IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00721/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision and Reasons**
On 6 November 2014 and 16 January 2015	**Promulgated on 20 February 2015**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

THARGAM AL HAMADI

Respondent

Representation:
For the Appellant: Mr G Harrison, Senior Presenting Officer
For the Respondent: Mr B Halligan instructed by Malik & Malik

DECISION AND REASONS

ERROR OF LAW

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Crawford and Mrs S A Hussain JP (the Tribunal) who for reasons given in their determination dated 6 June 2014 allowed the respondent's appeal against the decision to make a deportation order dated 11 April 2014. On 6 November I heard submissions and thereafter sent out my decision setting aside the Tribunal in the following terms.

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2. The Respondent (the claimant) is a national of Iraq where he was born 15 January 1992. He arrived in the United Kingdom in February 2008 when he claimed asylum. He had on arrival presented a Lithuanian identity card which was found to be false and he was refused leave to enter.

3. Whilst his claim to asylum was pending, the claimant committed offences resulting in convictions in March and April 2010 and December 2011 before his asylum claim was refused on 8 September 2011. The convictions over this two year period were as follows:

    (i) 16 March 2010; conviction of burglary with intent to steal resulting in a sentence of four months in a young offenders' institution on 19 May 2010.

    (ii) 28 April 2010; conviction of sexual assault – intentionally touch a female. On 26 May 2010 sentenced to four months' training and training order.

    (iii) 1 December 2011; convicted of failing to comply with notification requirements. A community order extended to 23 February 2012 with a curfew requirement for twelve weeks and electronic tagging.

4. The claimant's appeal against the refusal of his asylum claim was allowed on Article 8 human rights grounds. On this basis he was granted discretionary leave to remain on 26 June 2012 until 26 June 2015.

5. On 23 January 2014 the claimant was sentenced to 65 weeks' imprisonment. He had pleaded guilty to a count of conspiracy to supply cannabis and an offence of aggravated vehicle taking. The sentences imposed were 31 weeks' imprisonment for aggravated vehicle taking and 34 weeks' imprisonment for the drugs offence. The claimant had been driving a motor car which had been acquired by his co-defendants which had resulted in a police chase and a collision with three other vehicles. The drug offence occurred on 3 November 2012 when the claimant was transporting eight bags of cannabis worth between £2,000 to £4,000 in a taxi as the trust courier of his co-defendants. The sentencing judge observed that the drugs were for onward supply but not, in his judgment, street dealing quantities.

6. The claimant married Samantha Connors on 30 December 2011. This relationship was the basis of the asylum appeal having been allowed on article 8 grounds which had led to the grant of discretionary leave.

7. The reasons for the proposed deportation order are set out in a letter dated 11 April 2014 in which it is explained that paragraph 398(c) of the Immigration Rules applied in the case. The Secretary of State did not accept that the claimant could benefit from paragraph 399(a) because there were no children nor in respect of 399(b) because it was not accepted he had a genuine and subsisting relationship with his British citizen partner. In any event he had not lived in the United Kingdom with valid leave for at least the fifteen years preceding the date of the decision. In respect of paragraph 399A it was accepted the claimant may have developed a degree of private life he did not meet the criteria of this rule. This was the basis that as a 22

year old, even before any periods of imprisonment had been discounted, the claimant had not spent at least half his life in the United Kingdom. In his asylum claim he had advised that his family remained in Iraq and there was no evidence to suggest they would be unable to help him to re-establish himself on return. It was considered that there were no exceptional circumstances which would prevent deportation.

8. The Tribunal took a different view on these matters after hearing evidence from the claimant and his wife. Under a misconception, it understood the Secretary of State had contended the claimant's deportation was conducive to the public good because he had been sentenced to a period of imprisonment of over twelve months with reference to paragraph 398(b). The Tribunal found that the claimant had been accepted into Ms Connors' family. He had learned English and has used his time in custody constructively. It was accepted that the claimant's family had not approved of this marriage. Ms Connors had always lived in the United Kingdom and did not speak Arabic.

