Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01029/2014

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 3 December 2014	**On 29 January 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

V A D S M
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms G Capel instructed by Adam Khattak, Solicitors

DETERMINATION AND REASONS

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

Introduction

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge N J Osborne and Mrs S Singer) allowing the appellant's

appeal under Art 8 of the ECHR against the Secretary of State's decision taken on 27 May 2014 to make a deportation order by virtue of s.3(5)(a) of the Immigration Act 1971.

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

4. The appellant is a citizen of Guinea-Bissau who was born on 19 February 1976. On 28 August 2013, the appellant was convicted of a number of offences: (1) driving a motor vehicle with excess alcohol; (2) using a vehicle whilst uninsured; (3) driving otherwise than in accordance with a licence; (4) dangerous driving; (5) committing an act/series of acts with intent to pervert the course of justice; (6) causing or procuring an act of cruelty to a child or young person; and (7) committing an act/series of acts with intent to pervert the course of justice. The appellant was sentenced to a total of two years imprisonment but, and the importance of this will become apparent shortly, it is clear from the court record that none of the sentences was individually of twelve months or more imprisonment.

5. The background to the driving offences was that the appellant was arrested whilst driving with over three times the limit of alcohol in his blood and in the car with him was his young daughter, "M". She was born on 12 July 2009 and is a British citizen. Her mother, "KB", cohabited with the appellant between July 2008 and January 2009 but their relationship has since ended.

6. On 8 May 2014, the Secretary of State wrote to the appellant indicating his liability to be deported and seeking any representations as to why that should not occur. A response was made on behalf of the appellant on 12 May 2014. The basis of those representations centred on the appellant's relationship with his daughter, M, and the impact upon her if he were deported.

7. On 27 May 2014, the Secretary of State rejected the appellant's claim not to be deported based upon that relationship under para 399(a) of the Immigration Rules (HC 395 as amended). Further, the Secretary of State rejected the appellant's claim based upon his private life under para 399A of the Rules. Finally, in relation to Art 8, the Secretary of State concluded that there were no "exceptional circumstances" such that the appellant's deportation would be disproportionate.

8. As a consequence, on 27 May 2014, the Secretary of State made the decision to make a deportation order under s.3(5)(a) of the Immigration Act 1971 on the basis that the appellant's deportation was conducive to the public good and in accordance with the Immigration Rules and not a breach of Art 8.

The First-tier Tribunal's Decision

9. The appellant appealed that decision to the First-tier Tribunal.

10. First, before the First-tier Tribunal, it appears to have been assumed that the appellant was appealing against a decision to apply the automatic deportation provisions in the UK Borders Act 2007. That was not correct

as the respondent's decision of 27 May 2014 makes plain, because the 2007 Act did not apply as the appellant, although he had been sentenced to an aggregate period of imprisonment of at least twelve months, was not a "foreign criminal" within s.32(1) and (2) of the 2007 Act because, by virtue of s.38(1)(b) a sentence of imprisonment of at least twelve months:

> "does not include a reference to a person who is sentenced to a period of imprisonment of at least twelve months only by virtue of being sentenced to consecutive sentences amounting in aggregate to more than twelve months ..."

11. I will return to this below.

12. Secondly, the First-tier Tribunal concluded that the applicant could not succeed under para 399(a) of the Immigration Rules because one of the requirements was that:

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

13. Although the provision applied, in principle, because M is a British citizen under the age of 18 and it was not disputed that there was a "genuine and subsisting parental relationship" between her and the appellant, she had another family member, namely her mother (KB), who was able to care for her in the UK. Consequently, the First-tier Tribunal concluded that the appellant could not succeed under the Immigration Rules but then went on to consider whether, nevertheless, he could succeed under Art 8 of the ECHR.

14. In applying para 399(a) the First-tier Tribunal directed itself as to the terms of that rule in force prior to 28 July 2014. However, that rule was amended from 28 July 2014 by HC 532. It is clear from the Court of Appeal's decision in YM (Uganda) v SSHD [2014] EWCA Civ 1292 that the Rules in force from 28 July 2014 apply in any appeal hearing on or after that date. The First-tier Tribunal, therefore, applied the wrong rule. I will also return to this below.

15. Thirdly, in applying Art 8, it was common ground before the First-tier Tribunal that the case, in effect, turned upon the application of the new Part 5A of the Nationality, Immigration and Asylum Act 2002 inserted by s.19 of the Immigration Act 2014 with effect from 28 July 2014. In particular, the appellant relied upon s.117C(3) and (5) applicable to cases involving "foreign criminals". Section 117C(3) states that:

> "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."

