Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00127/2015

THE IMMIGRATION ACTS

Heard at Field House
On 23rd February 2016

Decision & Reasons Promulgated
On 12th July 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

CURTIS ALEXANDER FRASER
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. A Seelhoff; A. Seelhoff Solicitors
For the Respondent: Mr. D Clarke; Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before the Upper Tribunal following a hearing on 7th December 2015. Upper Tribunal Judge O'Connor found an error of law in the decision of the First-tier Tribunal. The error of law decision, described as a 'decision and directions' is attached as an Annex to this decision.

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2. The salient facts of the appeal are uncontroversial and are helpfully set out at paragraphs [2] to [4] of the decision of Upper Tribunal Judge O'Connor.

> "2. The appellant is a citizen of Jamaica, born on 4 December 1965. He entered the United Kingdom as a visitor on 1 August 1998, having been given leave to enter for six months at port. The appellant's leave was thereafter extended – as a student – until 30 December 1999. Despite the appellant's subsequent continued presence in the United Kingdom there is nothing in the evidence before me to indicate that after 30 December 1999 this presence was lawful.
>
> 3. There are a number of features of the appellant's time in the UK that have direct relevance to this decision: (i) on 22 April 2011 he was served with an IS151A notice, as an overstayer; (ii) on 20 December 2011 he was convicted of possessing a class A controlled drug (Cocaine) with intent to supply and of possessing a class C controlled drug (Cannabis), for which he was sentenced to a 24 month Community Order and 18 months of drug rehabilitation supervision; and, (iii) on 20 February 2014 he was convicted of possessing a class A controlled drug (Crack Cocaine) and a class B controlled drug (Cannabis/Cannabis resin) and was sentenced to a total of 8 months imprisonment (this equating to the period of time that the appellant had already spent on remand).
>
> 4. As a consequence of the aforementioned convictions on the 29 April 2014 the respondent sent a "Liability for Deportation Notice and Questionnaire" to the appellant, which was returned to the respondent on the 12 May 2014 suitably marked so as to reflect the fact that the appellant was not living at the address to which the notice was sent. On the 18 June 2014 the respondent made a decision that the appellant's deportation would be conducive to the public good. A deportation order was subsequently signed in the appellant's name on the 4 July 2014."

3. Having found that the decision of the First-tier Tribunal contains an error of law capable of affecting the outcome of the appeal, Upper Tribunal Judge O'Connor set aside the decision of the First-tier Tribunal. He directed that paragraph 398 of the Immigration Rules, and the appellant's reliance upon Article 8 grounds should

be considered *de novo* by the Upper Tribunal. Having rejected the submissions made on behalf of the appellant that the scope of the appeal should also encompass a challenge to the First-tier Tribunal's conclusions relating to the Refugee Convention and Article 3, Upper Tribunal Judge O'Connor expressly directed that the re-making of the decision on appeal is to be limited to the Article 8 grounds. Both parties were directed to file and serve a skeleton argument.

4. A skeleton argument dated 28th January 2016 has been filed and served by the appellant. No skeleton argument was filed and served by the respondent. The appellant relies upon the documents set out in the consolidated bundle that comprises of some 72 pages. I have carefully read through the documents relied upon by the appellant and in reaching my decision, I have had regard to the documents contained in that bundle, whether expressly referred to in this decision or not.

5. It is useful to begin my consideration of this appeal by reminding myself of the relevant provisions of the immigration rules.

<u>The Immigration Rules</u>

6. Part 13 of the Immigration Rules relating to deportation provide 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 and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

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

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

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

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

(i) the child is a British Citizen; or

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

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

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

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

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

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

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

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.

The respondent's decision of 18th June 2014

7. In her decision of 18th June 2014, the respondent refers to the appellant's immigration history and his convictions in December 2011 and February 2014. The circumstances of the offences are considered at paragraphs [11] to [14] of the decision. At paragraph [11] the respondent states:

> *"The Secretary of State regards as particularly serious those offences involving drugs. Also taken into account is the sentencing Court's view of the seriousness of the offence, as reflected in the sentence imposed, as well as the effect of that type of crime on the wider community. The type of offence and its seriousness, together with the need to protect the public from serious crime and its effects are important factors when considering whether deportation is in the public interest. In addition to these factors your personal circumstances together with the circumstances of your offence have been carefully looked at."*

