, section 32(4) [the automatic determination that the deportation of a foreign criminal is conducive to the public good] continues to apply.

The Article 8 exception: the applicable Immigration Rules

The position as at the date of the FtT decision

22. Since 2012 the Immigration Rules ('The Rules') have established a rule - based approach to the consideration by the Secretary of State of Article 8 claims. The balancing exercise to be carried out under Article 8(2) where Article 8 is engaged, in particular, in the context of deportation, the consideration of whether deportation would be a disproportionate interference with Article 8 rights, is now reflected in the Rules. Deportation is dealt with under Part 13 of the Rules. When first introduced, paragraph A362 read:

> 'where article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will succeed only where the requirements of these rules as at 9 July 2012 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served'

23. As at the date of the Secretary of State's decision in this case (November 2013) and as at the date of the determination of the FtT (29 May 2014) paragraphs 398 to 399A of the Rules set out when a foreign criminal's private and/or family life will outweigh the public interest in deporting him in the terms referred to below. In MF (Nigeria) [2013] EWCA Civ 1192 the Court of Appeal held that the 2012 Rules were 'a complete code' for dealing with a person faced with deportation under the Immigration Acts and who claims this would be contrary to his Article 8 rights. See MF at paragraph 44, and the Court of Appeal decision in YM (Uganda) [2014] EWCA Civ 192 at paragraph 41.

24. The starting point is paragraph 398 which read as follows:

> '398. where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good 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 because thy have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but al least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good 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, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.'

25. Paragraphs 399 and 399A of the Rules then provide, respectively, a family life and private life exception to automatic deportation but the important matter to note for present purposes is that these paragraphs and hence these exceptions apply only to those who fall within paragraph 398(b) and (c) of the Rules. An individual who falls within paragraph 398(a) cannot avail themselves of the benefit of paragraphs 399-399A. In such cases, as the Rules stood as at the date of the FtT determination, the public interest will be outweighed by other factors '*only in exceptional circumstances'*.

The position as of today

26. Since the FtT determination, section 19 of the Immigration Act 2014 has come into force on 28th July 2014 and introduced a new Part 5A into the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) (sections 117A to 117D) setting out a number of public interest considerations to which a court or tribunal *must* have regard when called upon to determine whether a decision under the Immigration Acts breaches a person's Article 8 rights. Section 117B is applicable to all cases. Section 117C sets out additional considerations in cases concerning the deportation of foreign criminals.

27. We set out first subsections (1) to (6) of section 117C:

'117C **Article 8: additional considerations involving foreign criminals**

(1) The deportation of foreign criminal 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.'

28. The final subsection of section 117C is important in the context of the issues raised on this appeal. It provides as follows:

'(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.'

29. The emphasis is the emphasis of this court.

30. 'Foreign criminal' in Part 5A of the 2002 Act is defined in section 117D(2) as meaning:

'a person:

(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence and
(c) who –
    (i) has been sentenced to a period of imprisonment of at least 12months

    (ii) has been convicted of an offence that has caused serious harm, or

    (iii) is persistent offender'

Changes to the Rules

31. Changes have been made to Part 13 of the Rules to ensure alignment between the Rules and the new statutory framework. These changes came into force on the same day as Part 5A of the 2002 Act, the 28th July of this year. A362 is like terms as before save for substitution of:

'… the claim under article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met …'

32. The basic scheme of the amended Rules 398 to 399A however remains the same. They continue to set out when a foreign criminal's private and/or family life will outweigh the public interest in deporting him. They continue to provide a family life exception to deportation (399(a) with reference to a parental relationship, and 399(b) with reference to a

partner relationship) and a private life exception (339A) although the wording of the requirements to make out these exceptions has changed. They continue to provide that these exceptions do not apply where 398(a) applies which is now in these terms (the italics highlights the material amendment)

'(a) the deportation of the person from the UK is conducive to the public good *and in the public interest* because thy have been convicted of an offence to which they have been sentenced to a period of imprisonment of at least 4 years.'

Similar amendment to introduce the words '*and in the public interest'* has been made to the provisions of 398(b) and (c), but otherwise they remain the same.

33, Where the exceptions do not apply, the wording of 398 is now 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 paragraphs 399 and 339A'*.