The relevant exception is 'Exception 2' which is set out in s.117C(5) as follows:

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

16. Having considered the circumstances of the appellant and M at paras 41-44, the First-tier Tribunal concluded that it would

> "be unduly harsh upon [M] to deprive her of a direct physical relationship with her natural father, the Appellant." (at [42]).

17. Further, having regard to her best interests [43] and having regard to the appellant's offending and any future risk, the First-tier Tribunal found (at para 44) that:

> "If the Appellant is deported such a relationship would be adversely affected, if not effectively terminated as modern means of technology are no substitute for the natural physical and intimate relationships that exist between a parent and a child. For all those reasons we find that this particular case is one of those cases where the public interest in deporting the appellant is outweighed by the established family life that exists between the Appellant and his daughter [M]."

18. Consequently, the First-tier Tribunal allowed the appellant's appeal under Art 8 of the ECHR.

19. It is not readily apparent upon what basis it was assumed by the parties and the Tribunal that Part 5A of the NIA Act 2002 applied. It may have been on the same basis that the First-tier Tribunal assumed that the automatic deportation provisions in the UK Borders Act 2007 applied, namely that the appellant, not being a British citizen, had been "sentenced to a period of imprisonment of at least twelve months" (see s.117D(2)). However, as with the UK Borders Act, that period of "at least twelve months" imprisonment required to engage Part 5A of the 2002 Act had to reflect at least a single sentence of that period and could not be established merely by aggregating consecutive sentences (see s.117D(4)(b)).

20. Section 117C was not, as a result, applicable to this appeal. I will return to this issue also shortly.

The Appeal to the Upper Tribunal

21. The Secretary of State sought permission to appeal to the Upper Tribunal on three grounds. Only the second error I have identified was relied upon. No mention was made of the other errors. First, the First-tier Tribunal's decision that the appellant's deportation would be "unduly harsh" upon the appellant's daughter, M, under s.117C(5) was irrational having regard to his relationship and the nature of his offending, including an act of cruelty towards M. The finding was both irrational and unreasoned. Secondly, the First-tier Tribunal had failed to identify whether there were "exceptional circumstances" outside the Rules so as to allow the appeal under Art 8 applying MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC). Thirdly, the First-tier Tribunal had erred in law by wrongly applying the Immigration Rules in force prior to 28 July 2014 rather than the amended Rules in force after that date.

22. On 10 September 2014 the First-tier Tribunal (D J Macdonald) granted the Secretary of State permission to appeal to the Upper Tribunal on all grounds.

23. Thus, the appeal came before me.

The Submissions

24. On behalf of the Secretary of State Mr Richards challenged the First-tier Tribunal's decision that the appellant's deportation would be "unduly harsh" on his daughter M and that, therefore, the appellant was entitled to succeed because s.117C(3) and (5) applied. Mr Richards conceded that if Exception 2 set out in s.117C(5) applied, then the First-tier Tribunal's decision was correct. Indeed, he did not seek to specifically address grounds 2 and 3 in relation to the "exceptional circumstances" point and that the First-tier Tribunal had applied the wrong rule. He indicated that he did not consider that grounds 2 and 3 took the matter further than the Tribunal's consideration of the primary legislation in the new Part 5A of the NIA Act 2002.

25. However, Mr Richards submitted that the evidence was not reasonably capable of leading to the conclusion that the appellant's deportation would have an "unduly harsh" effect on M. He pointed out that M's mother had not attended to give evidence although written evidence had been submitted and there was no independent evidence of the potential effect of the appellant's deportation on M. He submitted that the only tested evidence before the Tribunal was that of the appellant himself and, by and large, the Tribunal had found his evidence to be unreliable. Mr Richards submitted that in determining whether the appellant's deportation would have an "unduly harsh" effect on M, the severity of the offence had to be taken into account (and all its circumstances) as well as the factual impact upon M. He submitted that there was, in effect, a balancing exercise to be undertaken laying the public interest against the severity of the effect of deportation in order to decide whether the impact upon M was "unduly" harsh in the sense of "unjustifiably" harsh.

26. Ms Capel on behalf of the appellant provided me with a very detailed and helpful skeleton argument and rule 24 response. She expanded upon that document in her oral submissions.

27. First, she submitted that the correct approach to applying the Rules and Part 5A of the 2002 Act was as follows:

> (1) Following MF (Nigeria), the Immigration Rules, in particular paras 399-399A were a "complete code" in relation to deportation cases;
>
> (2) First, it had to be decided whether an individual fell within para 399(a) or 399A and, if he did, then he succeeded under Art 8 in resisting his deportation;
>
> (3) Secondly, if however that was not the case, then the decision-maker should go on to consider Art 8 on the basis of "exceptional circumstances" (pre-28 July 2014) or whether there are "very compelling circumstances over and above those described in paras

399 and 399A" (post-28 July 2014). That, Ms Capel submitted, was the Art 8 exercise involving proportionality and at this point the relevant considerations under Part 5A had to be factored in.