8. The respondent refers to the presumption in favour of deportation set out in paragraph 396 of the Immigration Rules at paragraph [15] of her decision and at paragraphs [16] to [39] of the decision considers the appellant's Article 8 rights by reference to paragraphs 398, 399 and 399A of the rules. The respondent concludes at paragraph [42] of her decision that it would not be contrary to the United Kingdom's obligations under the ECHR to deport the appellant from the UK. At paragraphs [21] to [23] of her decision, the respondent states:

> *"21. You were convicted of possessing a class A controlled drug (Crack Cocaine) and for possessing a class C controlled drug (Cannabis/ Cannabis resin) for which you were sentenced to 8 months' imprisonment for count 1 and 2 months imprisonment for count 2 to run concurrently. You also had to pay £100 victim surcharge and the forfeiture and destruction of Crack Cocaine and Cannabis in your possession was ordered. The Immigration Rules state that, where a person's deportation is conducive to the public*

good because in the view of the Secretary of State their offending has caused serious harm, in assessing a claim that deportation would be contrary to Article 8, the Secretary of State will consider whether paragraph 399 or 399A applies.

22. If neither applies, it will only be in exceptional circumstances that a person's right to family and/or private life or other reasons would outweigh the public interest in seeing a person deported.

23. It is considered that paragraph 398(c) applies in your case because in between the period of 20 December 2011 and 20 February 2014 you had committed 4 offences and been convicted of 2 drug offences. Your crimes are considered to be of serious harm to the public and as such it would be in the public's interest to see you deported.

The evidence

9. The appellant relies upon the evidence set out in the consolidated bundle that has been served on his behalf and which runs to 72 pages. I have read the material contained in that bundle and have had regard to the documents relied upon by the appellant in reaching my decision.

10. The appellant has made three witness statements. I summarise the evidence set out. The appellant came to the UK as a visitor on 1st August 1998. He had previously trained to be a welder and a mechanical engineer but did not have any formal qualifications. In January 1999 he enrolled on a course and was granted leave to remain in the United Kingdom until 30 December 1999 as a student. The appellant approached a solicitor in November 1999 with a view to extending his leave to remain. The solicitor assured the appellant that he would be submitting an application for an extension of the appellant's visa with the appellant's passport. Between November 1999 and 2005, the appellant repeatedly chased his solicitor to establish whether there had been any progress with his application but in 2005 when he went to see his solicitor, he was shocked to find that the solicitors were no longer at that address. He has tried ever since to find the new location of their offices, but has not been able to do so.

11. In 2005, the appellant was attacked by a gang who beat him badly and he was robbed of his wallet and money. He suffered an injury to his eye requiring an operation at Kings College Hospital. In December 2008, the appellant was set upon by the same gang whilst working as a volunteer in a Community Centre. On that occasion, he was stabbed through the heart and was again treated at Kings College Hospital. Following that incident, the appellant has lived in fear of his life and started to take drugs to help him cope with the pain and stress. He became addicted to the drugs he was taking, and was buying in large quantities because he wanted to end his life and was afraid of the gang. The appellant states that although he was convicted of possession with intent to supply, he never intended to supply, and the drugs were for his own personal use. He states that in 2013, because of depression he had a relapse, and started using drugs again leading to his second conviction.

12. The appellant states that following his release from prison in January 2014 he returned to stay and sleep at the former address that he shared with his partner, [ST]. She refused to allow him to enter the house, and arrangements were then made for him to stay and sleep at another address. The appellant assumed that the respondent was aware of that new address but unfortunately a questionnaire was sent to the appellant's former address.

13. The appellant sets out his family life in the UK. The appellant has two sons and two daughters and the evidence of his relationship with each of them is briefly set out in his first witness statement dated 30th June 2015. I have carefully read what is said by the appellant at paragraphs [27] to [35] of that statement. For present purposes, suffice it to say that the appellant's children are now 12, 10, 5, and 2 years of age and they are all British Citizens. I shall refer to the children by their first initial. The appellant has a daughter, "A" aged 10 living with her mother, [SS] and her great grandmother. The appellant has a son and daughter aged 5 and 2 who have been taken into care by social services. The appellant has a son, "G" now aged 12.