The history of the making of the deportation order in this case

34. On the 26th April 2010 the Secretary of State through the then UK Border Agency wrote to the Governor of the prison where the appellant was held asking that the appellant be informed that in the light of his conviction and sentence of the 4th March 2010 he was liable to deportation under the 1971 Act, and to automatic deportation in accordance with section 32(5) of the 2007 Act, unless he fell within one of the exceptions set out in section 33 and requesting him to give reasons why he might qualify for an exception. The appellant returned a questionnaire setting out his family background. He subsequently instructed solicitors who submitted documentary evidence in support of the claim that the appellant fell within the Article 8 exception.

35. By a notice of decision dated the 9th November 2012, the Secretary of State considered the appellant's Article 8 claim under the Immigration Rules as they then stood. By this notice her decision was that section 32(5) did apply but she reached this by a different route from that in the decision under this appeal. On this occasion she did *not* consider that paragraph 398(a) applied. She proceeded on the basis because of the conviction and 21 month sentence of the 4th March 2010 it was paragraph 398(b) which applied. She accordingly went on to consider whether the appellant could bring himself into one or more of the family life or private life exceptions under 399 and 399A but found he could not. She found that the appellant could not qualify under paragraph 399(a) (family life with a child) because the requirement under (a)(ii)(b) as it then stood, could not be met ('*there is no other family member who is able to care for the child in the UK'*), nor under 399(b) (family life with a partner) because there was no satisfactory evidence that he currently had a '*genuine and subsisting relationship*' with any person settled in the UK (and that included his wife MG), nor under 399A (private life) because he could not satisfy requirement 339A(b) as it then stood ('*he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK'*). She then went on to explain why she did not consider there were any exceptional factors which would cause deportation to be in breach of Article 8.

36. By a subsequent notice of appeal the appellant challenged this decision of November 2012.

37. What then happened was that at the substantive hearing of the appeal on the 18th June 2013 in the light of recent information that the appellant's immigration bail had been varied and he was now back living and cohabiting with his wife MG in Romford, the Secretary of State by her Presenting Officer withdrew the decisions of 9th November 2012, namely both the decision that section 32(5) applied and the decision to make a deportation order, and undertook to reconsider the appellant's case given his current circumstances.

38. It might have been thought that upon that re-consideration the question for the Secretary of State was going to be whether the appellant could now bring himself within the requirements of the family life exceptions not whether the exceptions applied to him at all. Indeed on 21st June 2013 the Secretary of State through one of her caseworkers wrote to the appellant's solicitors in these terms:

'… I have been allocated a case on behalf of your client in order to consider his automatic deportation from the United Kingdom in light of his criminal conviction.

On 18 June 2012*(sic*) the decision to deport dated 9 November 2012 was withdrawn in order that your client's case could be reconsidered given his current circumstances …

… please provide details of his current family and private life in order that a new decision can be made …'

39. The appellant's solicitors duly made submissions that on the evidence there was a genuine and subsisting relationship between him and his wife MG and there were insurmountable obstacles to her living in Jamaica and hence the requirements of 399(b)(i) and (ii) as they then stood, were met.

The Decision of the 3rd December 2013

40. The Secretary of State's decision made on that reconsideration and which is in issue in this appeal was still that section 32(5) applied but the reasoning was now very different. The Secretary of State now stated that the exceptions allowed for in paragraphs 399(a) and (b) and 399A did not apply to the appellant at all because it was now considered that he fell within paragraph 398(a) which, it is to be recalled, read at the time:

> '(a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they were sentenced to a period of imprisonment of at least 4 years;'

and that there were no exceptional circumstances raised which would outweigh the public interest in seeing him deported given his record ('*the serious nature of your offences and your sustained criminality … the sustained nature of your criminality is clear evidence of your failure to rehabilitate and your ongoing contempt for UK's law*s').

41. The reasoning of the Secretary of State as to why she considered the appellant fell within paragraph 398(a) is not wholly clear from this decision letter which appears to vacillate between identifying the Rape conviction of 1985 as being the sole reason why the appellant met the criteria in that paragraph (see paragraphs 14 to 19 of the decision), and considering for this purpose that it was legitimate to look at the totality of the appellant's offences (see paragraphs 11 to 13).