9. The exceptional circumstances the Tribunal found in this case were as follows:

> "(i) The Appellant's strong subsisting marriage to Ms Connors;
>
> (ii) His relationship with her family;
>
> (iii) Her inability to leave her family and employment to live in a country considered dangerous for British citizens by the Foreign office;
>
> (iv) The fact that if he were deported alone, it would in effect, break up the marriage with Miss Connors, who is an innocent party and a hard-working respectable young woman;
>
> (v) If the Appellant were deported, he could not re-enter the UK for a ten–year period, which we believe might well extinguish his relationship with his wife."

10. The Tribunal thereafter turned its attention to the proportionality exercise with reference to *Razgar* and concluded at [28][iv] that:

> "...interference with the [claimant's] private and family life is not necessary in the interests of national security, public safety, the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of rights and freedoms of others."

11. The Tribunal then proceeded in brief terms to state that in their judgment deportation of the claimant to Iraq was a disproportionate interference with his right to a private and family life and thus on this basis allowed the appeal under Article 8.

12. The Secretary of State's challenge argues that the Tribunal had failed to give reasons or adequate reasons for its finding on material matters with reference to the decisions in *MF (Nigeria)* [2013] EWCA Civ 1192, *Gulshan v SSHD* [2013] UKUT 00640 (IAC)

and *Nagre* [2013] EWHC 720 (Admin). In short it was argued that the Tribunal had failed to provide reasons why the claimant's circumstances were either compelling or exceptional.

13. In granting permission to appeal First-tier Tribunal Judge Parkes noted that the grounds and the determination referred incorrectly to s.32 of the 2007 Act. He considered that the grounds were arguable.

14. I am grateful to Ms Johnstone and Mr Halligan for their submissions. Ms Johnstone sought leave to amend the grounds to include reference to the wrong provision of the Rule to which Mr Halligan had no objection. Ms Johnstone confirmed that the challenge in essence was a perversity challenge. In his response Mr Halligan argued in essence that, when read in its entirety, the determination showed the Tribunal had carried out the proportionality test correctly.

15. Having considered the submissions and the determination, I am satisfied that the Tribunal erred in its Article 8 consideration in the following respects.

16. Whilst it might not of itself be material, the Tribunal misunderstood the nature of the immigration decision under challenge referring in its opening paragraph to a decision to deport the claimant under the automatic deportation provisions of the 2007 Act.

17. The determination sets out accurately the claimant's offending history and also the nature of the offending that had specifically led to the decision to make a deportation order. However a further error emerges in [22] which reveals the Tribunal understood that the deportation was conducive to the public good because of the sentence to a period of over twelve months' imprisonment with reference to paragraph 398(b) as I have observed above.

18. But for that reference, there is no explanation by the Tribunal how it factored the criminal offending into the proportionality exercise nor is there an explanation of how the public interest had been reconciled with the competing factors in favour of the claimant and his wife. There is an absence of reasoning why the Tribunal concluded that the interference with the claimant's protected Article 8 rights was not necessary having regard to the Secretary of State's aims other than a reference earlier in the determination as follows at [24]:

> "…The appellant and his wife say that the appellant has learnt his lesson and wishes to be a constructive member of society. We accept that this is the appellant's intention and that he has the support of his wife and family. We note that the appellant is still only 22 years old and that his first conviction in the UK occurred when he was 18 years old. He was given the chance to live a normal life in the UK, but re-offended. On the other hand, we accept that he has lived in the UK since he was 16 years old and has spent his adult life in the UK. We accept that he has learnt English and used this time constructively."

19. There was no direction by the Tribunal as to the principles it was required to apply pursuant to *MF (Nigeria)* and the Tribunal failed to appreciate that the scales in favour of deportation by virtue of the claimant's offending were already heavily weighted in favour of the Secretary of State. Although a failure to refer to the relevant case law would not of itself result in error if, in substance, the correct test had been applied, this is not evident from a reading of the determination. The Tribunal correctly explained in [26] that it needed to consider whether there were exceptional circumstances but it is not clear from the language of the determination that it understood that "something very compelling (which will be "exceptional") is required to outweigh the public interest in removal" (as per the judgment in *MF* at [42]).