14. In his witness statement, the appellant claims that he has asked [SW] *(I assume this is A's mother)* to attend his hearing to confirm that the appellant played a large part in his daughter's life, but he does not think that she is now willing to assist him. Similarly, he has been in touch with [SB] and although she has expressed an eagerness to assist the appellant with his immigration appeal, the appellant has found her difficult to reach and she has let him down.

15. The appellant considers himself to be someone of good character apart from when he turned to drugs. He explains that he has been doing voluntary work since 2005. He explains that he has also learned a lot about drugs and has in place, tools to use, if the situation should arise again so that he can remain clean not just for himself, but also his children. He states that he has attended rehabilitation courses and regrets having taken drugs and feels very sorry and ashamed that he turned to drugs.

16. In his most recent statement of 8th January 2016, the appellant again confirms that he started taking drugs after he was stabbed in 2008 as a way of managing the pain. He sets out his evidence as to the background to his two arrests and convictions at paragraphs [3] to [13] of that statement. He acknowledges that he has broken the law by taking drugs and acknowledges that drugs cause harm to society. The appellant does not believe that his offending has caused "serious harm".

17. The appellant then sets out his evidence of a relationship with [PC], with whom he now lives. He confirms that he sees his daughter A who is now 10 years of age. He states that because A's grandmother is old, the appellant collects A from school each evening and takes her home and makes her dinner. He states that he is also trying to get access to some of his other children who have been taken into care.

18. The appellant was called to give evidence. He adopted his witness statement of 8th January 2016 and confirmed that the contents of that statement are true and correct. In his evidence-in-chief, the appellant was asked about his application for

contact. He confirmed that he had been to see social services and has contacted a solicitor specialising in family law. He understands that two of his children *(his daughter aged 5 and his son aged 2)* were taken into care, and he has been told that the two children have now been adopted. He stated "I am trying to get my children back", but did not know whether any application had been made to the court. He stated that his solicitor is dealing with the matter. He confirmed that he instructed solicitors to deal with the matter when he was released from detention. He was asked to clarify whether the children had in fact been adopted, or are in foster care. The appellant said that he has been told by the social worker that the two children have been adopted. The appellant confirmed that his oldest son, G, now aged 12, lives with his mother in Leeds and that he has been unable to travel to Leeds to see him because of the curfew. He last saw his eldest son in June 2014.

19. In cross-examination, the appellant confirmed that there is no evidence before the Tribunal from A's mother about the appellant's relationship with his daughter and the role and that he currently plays in her life. He confirmed that during the school term, A returns home each day to her mother and great grandmother. During weekends and school holiday's she will stay with the appellant. The appellant collects her from school on Friday and she remains with him until Sunday evening. During the school week, a driver collects A from home in the morning, and takes her to school. The appellant is unable to do so, because of the restrictions imposed by the curfew. The appellant stated that prior to his imprisonment and the curfew subsequently imposed, he would take A to school in the morning.

20. Included in the appellant's consolidated bundle is an unsigned statement from [PC], dated 5th January 2016. She confirms that she has been in a relationship with the appellant, on and off, for 6 years. She's simply states that she has read the statement of the appellant and confirms that he goes to collect A from school every day and that he "sometimes brings her to my home at the weekend". [PC] did not attend the hearing and was therefore unable to confirm that the content of her statement is true. Her statement that that the appellant "... sometimes brings her to

my home at the weekend ..." is at odds with the appellant's claim that A stays with the appellant at weekends and during the school holidays. Her evidence could not be tested by way of cross-examination and I can attach very little weight to it in the circumstances.

21. I was provided with a letter from [ ] School dated 3rd February 2016. The letter confirms that the appellant "… collects and brings A to school regularly and attends all the school events and functions i.e. assemblies and parents' evenings and paying for visits, trips and dinners …". The reference to the appellant taking A to school is curious because the appellant's own evidence is that he previously took A to school in the mornings but is unable to do so now, because of the restrictions imposed upon him by the curfew.