42. Thus paragraphs 14 to 19 are in these terms:

‘**Family Life**

Family life with children
Consideration under paragraph 399(a)

14. Paragraph 399(a) of the Immigration Rules specify the criteria which must be satisfied in order for a parental relationship with a child to outweigh the public interest in deportation in line with Article 8 of the ECHR …

15. You have a previous conviction which resulted in a sentence of 4 year imprisonment and this conviction is not spent, consequently you meet the criteria as outlined in Paragraph 398(a) and therefore your circumstances under Paragraph 399(a) will not be considered.

Family life with a spouse/partner
Consideration under paragraph 399(b)

16**.** Paragraph 399(a) of the Immigration Rules specify the criteria which must be satisfied before a genuine and subsisting relationship with a spouse or partner outweighs the public interest in deportation in line with Article 8 of the ECHR.

17. You have a previous conviction which resulted in a sentence of 4 year imprisonment and this conviction is not spent, consequently you meet the criteria as outlined in Paragraph 398(a) and therefore your circumstances under Paragraph 399(b) will not be considered.

Private Life
Consideration under Paragraph 399A

18. Paragraph 399A of the Immigration Rules specify the criteria which must be satisfied before an individual’s private life outweighs the public interest in deportation in line with Article 8 of the ECHR.

19. You have a previous conviction which resulted in a sentence of 4 year imprisonment and this conviction is not spent, consequently you meet the criteria as outlined in Paragraph 398A and therefore your circumstances under Paragraph 399A will not be considered.’

43. In contrast paragraphs 11 to 13 read as follows:

‘Sentence of at least 4 years imprisonment

11. You were convicted on 04 March 2010 of Being Concerned in … Import … which is prohibited (drugs class B) and sentenced to a period of 21 months imprisonment. This conviction will be considered in conjunction with your previous conviction on 17 October 19985 of Rape for which you were sentenced to 4 years imprisonment and your

conviction on 21 March 1997 of Possessing a Controlled drug with Intent to Supply and Possessing a Controlled drug for which you were sentenced to 2 years imprisonment.

12. As your previous convictions are not spent, their totallity (*sic*) must be taken into account when considering the criteria with regard to the Immigration Rules.

13. The Immigration Rules state that it will only be in exceptional circumstances that a person's right to a family life and/or private life would the public interest in seeing a person deported where they have been sentenced to a period of imprisonment of at least 4 years'

The determination of the First–tier Tribunal

44. On AG's successful appeal against this decision to the First-tier Tribunal, it was found (at paragraph 21) that the appellant could not and did not fall within paragraph 398(a) as '*the conviction which gave rise to his liability to deportation*' was not that of the 1985 Rape but his conviction of March 2010 for which he was sentenced to 21 months imprisonment, that paragraphs 398(a) and (b) refer to a conviction for **an** offence and the respondent had been wrong in paragraph 12 of her decision to take the totality of the sentences of imprisonment imposed on the appellant between 1985 and 2010 into account in finding that paragraph 398(a) applied.

45. The Tribunal then went on to find that although the appellant could not bring himself within either the family life with children exception under paragraph 399(a) [it being conceded by the appellant that his wife was able to care for their children and hence (a)(ii)(b) was not met], or the private life exception under 399A, the requirements of the private life with a partner exception under paragraph 399(b) had been made out. On the evidence before them they found that on the sole issue under this paragraph disputed by the Secretary of State, there was a genuine and subsisting relationship between the appellant and his wife, and hence 'the appellant has established his article 8 claim on the ground of family life with his wife within the Immigration Rules' (paragraph 22). It appears that the Secretary of State conceded that there would be insurmountable obstacles to the wife going to live with the appellant in Jamaica as she had to remain in the UK to look after their young son and hence the requirements of 399(b)(ii) were satisfied.