She submitted that there was no material difference between the words "exceptional circumstances" and "very compelling circumstances" as a result of the amendment to para 398 from 28 July 2014.

28. Secondly, Ms Capel submitted that even if the First-tier Tribunal had applied the wrong rule, namely the pre-28 July 2014 version of para 399(a), that was not a material error as the First-tier Tribunal's finding in relation to para 117C(5) that the appellant's deportation would have an "unduly harsh" effect on M, effectively determined the issue under the new para 399(a) that it would be unduly harsh for M to live in Guinea-Bissau and it would be unduly harsh for M to remain in the UK without the appellant.

29. Thirdly, Ms Capel submitted that the First-tier Tribunal's finding in relation to para 117C(5) was not irrational or unreasoned. She submitted that the First-tier Tribunal had been entitled to act upon the evidence of the appellant's former partner, M's mother, in respect of the appellant's relationship with M. She submitted that the First-tier Tribunal took a balanced view of the evidence including the seriousness of the appellant's offending and his post-conviction behaviour. Initially, Ms Capel somewhat 'sat on the fence' in relation to Mr Richards' submission that the phrase "unduly harsh" in s.117C(5) required a balancing exercise in itself in determining whether the impact was "unduly" harsh. However, when pressed, she submitted that such an exercise was not required but that, in any event, it was clear from the First-tier Tribunal's reasoning that, even if Mr Richards was correct in this regard, the Tribunal had taken into account the public interest and engaged in a balancing exercise in reaching its finding. She submitted that the First-tier Tribunal's finding was, as a consequence, properly open to it and sustainable in law.

Discussion

30. I begin with the relevant Immigration Rules. Prior to 28 July 2014, para 398 provided 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 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 23 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."

31. Paragraph 399, so far as relevant, provided as follows:-

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

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

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

(a) it would not be reasonable to expect the child to leave the UK; and

(b) there is no other family member who is able to care for the child in the UK."

32. That is the provision applied by the First-tier Tribunal in this appeal and which, and it is not disputed, the appellant could not succeed under as he could not establish the requirement in 399(a)(ii)(b) that there was "no other family member" who was able to care for her in the UK.

33. Paragraph 399A deals with an individual's 'private life' claim. I do not set it out here as it was not relied upon by either party in this appeal.

34. However, on 28 July 2014, paras 398 and 399 were amended by HC 532 so as to read as follows. The inserted or replaced text is underlined.

"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 <u>and in the public interest</u> 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 <u>and in the public interest</u> 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 23 months; or

(c) the deportation of the person from the UK is conducive to the public good <u>and in the public interest</u> 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, <u>the</u>

> 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."

35. Paragraph 399 is in the following terms:

> "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."

36. First, clearly the First-tier Tribunal erred in law by applying the pre-28 July 2014 Rule. As I have said, Mr Richards did not press this point before me. That error would, in my judgment, not be material if the First-tier Tribunal's finding in relation to s.117C(5) that the appellant's deportation would be "unduly harsh" on M stands as a factual finding. Mr Richards did not seek to argue, indeed he accepted, that M could not be expected to live in Guinea-Bissau given her age, that she is a British citizen as is her mother who is no longer in a relationship with the appellant. It would undoubtedly be "unduly harsh" for M to have to live in the appellant's own country. That satisfies, therefore, the requirement in para 399(a) and, if the finding in relation to s.117C(5) stands, the requirement in para 399(a)(i)(b) would be satisfied, namely that it would be "unduly harsh" for M "to remain in the UK without [the Appellant]".

37. Secondly, I accept Ms Capel's submission as to the appropriate structure in relation to deportation decisions reading the Immigration Rules with Part 5A of the 2002 Act. The "complete code" approach adopted by the Court of Appeal in MF (Nigeria) is no less applicable given the amendments to the Rule and the enactment of Part 5A of the 2002 Act.

38. Consequently, applying the Rules, the decision-maker must first consider whether an individual can succeed under para 399 or 399A. If he or she does so, then they will have succeeded in establishing that the deportation breaches Art 8. If, however, the individual does not satisfy the provisions of para 399 or 399A (which, in any event, are inapplicable where an individual has been sentenced to a period of imprisonment of four years or more), then the decision-maker should go on to consider (in the language of the new para 398) whether there are "very compelling circumstances over and above those described in paragraph 399 and 399A".