22. I have also carefully read the letters in support from:

a. Luke Hutchinson, Detainee Custody Officer at Brook House Immigration Removal Centre;

b. Brian Harrison, General Manager of Aramark Ltd;

c. Wendy Kite, Registered Nurse from South London and Maudsley NHS Foundation Trust;

d. Mr A Balogun, Secretary of Campaign for Truth & Justice;

e. M N Raouf;

f. Raob Malkin of Spires;

Submissions

23. On behalf of the respondent, Mr Clarke submits that paragraph 398(c) of the Immigration Rules applies in this case. That is, "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 …". He submits that it is the view of the Secretary of State that is important. He submits

that the respondent has set out her view in her decision of 18th June 2014 that the respondent regards as particularly serious, those offences involving drugs. He submits that the view of the Secretary of State as expressed in her decision letter is consistent:

a. With the recognition in Schedule 1 Part 1(1) of the Serious Crime Act 2007 of an offence under s5(3) Misuse of Drugs Act 1971 (possession of controlled drug with intent to supply) as a "Serious Offence". Mr Clarke submits that what underpins offences such as possession of controlled drug with intent to supply as a serious offence under the Act, is the recognition of the harm that drugs do to society.

b. Chapter 13 Immigration Directorate Instructions "criminality guidance in Article 8 ECHR cases" (Version 5.0 28th July 2014) that:

2.1.2 It is at the discretion of the Secretary of State whether or not she considers an offence to have caused serious harm.

2.1.3 "An offence that has caused serious harm" means an offence that has caused serious physical or psychological harm to a victim or victims, or that has contributed to widespread problem that causes serious harm to a community or to society in general.

2.1.4 The foreign criminal does not have to have been convicted in relation to any serious harm which followed from his offence. For example, he may fit within this provision if he is convicted of a lesser offence because it cannot be proved beyond reasonable doubt that he was guilty of a separate offence in relation to the serious harm which resulted from his actions.

2.1.5 Where a person has been convicted of one or more violent, drugs or sex offences, he will usually be considered to have been convicted of an offence that has caused serious harm.

24. Mr Clarke submits that once it is established that it is the view of the Secretary of State that the appellant's offending has caused serious harm, I must consider whether paragraphs 399 or 399A apply. He accepts that the appellant has a parental relationship with a child under the age of 18 years who is in the UK and is a British citizen. He submits however that the only relationship that the appellant has with any of his children, is the relationship that he has with his daughter A. He submits that it is not enough for the appellant to establish that he has a genuine and subsisting parental relationship with A and that more is required. He submits that taken at its highest, the evidence is that A lives with her grandmother. He submits that there is no evidence before the Tribunal as to the impact that deportation of the appellant, would have upon A. He submits that the evidence of the appellant and the school simply establishes that the appellant plays a limited role in A's life but that is far from saying that it would be unduly harsh for A to remain in the UK without the appellant. Her primary carers are after all, her mother and great grandmother and the deportation of the appellant will not impact upon the arrangements for her day to day care. He submits that the three requirements of paragraph 399A are not met. The appellant has not been lawfully in the UK for most of his life and there is no evidence before the Tribunal that there would be very significant obstacles to the appellant's integration into Jamaica.

25. Mr Seelhoff relied upon the matters set out in his skeleton argument. He submits that I must first assess whether the appellant's offending has caused serious harm. He submits that the drafting of the Immigration Rules as a whole suggests that offences that attract prisons sentences of less than a year will not normally be regarded as "causing serious harm", and that it is for the respondent to establish that the appellant's offending has caused serious harm. Mr Seelhoff submits that if it was Parliament's intention that a particular category of offence would be sufficient to establish serious harm, then the rules themselves would specify those categories of offence which are considered to cause serious harm or would incorporate statutory lists of serious offences such as that set out in Schedule 1 Serious Crime Act 2007, or that referenced in section 72(4)(a) of the 2002 Act.

26. Mr Seelhoff submits that the respondent's guidance is flawed. It has not been laid before Parliament and it cannot be right for the respondent to simply proceed upon the premise that violent, sexual and drugs offences will always be regarded as causing serious harm. He submits that were this parliament's intent, the rules would have specified that such offences would always be grounds for deportation. Furthermore, whilst the respondent may have an apparent discretion to decide whether an offence has caused serious harm, that assessment must be objectively well founded by reference to a range of factors including the specific circumstances of the offence, any specific harm caused by the offence, the category and number of offences, the length of sentence and the reasons for a particularly long or short sentence. Mr Seelhoff refers to the circumstances behind the conviction in December 2011 and whilst acknowledging that drug use causes harm to society, he submits that on the appellant's evidence, the primary victim was the appellant himself. As for the subsequent conviction in August 2013, Mr Seelhoff submits that there is simply insufficient evidence to establish that the appellant's offending caused serious harm.