20. Whilst it was open to the Tribunal to identify the factors that it considered sufficient to outweigh the public interest it was also necessary to explain why that was so in the context of the heavy weighting in the scales in favour of removal. As the rules contemplate the possibility of separation because of criminal offending, it was necessary to explain why, in the absence of the 15 year residence requirement being met, the article 8 claim should trump the public interest. Perhaps if the Tribunal had understood that the decision to make a deportation order was based on persistent offending it might have realised the importance of the criminal history. In any event, the assurances given by the claimant and his partner as to a change of behaviour lacks a critical analysis of why their word was enough in the face of a pattern of criminal behaviour.

21. A factor such as the possibly that a relationship would be unable to continue can have considerable weight but only after proper regard has been had to the force of the public interest and adequate reasons given for the resulting proportionality decision.

22. The decision cannot stand. I therefore set aside the determination of the First-tier Tribunal. The only new evidence Mr Halligan indicated would be led related to medical treatment by the claimant and his partner connected with having a baby. The relationship is not disputed and I do not consider such further fact-finding on this aspect requires the case to be remitted to the First-tier Tribunal.

REMAKING THE DECISION

23. In compliance with directions given, the claimant's representatives have lodged with the Upper Tribunal further statements by the claimant and his partner and supporting letters from the claimant's cousin and aunt. Mr Harrison had no questions for the claimant and his partner and accordingly neither was called. After submissions from the representatives I reserved my decision.

24. The statement by the claimant refers to the absence of any breach of the licence on which he was released from prison which has now expired. He expresses regret at his offending and the impact on his partner. He accompanies her when she attends hospital for infertility treatment.

25. In her statement Ms Connors refers to the support that the claimant provides her. She also refers to her employment with one of the clearing banks and the courses she follows to further her career. It is her contention that as a British citizen it would be unreasonable and unfair to expect her to go to Iraq to live with the claimant. She confirms the strength of her relationship with the claimant.

26. Mr Halligan began his submissions with the argument that the decision by the Secretary of State showed that she had misunderstood the task before her in the way that she had addressed Article 8 in her decision letter. I find no merit in this particular argument. The Secretary of State asked herself the question whether there were circumstances present which were sufficiently exceptional to outweigh the public interest. It is not arguable that she was applying an exceptionality test in the context of a decision letter that involves a detailed consideration of the Immigration Rules.

27. Thereafter the representatives addressed me the approach they contended I should take under the Immigration Rules. In addition, Mr Halligan argued that the circumstances of Ms Connors required separate consideration under Article 8 outside the Rules.

28. In accordance with *YM (Uganda) v SSHD* [2014] EWCA Civ 1292 the 2014 Rules apply in this case as do the amendments to the 2002 Act bringing into force Part 5A. I began with the latter. Relevant to the issues in this appeal the provisions are as follows:

> *117A Application of this Part*
>
> *(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –*
>
> *(a) breaches a person's right to respect for private and family life under Article 8, and*
>
> *(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.*
>
> *(2) In considering the public interest question, the court or tribunal must (in particular) have regard –*
>
> *(a) in all cases, to the considerations listed in section 117B, and*
>
> *(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.*
>
> *(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).*
>
> *117B Article 8: public interest considerations applicable in all cases*
>
> *(1) The maintenance of effective immigration controls is in the public interest.*
>
> *(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –*
>
> *(a) are less of a burden on taxpayers, and*

(b) are better able to integrate into society.

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

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

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

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

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

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

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.

117D Interpretation of this Part

(1) In this Part –

- *"Article 8" means Article 8 of the European Convention on Human Rights;*

- *"qualifying child" means a person who is under the age of 18 and who –*
  - *(a) is a British citizen, or*
  - *(b) has lived in the United Kingdom for a continuous period of seven years or more;*
- *"qualifying partner" means a partner who –*
  - *(a) is a British citizen, or*
  - *(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 – see section 33(2A) of that Act).*

(2) In this Part, "foreign criminal" means 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 12 months,

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

(iii) is a persistent offender.