39. That exercise is, in my judgment, as the Court of Appeal recognised in MF (Nigeria), to engage in the proportionality assessment required by Art 8.2 of the ECHR. It does seem to me that the change in language, namely

from “exceptional circumstances” to “very compelling circumstances” necessarily beyond those based on an individual’s family or private life under paras 399 and 399A does reflect, at least in principle, a change in the potency of individual circumstances required to outweigh the public interest in deportation. I say “in principle” because it may well be that only in a marginal cases would it make any difference in outcome. Because of the view I take in relation to the First-tier Tribunal’s finding in respect of s.117C(5) and therefore the application of the new para 399(a), the point does not arise for decision in this appeal and I do not express a concluded view.

40. Thirdly, I accept Ms Capel’s submission that it is at this later stage in carrying out the assessment in para 398 of assessing whether there are “very compelling circumstances” which incorporates the consideration set out in the new Part 5A of the 2002 Act.

41. I do not propose to set out the whole of Part 5A but rather the relevant provisions related to the structural argument and to the particular application of Exception 2 to this appeal.

42. The application of Part 5A is set out in s.117A 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).”

43. Consequently, a court or tribunal (but not apparently the Secretary of State) when Art 8 is raised in relation to a decision “under the Immigration Acts” “must (in particular) have regard” to the considerations in s.117B in all cases and, in addition, those in s.117C in the case of the deportation of foreign criminals. Part 5A would seem, therefore, to have no application in appeals under the Immigration (EEA) Regulations 2006 (SI 2006/1003 as amended).

44. Regard must be had to those factors in determining the “public interest question” which means whether the interference with an individual’s private or family life is justified under Art 8(2).

45. Before turning to s.117B and s.117C, it is worth pausing to note the application of the deportation provision in s.117C to "foreign criminals". A foreign criminal is defined in s.117D(2) as follows:

> "(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."

46. By virtue of s.117D(4)(b), a person who has been sentenced to "a period of imprisonment of a certain length of time" does not

> "include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time; ..." (my emphasis)

47. The underlying assumption by both the parties and First-tier Tribunal in this appeal that s.117C applied could not, as I have already indicated above, turn on the fact that the appellant had been sentenced to a period of imprisonment of "at least twelve months" since that period of imprisonment could only be reached by aggregating the consecutive sentences passed upon him.

48. The provisions in Part 5A therefore could only apply if he had been convicted of "an offence that had caused serious harm" or if he was "a persistent offender". It does not seem that the appellant could possibly be described as a "persistent offender" as all the offences relate to a single driving incident. No one has considered whether he has been convicted of "an offence" that has "caused serious harm". It is far from clear to me that, although his offences were serious, they actually caused "serious harm". If this point was crucial to the outcome of this appeal, it would have been necessary to consider whether the parties should be invited to make further written submissions or whether, without more, the First-tier Tribunal's decision plainly could not stand. However, it is not. As I will shortly make clear, the First-tier Tribunal's findings in relation to s.117C, even if that provision was technically not applicable, in substance determine the appellant's appeal in his favour under the new para 399(a).

49. I now return to ss.117B and 117C. Section 117B sets out a number of "considerations" applicable in all cases where Art 8 is raised as follows:

> "**117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.

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

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

(b) are better able to integrate into society.

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

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

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

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

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

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

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

50. Section 117C, dealing with deportations of "foreign criminals" is directly relevant to this appeal and the First-tier Tribunal's decision. It provides as follows:

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

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

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

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

(4) Exception 1 applies where—

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

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

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

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

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

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

51. As I have already pointed out, the First-tier Tribunal considered that Exception 2 in s.117C(5) applied.

52. It is not disputed that the appellant has a "genuine and subsisting parental relationship" with M who is a qualifying child because by virtue of s.117D(1) the term "qualifying child" includes a person under the age of 18 who is a British citizen.

53. On the face of it, the effect of s.117A(2) is that a court or tribunal must "have regard" to the considerations set out in s.117B and 117C. That requires the considerations to be taken into account in assessing the "public interest question" namely whether the interference with the person's Art 8 rights is justified under Art. 8.2. Clearly some "considerations" set out in ss.117B an 117C are relevant, but do not purport to be "determinative" factors, for example speaking English, not being an economic burden on the UK and the seriousness of the offence committed.

54. However, the wording of s.117C(3), which was the one applied by the First-tier Tribunal in this appeal, is more difficult to read in that way. It states that "the public interest requires C's deportation" unless either Exception 1 or Exception 2 applies. If neither exception applies, what is meant by the "public interest requires" C's deportation? It appears to permit of no further analysis of any factor relevant to the balancing exercise inherent in proportionality. Likewise, if one of those two exceptions applies, it would appear that the public interest does not require C's deportation. The latter was conceded by Mr Richards in his submissions and, in like fashion, he accepted that if neither of the exceptions applied then the public interest was resolved against C.