27. As to any assessment of proportionality thereafter, Mr Seelhoff submits that the appellant has a number of children living in the UK and in Jamaica. He has daily contact with his daughter A. He submits that it would be unduly harsh for A to move to Jamaica given that she has never lived there and her mother and her primary carer (her great grandmother), live in the UK. He submits that on the evidence, A's great grandmother is dependent on the appellant to arrange for A to get to and from school and that in the circumstances, it is clearly in A's best interests for the appellant to remain in the UK, as he is the most involved, of her two parents.

28. Mr Seelhoff refers me to the decision of the Upper Tribunal in **OLO and others (para 398 – "Foreign Criminal") [2016] UKUT 00056 (IAC)** and submits that in the event that the respondent cannot establish that the appellant's offending caused serious harm, the appellant is not a "Foreign Criminal" for the purposes of s117 of the 2002 Act.

Findings and Conclusion

29. The burden of proof is on the appellant to establish his case on a balance of probabilities.

30. The claimant has four children in the UK by three different women. All four of the children are British citizens. There is a distinct paucity of evidence before me regarding the relationship that the appellant has with three of his children in the UK. I find:

    a. The appellant does not have a genuine and subsisting relationship with his eldest son G who is now 12 years of age. The appellant's own evidence is G lives with his mother in Leeds, and that he last saw his eldest son in June 2014.

    b. The appellant does not have a genuine and subsisting relationship with his daughter "S" and his son "E". The appellant's own evidence in relation to those two children is that they have been taken into the care of social services. His evidence seems to go even further in that be believes that the children have now been placed for, and may well have been adopted. The appellant's evidence before me was that he has instructed solicitors with a view to establishing contact with his children. There is no evidence before me of any steps having been taken by the appellant's solicitors to establish contact and I find that he neither has contact, nor does he play a role in the children's lives. If he is right in saying that the children have been adopted, he will play no role at all in their lives in the future.

31. There is some limited evidence before me of the appellant's relationship with A, who is now 10 years old. I find that the appellant does have a genuine and subsisting relationship with his daughter A. The appellant is clearly not the primary carer for A who lives with her great grandmother. There is very little evidence before me as to the role that the appellant play's in A's life and I accept

the submission made by Mr Clarke that there is no evidence at all before me of the impact that the deportation of the appellant may have upon A. I accept however that the appellant supports A's primary carer with the arrangements for her collection from school during term time. I also accept that the appellant has A stay with him and his partner some weekends, and at times during school holidays. I find that the appellant play some, albeit limited role in the care of A.

32. It is uncontroversial that the respondent has taken her decision to deport the appellant, relying upon paragraph 398(c) of the Immigration Rules. I begin my consideration of this appeal by considering whether the material facts alleged by the respondent are made out. That is, whether the respondent has established that the deportation of the appellant from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, his offending has caused serious harm.

33. The use of the words "in the view of the Secretary of State" in paragraph 398(c) are in my judgement important. The requirements of the rule are clearly met if the Secretary of State takes the view that the deportation of the appellant from the UK is conducive to the public good because, his offending has caused serious harm.

34. In **Mahad (And Others) v Entry Clearance Officer [2009] UKSC 16**, Lord Brown, stated at [10]:

> *"…Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The respondent's counsel readily accepted that what she meant in her written case by the proposition "the question of interpretation is … what the Secretary of State intended his policy to be" was that the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under section 3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament which then has the opportunity to disapprove them. True, as I observed in Odelola (para 33): "the question is what the*

Secretary of State intended. The rules are her rules." But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions (IDIs) issued intermittently to guide immigration officers in their application of the rules. IDIs are given pursuant to paragraph 1(3) of Schedule 2 to the 1971 Act which provides that:

> *"In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (not inconsistent with the immigration rules) as may be given them by the Secretary of State …" (emphasis added).*

35. In **Iqbal (And Others) v SSHD [2015] EWCA Civ 169**, their Lordships highlighted that the exercise of rewriting any provision of the Rules under the guise of purposive construction is a forbidden one. Lord Justice Vos stated, at [33], that:

> *"…..the court cannot and should not construe the Secretary of State's Rules to mean something different from what, on a fair objective reading, they actually say. In this case, the two main construction points advanced respectively by Mr. Iqbal and Mr. Macdonald urged that result. I would hope that arguments of this kind will be less prevalent in future…"*

36. Paragraph 398 of the Immigration Rules forms part of a series of rules introduced by the respondent that apply where a foreign criminal liable to deportation claims *inter alia* that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Right's Convention. Paragraph 398(a) refers to those that have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years. Paragraph 398(b) refers to those that 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 and paragraph 398(c) relates to those whose deportation 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. In each case, unless paragraphs 399 or 399A apply, 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.