46. The Tribunal did go on however to consider whether, if they were wrong in finding that paragraph 398(a) did not apply, 'having regard to the decision of the Court of Appeal in MF(Nigeria) … there are exceptional circumstances which outweigh the great weight to be given to the public interest in the deportation of foreign criminals'. They found such circumstances had been made out. Their reasoning is set out in paragraph 24:

> '24. If we were wrong in our finding at paragraph 21 of this determination that paragraph 398(a) of the Immigration Rules does not apply, we have considered, having regarding to the decision of the Court of Appeal MF (Nigeria) v SSHD (2013) EWCA Civ 1192 whether there are exceptional circumstances which outweigh the great weight to be given to the public interest in the deportation of foreign criminals. At the hearing Ms. Masood relied on a number of factors which she set out in the penultimate paragraph of her skeleton argument. We have conducted a balancing exercise. On the one hand, the appellant's criminal record is poor. In 1985, shortly after reaching the age of eighteen, he was convicted of Rape and sentenced to four years imprisonment.

Subsequently, he was given a two year prison sentence in 1997 for Possessing a Controlled Drug with Intent to Supply and in 2010 he was sentenced to twenty one months imprisonment for Importing a Controlled Drug. Further, in the probation report, prepared for his 2010 court appearance, the likelihood of re-conviction was assessed as medium though the OASys report concluded that the likelihood was low. With regard to the prison sentences and to all the non custodial sentences appearing on his record, great weight has to be given to the public interest in his deportation as a foreign criminal. On the other hand, the appellant has lived legally in the United Kingdom since first arriving here in 1978 aged eleven. Further, he has, on our finding, a genuine and subsisting relationship with his wife and their two children S G and A G. There is also evidence that he has a genuine and subsisting relationship with his son A T who currently resides with him at the appellant's mother's house in Leyton and there is also evidence that he has a relationship with his son R G. In considering the appellant's relationship with his children we have had regard to section 55 of the Borders, Citizenship and Immigration Act 2009 and to the decision in ZH Tanzania (2011) UKSC 4 and we find, having particular regard to the close relationship which exists between the appellant and A G, that it would be in the child's best interests for him to be brought up by both parents in the United Kingdom. Further, at the hearing, it was accepted on behalf of the respondent that it was not reasonable to expect the appellant's wife or A G to live with him in Jamaica. There is also credible evidence that the appellant maintains contact with other family members in the United Kingdom. Overall, after conducting a balancing exercise, we find, having attached considerable importance to the interests of A G, that in the particular circumstances of this case exceptional circumstances outweighing the great public interest in deportation have been made out.'

47. We accept the submissions of the Secretary of State that these reasons can be summarised as (a) the appellant has lived in the UK since age 11 years, (b) genuine and subsisting relationship with his wife and their two children (c) evidence of a like relationship with two of his other children AT and RG, (d) the best interests of his children should be to be brought up by both parents it having been accepted by the respondent that it would be unreasonable for the wife and AG to relocate to Jamaica.

The grounds of appeal

48. Before us Mr Melvin on behalf of the Secretary of State although originally minded to seek to permission to amend the grounds of appeal to challenge the finding that the appellant met the requirements of, and hence succeeded under, paragraph 399(b), assuming the paragraph could be applied to him, did not ultimately pursue such a course.

49. The grounds of appeal before us were accordingly limited to two:

(1) that the First-tier Tribunal erred in law in finding that the appellant did not come within paragraph 398(a);

(2) that the First-tier Tribunal erred in law in finding that on the assumption that the appellant did come within paragraph 398(a) and to whom therefore paragraphs 399a and 399A did not apply, there were nonetheless 'exceptional circumstances' rendering deportation a disproportionate interference with the appellant's Article 8 rights.

50. Given the lack of challenge to the finding that the appellant met the requirements of the family life with partner exception under paragraph 399(b), it must follow that ground two can come into play only if the first ground succeeds. If the first ground fails, the appeal against the First-tier Tribunal determination allowing AG's Article 8 appeal within the Immigration Rules, must fail.

Ground One: the applicability of paragraph 398(a)

51. Mr Melvin did not seek to argue that the 1985 conviction could have brought the appellant within the automatic deportation provisions of the 2007 Act. He accepted that it was the 21 month sentence for the March 2010 drug offence which had had this effect. His argument was (to quote his written submission) that 'once within the automatic deportation provisions the Secretary of State is entitled to consider that a conviction of four years, albeit from 1985 for rape, can be used to show that an appellant comes within paragraph 398(a) of the Rules', and that once paragraph 398(a) applied, the Secretary of State was entitled to look at the totality of the appellant's offending when considering, applying the 'exceptional circumstances' criteria in paragraph 398, whether any Article 8 rights of the claimant outweighed the public interest in the deportation of a foreign criminal. This was all that the Secretary of State was purporting to do when saying that the 2010 conviction would be considered with the other convictions and that their totality had to be taken into account. Mr Melvin disavowed any attempt on the part of the Secretary of State to combine a number of sentences for a number of different offences in order to bring the appellant within 398(a). He submitted this was a misreading of paragraphs 11 to 13 of the decision letter.