55. I confess to have some difficulty in understanding what is intended by Parliament in s.117C(3) and also, though not applicable to this appeal, s.117B(6), when stating that the public interest does require C's deportation (in s.117C(3)) or "does not require" and individual's removal (in the case of s.117B(6)) if those are "considerations" which the court or

tribunal must "(in particular) have regard" to in determining the "public interest question". There are, I think, arguments both ways.

56. Here, however, Mr Richards conceded on behalf of the Secretary of State that the First-tier Tribunal's decision was correct if the First-tier Tribunal was entitled to conclude that Exception 2 applied in s.117C(5). In the light of that, and given my view as to the effect of that finding on the application of para 399(a) – where there can be no ambiguity – it is not necessary for me to resolve this complex and difficult issue in this appeal.

57. Further, I also resist the invitation to determine whether in applying s.117C(5) and the phrase "unduly harsh" that required not simply an assessment of the impact upon a child by the individual's deportation (or partner if that is the relied upon part of s.117C(5)), but also required a consideration of the public interest, namely the nature and extent of the offending committed by the person to be deported. My attention was drawn to the Secretary of State's guidance in applying Art 8 and these provisions in deportation cases in the IDI, *Chapter 13: Criminality Guidance in Article 8 ECHR Cases* (28 July 2014). There, the Secretary of State plainly considers that whether the "unduly harsh" requirement is met must take into account all the factors relevant to the public interest and at para 2.5.3 states:

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

58. In other words, what is "unduly" harsh will, in part, depend upon the nature of the appellant's criminality. The stronger the public interest, the greater the impact upon the child or partner may have to be to fall within s.117C(5). If that is correct, s.117C(5) has built into it the very balancing exercise that is required by a proportionality assessment under Art 8. It is a microcosm of the fifth Razgar question. It is not entirely clear to me that was the intended effect of this provision. It is not necessary for me to reach a concluded view upon this. I am content for the purposes of this appeal to approach the First-tier Tribunal's decision on the basis that the Secretary of State is correct that in determining whether the impact upon M is "unduly harsh" regard must be had to the public interest. I say that because, as will be apparent below, I accept Ms Capel's submission that the First-tier Tribunal did, in fact, approach the issue on that very basis in its determination. Therefore, even putting the Secretary of State's case at its highest on this point, if the First-tier Tribunal's finding in relation to "undue harshness" is legally sustainable, the Appellant was entitled to succeed in his appeal as the First-tier Tribunal in fact decided.

59. Consequently, I now turn to the First-tier Tribunal's finding that the appellant's deportation would be have an "unduly harsh" impact upon M.

60. The First-tier Tribunal's determination must fairly be read as a whole and not on the basis of an isolated consideration of its reasoning in particular paragraphs.

61. First, the Tribunal dealt with the appellant's relationship with M at para 21 as follows:

> "21. We find, however, that the Appellant does have a genuine and subsisting relationship with his daughter [M]. We accept that the Appellant exercised regular direct contact with his daughter on Saturdays from 11am, returning [M] to her mother's home at around 6-7pm, as confirmed by the Appellant's former cohabitee and former girlfriend [KB], date of birth 15 March 1988. She has provided two pieces of evidence in the form of a statutory declaration dated 8 October 2013 and a further statement dated 10 July 2014.
>
> We find that [KB] acknowledges that the Appellant has a relationship with his daughter and that [M] enjoys her relationship with her father. We further find that [KB] has no relationship with the Appellant. We note that she failed to attend the final hearing as a witness, claiming that she was unable to obtain time off work from her position of employment at Cardiff University. We further note that the university is now just over half way through its summer vacation. We have received no correspondence from Cardiff University itself confirming that it could not allow the witness time off work to attend the hearing and so in relation to this discrete issue we are not satisfied that the witness could not have attended this hearing if she considered it a matter of importance to her. Nonetheless, in two documents she has confirmed that the Appellant is a feature of some importance to their daughter [M]."

62. Having accepted the genuineness of the appellant's relationship with M, the Tribunal dealt further (at paras 28-39) with the evidence of the appellant and KB and found the appellant to be an "unimpressive witness" but accepted the evidence of KB as to their relationship.

> "28. The Appellant concedes that he formed a relationship with [KB] in or about 2007 but that they cohabited only relatively briefly between July 2008 and January 2009. [M] was born on 12 July 2009 and the Appellant exercised contact with her until he was sent to prison in August 2013. He remained in contact with her during his imprisonment by means of telephone calls and cards. She was unable to visit him in prison as he had committed an act of cruelty towards her as detailed above. .....
>
> In some respects the Appellant was an unimpressive witness. It is established that he has a propensity to dishonesty when it suits him as set out above and as is illustrated by his use of two aliases.
>
> 32. Additionally, we find that during his evidence the Appellant was prone to inappropriately exaggerate in an attempt to make a favourable impression upon the Tribunal. He told us that he wanted his daughter to grow up having a father figure because he himself had benefited from no such father figure. However, we

find that the Appellant's father was a significant feature of the Appellant's life until the Appellant at aged 14 left his home country of Guinea-Bissau as a talented young footballer for a life and career in Portugal. The Appellant proceeded to play professional football in Portugal over a period of some ten years. Moreover, the Appellant's father was employed by the Guinea-Bissau government and the Appellant travelled to Portugal with the benefit of a diplomatic passport obtained due to his father's employment.