29. The relevant Rules are in these terms:

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 with a partner who is in the UK and is a British citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

399B. Where an Article 8 claim from a foreign criminal is successful:

(a) in the case of a person who is in the UK unlawfully or whose leave to enter or remain has been cancelled by a deportation order, limited leave may be granted for periods not exceeding 30 months and subject to such conditions as the Secretary of State considers appropriate;

(b) in the case of a person who has not been served with a deportation order, any limited leave to enter or remain may be curtailed to a period not exceeding 30 months and conditions may be varied to such conditions as the Secretary of State considers appropriate;

> *(c) indefinite leave to enter or remain may be revoked under section 76 of the 2002 Act and limited leave to enter or remain granted for a period not exceeding 30 months subject to such conditions as the Secretary of State considers appropriate;*
>
> *(d) revocation of a deportation order does not confer entry clearance or leave to enter or remain or re-instate any previous leave."*

30. Section EX.2. of Appendix FM is in these terms:

> *EX.2. For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.*

DISCUSSION

31. Consideration of any article 8 claim must be through the lens of the above rules and the consideration of the public interest question i.e the justification for interference must have regard Part 5A. This approach is now well established by the authorities; the most recent reminder being by the Court of Appeal in *SSHD v AJ* (Angola) [2014] EWCA Civ 1636. Sales LJ explained at [39] and [40] that:

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

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

32. Mr Halligan accepted that the claimant's case came within 398(c) on the basis of the second category, "... persistent offender ...". Initially Mr Harrison argued that he was instead captured by 398(b). I reminded him that the claimant had been convicted of *two* offences leading to a consecutive sentence of more than twelve months; on reflection he acknowledged 398(b) was not in play.

33. Mr Halligan acknowledged that he was unable to make out a case under 399A. There are no children to the relationship and in consequence the focus is on 399(b).

34. As to 399(b)(i), the relationship was formed when the claimant was in the United Kingdom unlawfully in the sense that he did not have leave to enter or remain. Even if it could be said that Temporary Admission made his presence here lawful or that section 78 of the 2002 Act lawfully entitled him to remain pending the outcome of his asylum appeal, I consider that his immigration status was precarious. His asylum claim had been refused and the outcome of his appeal was uncertain. As matters turned out, his appeal was allowed on Article 8 grounds based on the relationship with Ms Connors. Mr Halligan argued that the effect of that grant of leave meant that the immigration status had ceased to be precarious and accordingly the claimant satisfied the category in 399(b).

35. Two questions flow from this. The first is whether a subsequent grant of leave has a neutralising effect on the precariousness of a previous immigration status. The second is whether the grant of discretionary leave for 30 months is in itself "precarious" immigration status.

36. The wording of the rule must be given its ordinary meaning. The past tense is used. If it was intended that a subsequent grant of leave would have the effect of rendering previous immigration status as not precarious, the rule would have said so.

37. I have no doubt that the claimant's immigration status was precarious when the relationship with Ms Connors was formed. According to a preliminary ruling of First-tier Tribunal Judge Lever dated 30 March 2012, the claimant's asylum claim was refused on 8 September 2011. The First-tier Tribunal's decision of 6 June 2014 noted the evidence that the claimant had proposed to her on New Year's Eve on 2010 and their marriage took place on 30 December 2011. The "preliminary ruling" of Judge Lever addressed the issue whether the Secretary of State was required to consider paragraph 395C. He concluded there was no such requirement and the matter should proceed to a substantive hearing which took place four weeks later.

38. I have not been provided with a copy of the decision. However it is not disputed that the appeal was allowed on human rights grounds only under Article 8, resulting in the grant of discretionary leave on 16 July 2012. That grant includes the following observation:

> "Applying for an extension.
>
> Before the period of leave that you have been granted expires, you should either leave the United Kingdom or apply for an extension of stay, explaining the reasons on which you were seeking further leave. Any application will be considered in the light of the circumstances prevailing at that time. If you application to extend your stay is refused, you will be advised as to the reasons for this and any right of appeal against that decision. Applications to extend your stay must be made on the correct form which is rivalled from this office or by calling 0870 2410645.
>
> Caution
>
> The leave you have been granted may be subject to review before it expires if the circumstances which led to your grant of leave change. You should understand that you may not be allowed to remain in the United Kingdom if, during your stay, you take part in any criminal activities or activities such as support for or encouragement of terrorist organisations, or you otherwise endanger national security or public order. Furthermore, you may not be allowed to remain in the United Kingdom if it is decided for some other reason that your presence here is not conducive to the public good."