37. As I have set out, in the respondent's decision it is clear that the respondent does take that view that the appellant's offending has caused serious harm. The respondent has made an assessment and takes that view. I accept the submission made by Mr Clarke that the assessment carried out by the respondent is consistent with the respondent's published guidance that an offence that has caused serious harm encompasses an offence that has contributed to a widespread problem that causes serious harm to society in general. The rule expressly refers to the view of the Secretary of State and it is not open to me to substitute my view as to whether the deportation of the appellant from the UK is conducive to the public good and in the public interest because his offending has caused serious harm.

38. I reject the submission by Mr. Seelhoff that the respondent's guidance is flawed because it has not been laid before parliament. It is right that the Supreme Court in **R (Alvi) v SSHD [2012] UKSC 33** held that any requirement in immigration guidance or codes of practice which, if not satisfied by the migrant, would result in an application for leave to enter or remain in the United Kingdom being refused is tantamount to a "rule" within the meaning of Section 3(2) of the 1971 statute. Accordingly, if not laid before Parliament, it does not have the quality of law. However Lord Hope at [41] stated:

> *"A contrast may be drawn between the rules and the instructions (not inconsistent with the rules) which the Secretary may give to immigration officers under paragraph 1(3) of Schedule 2 to the 1971 Act. As Sedley LJ said in ZH (Bangladesh) v Secretary of State for the Home Department [2009] Imm AR 450, para 32, the instructions do not have, and cannot be treated as if they possessed, the force of law. The Act does not require those instructions or documents which give guidance of various kinds to caseworkers, of which there are very many, to be laid before Parliament. But the rules must be. So everything which is in the nature of a rule as to the practice to be followed in the administration of the Act is*

> *subject to this requirement. Resort to the technique of referring to outside documents, which the Scrutiny Committee can ask to be produced if it wishes to see them, is not in itself objectionable. But it will be objectionable if it enables the Secretary of State to avoid her statutory obligation to lay any changes in the rules before Parliament.*"

39. Paragraph 398(c) of the Immigration Rules, expressly provides that it is the view of the Secretary of State that is important. The Immigration Directorates Instructions are not therefore importing any further requirement which, if not satisfied, will lead to deportation decision being upheld. Adopting the words of Lord Dyson, with whom Lord Hope agreed, at [94], Parliament wanted to have a say in the rules which set out the basis on which decisions were to be made. Here, Parliament has left the decision as to whether the deportation of the person from the UK is conducive to the public good and in the public interest because their offending has caused serious harm, to the view of the Secretary of State. The instructions are not inconsistent with the rules and give guidance to caseworkers as to how the discretion vested in the Secretary of State in the rules laid before parliament is to be exercised for consistency in decision making.

40. In **OLO and others (para 398 – "foreign criminal") [2016] UKUT 00056**, the Tribunal found that the appellant could not be defined as a "foreign criminal" under S.117C of the 2002 Act because of s117D(4)9b). The appellant's consecutive sentences excluded her from the definition of foreign criminal. Here, the appellant falls under the definition of a "foreign criminal" under s117D(2) because he is not a British Citizen and he has been convicted in the UK of an offence that has caused serious harm. The appellant is thus a foreign criminal for the purposes of the 2002 Act, and given that the meaning of the phrase 'foreign criminal' is to be construed consistently with the definition in the 2002 Act, in my judgement paragraphs 398, 399 and 399A apply to him.

41. In my judgment, the respondent has established that the deportation of the appellant from the UK is conducive to the public good and in the public interest

because, in the view of the Secretary of State, his offending has caused serious harm. That however is not the end of the matter because I must go on to consider whether paragraph 399 or 399A apply.