33. Whilst in Portugal the Appellant developed a cohabitational relationship with a female partner with whom he had a child, [AMM] who was born on 20 September 2004. When the Appellant stopped playing football, he found that Portugal was suffering a financial recession and so the Appellant voluntarily left that country in an attempt to find work in the UK. He has remained in this country ever since, thereby depriving [AMM] of a father figure.

34. The Appellant told us that it was his intention to send money home to his partner for the benefit of their child and to pay for her mortgage on the property in which they lived. The Appellant stated that he did so but he was unable to provide any documentary or other evidence of any sum of money that he had ever sent to his family in Portugal whether for their general maintenance or for the payment of the mortgage on their home. Yet further, the Appellant stated that he paid for his partner and daughter to visit him some four years ago for a holiday in the UK but he was equally unable to provide any documentary evidence of his funding of that claimed holiday.

35. Appeals of this nature are determined upon the basis of the evidence adduced. On the basis of the evidence adduced in this appeal on these issues, we are far from satisfied that the Appellant sent money to his family in Portugal whether as claimed by him or at all. We are further not satisfied to that standard which has to be applied in these appeals that the Appellant paid or contributed to the mortgage on his family's home in Portugal whether as claimed by him or at all and we are equally not satisfied that he funded a holiday for his former partner and their child.

36. Although we have already above accepted that the Appellant exercised direct contact with his daughter [M] between 11am and 6-7pm on Saturdays, the Appellant asserted in evidence that upon his release from detention on 14 August he then had [M] stay with him all day Friday, Saturday and Sunday overnight on Friday and Saturday, until he returned her to her mother at 6pm on Sunday evening. There is no evidence from [M]'s mother to confirm that extent of contact was allowed. We find that as the Appellant was exercising only weekly direct contact as described above before his imprisonment, it is most implausible that not having seen the child for a period of a year, that the child's mother would have allowed [M] to stay with him for a full three day period including two overnight stays. The Appellant's account of exercising contact to that extent is so implausible as to be incapable of any

objective belief without additional acceptable independent evidence. There was none, and we do not accept the Appellant's evidence upon this discrete issue for the reasons set out above.

37. Yet further in his evidence the Appellant stated at paragraph 6 of his statement and in his oral evidence that he had taken several courses in prison specifically in respect of his drink problem and also in respect of childcare. The Appellant adduced in evidence certificates demonstrating exactly which courses he had completed whilst in prison. None of those certificates confirm that he embarked upon or completed a specific course in respect of his drink problem. When pressed upon the point by Mr Richards (Home Office Presenting Officer) the Appellant prevaricated, and maintained that the clean living course that he had completed dealt with his alcohol problem. We accept that the Appellant has been teetotal since he was imprisoned and that during his period of detention he was not able to and did not consume alcohol. We also accept that he has formed the intention of remaining teetotal and of defeating his drink problem. However, we are far from satisfied that he embarked upon or completed any course in prison which was specifically directed to his drink problem. This is yet a further example of the Appellant's propensity to exaggerate during his evidence in an attempt to inappropriately mislead the Tribunal into making a decision in his favour. That having been said, we do not underestimate for one moment the effort the Appellant made whilst in prison in focusing upon his drink problem and completing those courses for which he has been provided with certificates. We note also and significantly that the Appellant undertook the safeguarding children and young people course whilst in prison and was awarded a certificate for so doing on 3 April 2014.

38. We find that the Appellant is likely to have learned valuable lessons by being in prison and serving a sentence which prevented him from seeing his daughter for a period of twelve months. We also find that he is likely to have benefited from taking those courses in prison, particularly the safeguarding children and young people course.

39. Furthermore, since the hearing a letter from the Appellant's Probation Officer Mr Alistair Moore has been received. He has confirmed that he will be undertaking work with the Appellant during weekly probation sessions that specifically address the Appellant's alcohol related offending. ..."