52. When granting permission to appeal on this ground, UT Judge Gill said this:

'The first issue that arises … is whether it is only the sentence imposed for the conviction which precipitates deportation action that is to be taken into account in deciding whether a case falls under paragraph 398(a),(b) or (c) or whether the totality of the sentences imposed on an individual must be taken into account. The FTT took the former approach finding that the Respondent was wrong to take the latter approach. On that basis, the FTT decided that the appellant's case fell within the para 398(b). In support of the panel's view is the fact that the word 'because' in:

> 'the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years'

in paragraph 398(a) suggests there must be a link between the reason for considering that a person's deportation is conducive to the public good (thus leading to their deportation) and the sentence. As far as I am aware there is no authority on the point. It is an issue of some significance because it is evident from the concluding words of para 398 that Parliament has decided that an individual who falls within 398(a) is not to have the benefit of paras 399 and 399A from which it arguably follows that exceptional circumstances in such a case would have to be something more than the scenarios provided for in paras 399 and 399A.

The panel's view may be supported by the fact that the appellant's history … shows that he was granted ILR on 23 April 2003 after he committed some of the most serious offences, a fact which does not arguably support the contrary view that the totality of the offences should be taken into account …'

53. Ms Barnes on behalf of AG, in the course of her able and concise submissions, submitted that the approach of the FtT was correct. The historic 4 year sentence on conviction for rape could not be relied on to find that the paragraph 398(a) applied since the automatic deportation order issued was not predicated on this conviction. In any event AG had only been 18 when convicted of the offence, was most likely a child when the offence was committed, and the Secretary of State had granted him leave to remain in April 2003 some 7 years after he had committed the offence.

Our conclusion on Ground One

54. We are conscious that we are being invited to determine first whether the FtT determination was wrong in law having regard to the proper construction of the material Rules as they stood at the time of the decision, although if we were to conclude that an error of law is made out and decided both to set aside the decision and to proceed to remake the decision ourselves, we are satisfied that we would be governed by section 117C of the 2002 Act (see section 117A) and would be bound to apply the Immigration Rules as they now stand having regard to their proper construction in light of section 117C. See Aikens LJ in YM (Uganda) at paragraphs 36-39.

55. In broad terms the thrust of the Rules both as they were at the time of the FtT determination and as they are today, is that in the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years and whose deportation is conducive to the public good as result (see section 32(4) of the 2007 Act), his deportation will only be a disproportionate interference with his Article 8 rights 'in exceptional circumstances' (as per the 2012 Rules pre 28 July 2014) or if 'there are very compelling circumstance' 'over and above' those described in the private life/family life exceptions (as per the current Rules). Whereas, in the case of one who has been sentenced to less than four years but to at least 12 months (and hence is still a foreign criminal whose deportation is conducive to the public good pursuant to section 32 (4)), those Article 8 private life/family life exceptions set out in paragraphs 399 and 399A will apply, if their requirements are met, so as not to require deportation in the public interest.

Paragraph 398(a): single offence not totality of offending

56. It was common ground before us that paragraph 398(a) on its proper construction in either version of the Rules does not permit the totality of a criminal's offending to be taken into account to see whether he falls within its terms. It is not permissible to add up a number of sentences for a number of offences to see whether a total sentence of 4 years has been passed. Aggregation of multiple sentences for multiple convictions in order to bring a person within paragraph 398(a) is not permissible. See again Aikens LJ in YM at paragraphs 43-44. Paragraph 398(a) refers to 'an offence' not 'offences'. The relevant sentence must be a sentence for a single conviction. Only one offence at a time can be taken into account to determine whether paragraph 398a applies.