39. It seems to me that "precarious" is used in the rule to describe something that is uncertain or unstable. The above notes accompanying the grant of leave indicate continuing uncertainty and instability and thus, a precarious immigration status. The offending by the claimant after the grant of leave leading to the sentencing on 23 January 2014 undoubtedly contributed to the precariousness of the leave that had been granted.

40. Accordingly I am satisfied in this particular case that the claimant's immigration status was precarious at the time the relationship was formed and that it remained so by virtue of the claimant's own actions as it developed. He does not meet the first requirement of 399(b)(i).

41. Each of the requirements of 399(b) must be met if the claimant wishes to come within the category. His failure to cross the first hurdle is therefore fatal. The fact that Mr Harrison conceded that the requirements of 399(b)(ii) are met does not help the claimant. In passing I consider that Mr Harrison was correct to make that concession in the light of the nature of the situation Ms Connors would face were she to accompany the claimant to Iraq.

42. Any consideration of the third requirement at 399(b)(iii) has to be therefore hypothetical. I am not persuaded that it would be unduly harsh for Ms Connors to

remain without the claimant in the United Kingdom. The test has subjective and objective components. I have no doubt about the affection she feels towards him but she will have been aware when they met of the uncertainty of his immigration status and she has allowed the relationship to develop and strengthen despite the claimant undertaking criminal activity. She has invested a lot in somebody who has let her down. Whilst I have no doubt that the claimant's absence will cause heartache, I do not consider in all the circumstances that it would be unduly harsh for her to remain without the claimant even though it would be unlikely she will see him in the near future again unless the parties meet in a third country.

43. As the claimant cannot come within the 399(b) category the next stage in the journey through the Rules is the concluding clause in 398. The enquiry is whether there are "*very compelling circumstances over and above those in paragraphs 399 and 399A"*. It is also necessary to consider the provisions in Part 5A. I note that little weight should be given to a relationship that is "*formed with a qualifying partner that is established by a person at a time when the person's immigration status is precarious"*(section 117B(4)(b)). Both the section and the rule contemplate a past state of affairs. Whereas there is no flexibility in the rule, section 117 leaves room for some weight to be given however I do not consider it can avail the claimant in the light of undermining effect of his continued criminal behaviour.

44. Section 117(C) provides exceptions to the public interest requirement for deportation of foreign criminals. The claimant is in such a category as he has been sentenced to a period of imprisonment of at least 12 months (section 117D (2)). This is not restricted to a single offence. *Exception 2* in section 117B (4) requires consideration of the effect on Ms Connors. I see no difference between the test of "unduly harsh" in the Act and that used in 399(c)(iii). Although my finding under the rule was on a hypothetical basis, it can be applied without qualification to this provision in primary legislation. Ms Connors has permitted the relationship to be established whilst fully aware of its precariousness and to develop whilst the claimant was offending. I do not consider *Exception 2* is made out.

45. Mr Halligan argued that the circumstances of Ms Connors required consideration outside the Rules. As I have already observed, any Article 8 assessment is required to be made through the lens of the new Rules.

46. The removal of the claimant will effectively end further development of Ms Connors relationship with him unless they decide to live in a third country. Despite the real disappointment this will bring and giving consideration to the claimant's avowed intention not to offend again, I am not persuaded that these factors constitute very compelling circumstances that render the interference with the family life disproportionate. In reaching this conclusion I have also taken account of the period of time that the claimant has spent in the UK and the private life that he will have developed although it has to be said that the focus of the submissions was on the relationship. I have also taken account of the difficulties that he will face in readjusting to life in Iraq where he claims to have no ties. He states that he has little recollection of his life there. That may well be the case and I take account of the

absence of any challenge to this evidence. But even when all these factors are weighed against the strong pull of the competing public interest, I find based on the approach I must take, that deportation is proportionate and justified.

47. By way of conclusion, therefore, the decision of the Tribunal is set aside for error of law. I remake the decision and dismiss the appeal by the claimant against the decision dated 11 April 2014 to make a deportation order.

Signed Date 19 February 2015

Upper Tribunal Judge Dawson