63. Then, having set out the relevant provisions of Part 5A of NIA Act 2002 the Tribunal continued as follows at paras 40-43 as follows:

"40. There are specific additional considerations which apply in cases involving foreign criminals. The Appellant in this appeal is a foreign criminal. The deportation of foreign criminals is in the public interest. The more serious the offence the greater the public interest in the deportation of the criminal. We have indicated above our consideration of the seriousness of the Appellant's offending. The Appellant was sentenced to a period of imprisonment of two years in total and so the public interest

requires his deportation unless Exception 1 or Exception 2 applies. We find in accordance with 117C(4) that the Appellant has not been lawfully resident in the United Kingdom for most of his life; he is not socially and culturally integrated in the United Kingdom any more than he is Portugal or Guinea-Bissau in that he speaks Portuguese which is the main language of both Portugal and Guinea-Bissau and he has a brother and sister who continue to reside in his home country. We have not been made aware of any very significant obstacles to the Appellant's integration into his home country.

41. In relation to Exception 2, we find that the Appellant has a genuine and subsisting relationship with a qualifying child as [M] is a British citizen. We find from the evidence that we have heard that the effect upon the Appellant's deportation on his daughter would be unduly harsh. It is important to note and to explain that at this juncture we must consider not what is unduly harsh in respect of the Appellant himself but what is unduly harsh for his child. We are required by statute to consider this aspect of the Appellant's appeal specifically from the aspect of his 5 year old daughter. [M] has known her father from birth. She has had frequent and regular contact with him until he committed the above-mentioned offences which led to his imprisonment. They remained in indirect contact with each other throughout his term of imprisonment by means of telephone calls and cards. The Appellant has a reasonable relationship with [M]'s mother. [KB] promotes contact between father and daughter and she is commended for so doing. She has no relationship with the Appellant herself but she sees the benefit to [M] of regular direct contact with her father. [KB] acknowledges that [M] benefits from direct contact with her father. We find that the Appellant's period of imprisonment and the courses which he has completed in prison, particularly the safeguarding children and young people course, may well have led to an improvement in the Appellant's determination to control his alcohol habit. To some extent, time will tell.

42. [M] only has one natural father. She has benefited from knowing her natural father, albeit through a weekly arrangement made between her parents for her to have contact with her father each Saturday. Until his criminal offending, the Appellant had maintained that relationship and had consistently exercised direct contact with his daughter each Saturday. We find that generally, the Appellant is capable of maintaining an appropriate paternal parental relationship with [M]. We further find that [M] is likely to benefit from a consistent relationship with both her parents if that is at all possible. We find that in this case, provided the Appellant remains teetotal and/or appropriately controls his intake of alcohol, that the Appellant will be able to maintain a relationship that [M] will find beneficial to her stability as she develops. Indeed we find that [M] and the Appellant have had at least some contact since the recent release of the Appellant from immigration detention. [M] has a well-established relationship with her natural father. She should under present circumstances be given the opportunity of further benefitting from that

> relationship and we find that it would at this stage in the context of the particular facts of this appeal be unduly harsh upon [M] to deprive her of a direct physical relationship with her natural father, the Appellant."

64. As can be seen, the First-tier Tribunal concluded that it would be "unduly harsh" for M to live in the UK without her father, the appellant. On behalf of the respondent it is submitted that that finding is untenable on the evidence and fails to take into account the public interest in assessing whether the impact is "unduly" harsh.

65. Dealing with those in reverse order, it is plain beyond doubt that the First-tier Tribunal was well aware of the importance of the public interest and the considerable weight that should be given to it because of the seriousness of the appellant's offending.

66. The Tribunal dealt with this in paras 29-30, quoting the sentencing remarks of the Crown Court Judge as follows:

> "29. Assessing proportionality in an appeal such as this is an exercise in taking all relevant matters into consideration and appropriately balancing them. It is a most delicate matter. We find most definitely that society is entitled to express its revulsion against the Appellant's criminal offending. Having said that, we find that the criminal offences committed by the Appellant, whilst serious, are by some degree not the most serious that this Tribunal has considered. It is important to acknowledge that the Appellant's actions were not violent and did not involve illegal drugs. We find that the Appellant's offending arose out of a dependency upon alcohol and his misuse of alcohol. The Appellant acknowledges that for some while he had suffered from an alcohol problem. He has acknowledged his stupidity and the inappropriateness of his actions in driving dangerously with his young, unsecured daughter in the motor vehicle which he was driving whilst three times over the legal limit.
>
> 30. In reaching our conclusion upon the seriousness of the offending we have paid particular attention to the sentencing remarks of the learned sentencing judge, His Honour Judge Wynn-Morgan who said,
>
> > "I have also taken into account the fact that you have pleaded guilty now to all of these allegations .... That having been said, you have pleaded guilty to a series of very serious offences. Leaving aside the dangerous driving, the fact that you were over three times the limit for driving, and had a small child in your vehicle, insecure, your own daughter, who, apart from being frightened by the nature of your driving, was found to be freezing cold, is a quite appalling offence for a father to commit in respect of his own daughter. .... You have been dishonest with the court; you have perverted the course of public justice by attempting, successfully in one case, unsuccessfully in this, to pass yourself off as someone whom you are not."