57. On this aspect the First–tier Tribunal made no error of law when it ruled that it was wrong for the respondent in paragraph 12 of her decision to take the totality of the sentences of imprisonment imposed on the appellant in account in finding that paragraph 398(a) of the Rules applied - although as already indicated Mr Melvin disavows that this is what the Secretary of State was purporting to do.

The proper construction of paragraph 398(a) in the current rules

58. The current Rules have obviously been drafted to take account of the provisions of section 117C. A new A398 has been introduced providing, amongst other things, that:

> '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.'

Paragraph 398(a) and the concluding words of paragraph 398 must be taken as being intended to reflect subsections (1), (2) and (6) of section 117C. However critically for present purposes, those subsections are subject to subsection (7) which as we have already indicated, provides:

> '(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'

59. In the light of subsection (7), we have no doubt in the context of the current Rules, that for a foreign criminal to fall within paragraph 398(a), the conviction and sentence relied on must be the reason for the decision to deport. In other words there must be a causal link between the conviction and sentence relied on and the determination of public good conduciveness (under section 3(5)(a) of the 1971 Act) which has led to the making of the decision to deport. The conviction and sentence relied on must be the conviction and sentence upon which the foreign criminal's liability to deportation is predicated.

60. Had the First–tier Tribunal been applying the current Rules then this first ground of appeal would have been bound to fail. This appellant was liable to deportation in this case and the decision to deport him was made by the Secretary of State not because of the 1985 4 year sentence on conviction for Rape but because (and only because) of his 2010 conviction and 21 month sentence (see our analysis above at paragraph 14 to 19), which did not bring him within paragraph 398(a) but rather paragraph 398(b).

The proper construction of the 2012 Rules as at the date of the FtT determination

61. We accept that we cannot use the provisions of the 2014 Act introducing the new part 5A into the 2002 Act or our consideration of the proper construction of the current Rules in the light of those provisions, in any consideration of the proper construction of the 2012 rules as they stood in May of this year at the date of the FTT decision. See Aikens LJ in YM (Uganda) at paragraph 36.

62. Nonetheless our considered conclusion is that the only proper construction of paragraph 398(a) in its then form from its very wording and the context of its application to a person to whom a deportation notice has been issued on the express grounds that his deportation is conducive to the public good, is that the conviction and sentence relied upon to bring him within paragraph 398(a), must be the conviction and sentence relied on by the Secretary of State (expressly or by implication) in that notice for considering (under section 3(5)(a) of

the1971 Act) that his deportation is conducive to the public good for the purpose of giving rise to the liability to deportation and the making of the deportation order under section 5 of the 1971 Act. Indeed it is difficult to see to what other finding of 'public good conduciveness' paragraph 398(a) can refer other than that which has given rise to the liability to deportation in the particular case. The reference in paragraph 398(a) to the 'person's deportation being conducive to the public good' must be a reference to that essential stepping stone in the particular case which has given rise to the liability to deportation which is under challenge as being in breach of the appellant's human rights.

63. In other words even under the then 2012 Rules we consider there has to be a causal link between the conviction and sentence relied on as bringing a person within paragraph 398(a), and the liability to deportation which is under challenge. The First-tier Tribunal was correct in law so to find. Only a conviction and sentence upon which the liability to deportation and the consequential decision to deport is predicated in the particular case can bring a person within paragraph 398(a).

64. In this case the liability to deportation arose solely by reason of the operation of the 2007 Act. The only material conviction and sentence for this purpose was the 2010 conviction and the 21 month sentence for the reasons we have already explained. The 1985 rape conviction was not the reason for the liability to deportation in this case. It was not the reason for any stated 'deeming' by the Secretary of State that the appellants deportation was conducive to the public good. As we have already demonstrated the only basis for the appellant's deportation being conducive to the public good, relied on by the Secretary of State in making her deportation order, was that brought about by the operation of section 32(4) of the 2007Act which everyone accepts was triggered solely by the 2010 conviction and sentence. The Secretary of State has never purported to make a deportation order in this case on a discretionary basis by reference to an independent considered assessment of her own by which she deemed the appellant's deportation to be conducive to the public good.

65. Indeed it would be difficult to see any justification for an assessment of the Secretary of State in 2013 that the 1985 rape conviction and sentence viewed in isolation made the appellant's deportation from the UK conducive to the public good and made him liable to deportation, when the Secretary of State had in 2003 granted the appellant indefinite leave to remain, notwithstanding the existence of that rape conviction of many years before.

66. Nor is this a case in which the Secretary of State has purported, in exercise of an independent view, to 'deem' the appellant's deportation conducive to the public good because of his being a persistent offender with several convictions over several years demonstrating a particular disregard for the law. But even if she had, this would not have brought the appellant within paragraph 398(a) but rather paragraph 398 (c) to which the exceptions under 399 and 399A do apply.

67. For all these reasons we consider no error of law has been demonstrated under ground one.

The Immigration directorate instruction

68. We were referred to the 'Chapter 13: criminality guidance in Article 8 ECHR cases' issued by the Secretary of State on 28 July 2014 as part of Immigration Directorate instructions to immigration officers. This guidance is given pursuant to paragraph 1(3) of schedule 2 to the

1971 Act. Its purpose is stated as being to explain how decision-makers consider claims that the deportation of a foreign criminal would breach Article 8 of the ECHR.

69. We were referred in particular to the terms of paragraph 2.2.2 which reads:

> '2.2.2. Once a foreign criminal has been sentenced to a period of at least four years' imprisonment, he will never be eligible to be considered under the exceptions. This applies even if deportation is not pursued at the time of the four year sentence because there are very compelling circumstances such that deportation would have been disproportionate, and the foreign criminal goes on to re-offend and is sentenced to a period of less than four years. This is because his deportation will continue to be conducive to the public good and in the public interest for the four year sentence as well as any subsequent sentences'.

70. On any view this guidance must be treated with caution in so far as it is being relied upon to aid the proper construction of the Rules (see Lord Brown in Ahmad Mahad v Entry Clearance Officer 2009 UKSC 16 at paragraphs 10 and 11) but in any event we did not find any assistance in determining the issues in this appeal in the paragraph to which our attention was drawn.

71. This paragraph is referring to a situation where a foreign criminal has become liable to deportation by reason of a conviction and associated four year sentence which has triggered (by reason of section 32(4) of the 2007 Act) a finding that his deportation is conducive to the public good for the purposes of section 3(5) of the 1971 Act, but who, up until he re-offends, has been able to avoid deportation because of the existence of very compelling circumstances provided for in the current version of the 2012 Rules. The guidance in this paragraph makes clear, as must be correct in law, that even though the foreign criminal has to date avoided deportation on Article 8 grounds, his deportation remains conducive to the public good by reason of the original four year sentence (see again section 32(7) of the 2007 Act). Hence he will always be within paragraph 398(a) and will never be able to rely on the exceptions in paragraph 399 or 399A in the event, for example, of the Secretary of State considering that in view of the re-offending there are no longer very compelling circumstances, and his deportation is now in the public interest. If the foreign criminal were then to challenge his removal as being in breach of his Article 8 rights he could not lay claim to being outside paragraph 398(a) on the grounds that his re-offending had attracted a sentence of less than 4 years.

72. The situation covered by this paragraph of the guidance bears no resemblance to the one prevailing in this case. The appellant's 1985 rape conviction and four year sentence did not have the effect of making him a 'foreign criminal' within the meaning of the 2007 Act or the 2002 Act as amended, as neither were in force at the time. It did not have the effect of rendering his deportation conducive to the public good so that it could be said that this was a state of affairs which was still continuing when he re-offended in 2010. The appellant never became liable to deportation as a result of that 1985 conviction and sentence. There is no suggestion that this appellant would have been deported following that 1985 conviction and sentence but for some exceptional or compelling circumstances.

73. For all these reasons the Secretary of State's appeal on ground one must fail. The First-tier Tribunal did not err in law in finding that the 1985 conviction and sentence albeit one of four years did not bring the appellant within paragraph 398(a) of the Rules, and did not err in law

in finding that he came within paragraph 398(b) because of his 21 month sentence following his 2010 conviction and that accordingly he was eligible to be considered under the exceptions provided for under paragraphs 399 and 399A. As already explained, as there is no appeal challenging the finding that the appellant met the family life requirements of 398(b), it must follow that this appeal must be dismissed.

Ground two

74. It follows it is strictly unnecessary for this tribunal to determine ground two of this appeal, namely that the First-tier Tribunal erred in law in finding that if the appellant did come within paragraph 398(a) of the Rules, there were nonetheless exceptional circumstances making deportation disproportionate on article 8 grounds.