67. Prior to that, the First-tier Tribunal had set out the well-known passages in N (Kenya) v SSHD [2004 EWCA Civ 1094 and OH (Serbia) v SSHD [2008]

EWCA Civ 694, setting out the three facets of the public interest and concluding that:

> "Having considered all the evidence we have heard in this appeal, we find that the expression of society's revulsion at the particular crimes committed by this Appellant and the building of public confidence in the treatment of foreign citizens who commit serious crimes is a relevant feature of this appeal."

68. Then, at para 44 the First-tier Tribunal returned to the issue of the public interest and proportionality and concluded that the public interest was outweighed by the impact on the relationship between the appellant and M.

> "44. For these and for all the other reasons we have set out above and below, we consider that the Respondent's decision to deport the Appellant is in all the circumstances not proportionate in a democratic society to the legitimate aim to be achieved. We have formed the view that despite the Appellant's criminal offending, the Respondent adduced no evidence that he is or will be a risk to the public. We have noted and accept that the Appellant was during his period of imprisonment an enhanced prisoner and we have been told of no adjudications which were made against him during his period of imprisonment. For all intents and purposes therefore he was a model prisoner and to that extent we find there is some foundation to the Appellant's evidence that he has learned his lesson since his conviction and sentence. We find that if [M] is to have a relationship with her father she will benefit from a physical relationship with him which will be based upon the intimacy that they share and that will develop between them. We find that if the Appellant is deported such a relationship would be adversely affected, if not effectively terminated as modern means of technology are no substitute for the natural physical and intimate relationship that exists between a parent and a child. For all those reasons we find that this particular case is one of those cases where the public interest in deporting the Appellant is outweighed by the established family life that exists between the Appellant and his daughter [M]."

69. Consequently, I reject Mr Richards' submission that the First-tier Tribunal failed to take into account the relevant public interest reflected in the Appellant's offending. The First-tier Tribunal correctly, and in detail, directed itself on the importance of the public interest and in the paragraph cited clearly took that public interest into account in assessing the appellant's claim under Art 8. The Tribunal was not 'wrong footed' by considering the appeal to be under the automatic deportation provisions but even if it was the stronger public interest in such cases could only operate <u>against</u> the appellant and so could not materially have affected the Tribunal's decision to allow the appeal. It would, in my judgment, be myopic to read the Tribunal's decision as excluding those considerations in reaching its findings under s.117C(5) on whether the impact upon M of the appellant's deportation would be "unduly harsh".

70. Further, it is plain, as Ms Capel submitted, that the Tribunal carefully assessed the evidence concerning the relationship between M and the

appellant. The Tribunal did not simply accept everything that it was told. It did not accept the evidence of the appellant in relation to the level of contact he had with M. However, it was entitled to accept the evidence of M's mother concerning their relationship both as to its nature and quality. The First-tier Tribunal gave reasons for accepting her evidence even though, as it was well aware and expressly commented upon, she did not attend the hearing. The First-tier Tribunal took into account, as it was fully entitled to do, the appellant's post-conviction conduct in prison and to reach its view that the appellant was not a future risk and was addressing his problems related to alcohol. As Carnwath LJ (as he then was) pointed in Mukarkar v SSHD [2006] EWCA Civ 1045 at [40]:

> "The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law…."

71. Whilst the finding was not inevitable, the Tribunal's assessment was not, in my judgment, irrational or perverse. These were factual findings that the First-tier Tribunal was entitled to make on the basis of the written and other evidence before it.

72. Thus, I reject Mr Richards' submission that the First-tier Tribunal was not entitled as a matter of law to find that s.117C(5) applied. On the basis of Mr Richards' concession, the First-tier Tribunal's decision to allow the appellant's appeal under Art 8 necessarily, therefore, followed. If, however, the appellant was not in fact a "foreign criminal" and so s.117C did not apply, the First-tier Tribunal's finding did, in substance, resolve the appellant's appeal in his favour under the new para 399(a)(a) and (b). His appeal would, therefore, have also succeeded under the new para 399(a).

73. Despite, therefore, the difficulties that I have identified with the First-tier Tribunal's decision, I am not persuaded that any error was material to the outcome of the appeal. Given the First-tier Tribunal's finding in relation to s.117C(5), which is sustainable in law, any remaking of the decision would inevitably result in the appeal being allowed under Art 8 applying the Immigration Rules in effect since 28 July 2014.

Decision

74. For the above reasons, the First-tier Tribunal's decision to allow the appellant's appeal under Art 8 did not involve the making of a material error of law. That decision, therefore, stands.

75. The Secretary of State's appeal to the Upper Tribunal is dismissed.

Signed

A Grubb
Judge of the Upper Tribunal