75. We consider it appropriate however to indicate what our considered view is on this issue.

76. The 2012 Rules as at the date of the First-tier Tribunal decision clearly contemplated that anyone who fell into paragraph 398(a) should not have the benefit of the family life exceptions provided for in paragraphs 399(a) or (b), or the private life exceptions provided for in paragraph 399A, and that there would have to be exceptional circumstances in such a case if the public interest in deportation was to be outweighed by other article 8 factors relevant to proportionality. In MF (Nigeria) at paragraphs 40 and 41 the Court of Appeal accepted the submission in the context of this version of the Rules 'that the reference to exceptional circumstances serves the purposes of emphasising that in the balancing exercise great weight should be given to the public interest in deporting foreign criminals who do not satisfy paragraphs 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under Article 8(1) will trump the public interest in deportation'. At paragraph 42, the court said that 'in approaching the question whether removal is a proportionate interference with an individual's article 8 rights the scales were heavily weighted in favour of deportation and something very compelling, (which will be 'exceptional') is required to outweigh the public interest in removal'. At paragraph 46 the Court referred to the exercise contemplated by the new rules under paragraph 398 as regards consideration of 'exceptional circumstances', as being separate from consideration of whether paragraph 399 or 398 applies:

> '46. … if he (the claimant) does not (show that para 399 or 399A applies), it is necessary to consider whether there are circumstances which are sufficiently compelling (and therefore exceptional) to outweigh the public interest in deportation. That is an exercise which is separate from a consideration of whether para 399 or 399A applies. It is the second part of a two stage approach which … is required by the new rules'

77. We accept that the court in MF did not go on expressly to say that on such a consideration, the exceptional circumstances had to embrace matters which are over and above those described in paragraphs 399 and 399A and which are exceptional, but we have no doubt that this is the logical consequence of the structure of the Rules under which a foreign criminal caught by 398(a), is not to have the benefit of the exceptions provided for in those succeeding paragraphs.

78. Support for this construction can be found in the approach of the Court of Appeal in LC (China) v SSHD [2014] EWCA Civ 319 in the judgment of Lord Justice Moore–Bick at paragraph 24:

> '… in case where the person to be deported has been sentenced to a term of imprisonment of less than four years and has a genuine and subsisting relationship with a child under 18 who enjoys British nationality and is in the UK, less weight is to be attached to the public interest in deportation if it would not be reasonable to expect the child to leave the UK and there is no one else to look after him. By contrast however where the person to be deported has been sentenced to a term of 4 years imprisonment or more, the provisions of paragraph 399 do not apply and accordingly the weight to be attached to the public interest remains very great despite the factors to which that paragraph refers. It follows that neither the fact the appellant's children enjoy British nationality nor the fact that they may be separated from their father for a long time will be sufficient to constitute exceptional circumstances of the kind which outweigh the public interest in his deportation'.

79. We accordingly are of the view that had it been necessary to decide the issue, we would have been minded to find the that the tribunal below did err in law in its approach to the finding of exceptional circumstances since none of the matters relied on for this purpose were over and above, or went beyond, the family life or private life factors making up the exceptions in paragraphs 399 and 399A to which the appellant on this hypothesis could not lay claim. This in our judgment is self evident from the analysis of those factors identified above in paragraph 47.

'V*ery compelling circumstances' under the current Rules*

80. Were the current rules applicable, then from their very terms there is a requirement that in the case of a foreign criminal falling within paragraph 398(a) and who therefore cannot take advantage of the exceptions under paragraphs 399 and 399A there has to be demonstrated factors which are both 'over and above' those described in those paragraphs and are 'very compelling', if the deportation is to be found disproportionate. Hence under the current Rules we would not have considered that the factors relied on by the First-tier Tribunal would have been sufficient in law to support a finding that the public interest in deportation of the appellant as a foreign criminal falling within 398(a), was nonetheless outweighed.

Final conclusion

81. For the reasons we have given, this appeal by the Secretary of State is dismissed, and the decision of the First-tier Tribunal, allowing AG's appeal, is affirmed.

Signed Date 19th December 2014

Mr Justice King