42. I have already found that the appellant has a genuine and subsisting parental relationship with his daughter A, who is a child under the age of 18 years who is in the UK, and a British Citizen. I must consider whether:

a. it would be unduly harsh for A to live in Jamaica.; and

b. it would be unduly harsh for A to remain in the UK without the appellant;

43. I remind myself that s55 of the Borders, Citizenship and Immigration Act 2009 requires the respondent to make arrangements for ensuring that her functions in relation to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK.

44. I also note that the Court of Appeal in **MM (Uganda) –v- SSHD [2016] EWCA Civ 450** has recently confirmed that a Court or Tribunal considering whether deportation would be "unduly harsh" under the Immigration Rules r.399 and s117C(5) of the 2002 Act must have regard to all of the circumstances, including the deportee's criminal and immigration history. The more pressing the public interest in removal, the harder it will be to show that the effects of deportation would be unduly harsh.

45. In reaching my decision, I have therefore had in mind the fact that the appellant has only two convictions. The appellant was convicted in December 2011 of possession of a class A controlled drug with intent to supply and possession of a class C controlled drug and following a guilty plea. The appellant claims that he was badly advised at the time but I must proceed upon the basis that he has a conviction for possession of a class A controlled drug with intent to supply. I note however that he was sentenced to a 24 month Community Order and 18 months of drug rehabilitation supervision. The second conviction in February 2014 was for

possessing a class A controlled drug (Crack Cocaine) and a class B controlled drug (Cannabis/Cannabis resin). The appellant was sentenced to a total of 8-months imprisonment (this equating to the period of time that the appellant had already spent on remand). Insofar as the appellant's immigration history is concerned, I note that he arrived in the UK lawfully on 1st August 1998, but has remained in the UK unlawfully since 30th December 1999.

46. I accept the submission made by Mr. Seelhoff that it would be unduly harsh for A to move to Jamaica given that she has never lived there, and her mother and her primary carer (her great grandmother), live in the UK. The best interests of A are served by her remaining in the UK with her primary carers. There can be no question of A's mother and great grandmother moving to Jamaica. It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong. A will continue to benefit from that stability and continuation of social and educational provision, as a British citizen living with her great grandmother and her mother in the UK.

47. In my judgement, what is at the heart of this appeal is the question of whether it would be unduly harsh to expect A to remain in the UK without the appellant if he were to be deported. I have found that the appellant does not have a genuine and subsisting relationship with his other three children living in the UK.

48. I have set out in this decision the limited evidence before me about the relationship between the appellant and A and in particular the role that he plays in her life. The role that A's mother plays in her life is far from clear but in his statement of 30th June 2015, the appellant states that A lives with her mother [SS] and great grandmother [ED]. The role that A's mother and her great grandmother play in her life as her primary carer's would not be disturbed by the deportation of the appellant. From the limited evidence before me I have found that the appellant supports A's primary carers with the arrangements for her collection from school during term time. I have found that the appellant has A stay with

him and his partner some weekends, and at times during school holidays. I have found that the appellant play some, albeit limited, role in the care of A. The appellant does not live in the same household as A and neither of A's primary carers has provided any evidence in support of the appellant's appeal as to the quality of the relationship between the appellant and his daughter, or indeed the impact that deportation would have upon the day to day arrangements for her care. I do not accept that the deportation of the appellant would have a significant impact upon the day to day arrangements for the care of A. There is no evidence before me that suitable and satisfactory arrangements were not in place during the time that the appellant was detained, and that there was any impact upon A during that time. There is no evidence before me that suitable and satisfactory arrangement could not be made again. There is no evidence before of any particular financial provision that the appellant makes towards A's care that would be lost if the appellant were deported. There is no evidence before me that the appellant's deportation from the UK is likely to cause harm to A or any detriment in the form of any lasting and damaging effect.

49. I remind myself that the best interests of the children are of substantial importance but are not determinative of the question of whether it would be "unduly harsh" for them to remain in the UK without the person being deported. In **SS (Nigeria) –v- SSHD [2013] EWCA Civ 550** the Court of Appeal held that a child's interests has to be stronger the more pressing the nature of the public interest in a parent's removal. Furthermore, the Courts must respect the legislatures view on the pressing nature of the offence, particularly since it reflects policy in the area of moral and political judgment; *(See Laws LJ at paragraphs 49-50)*

50. The Serious Crime Act 2007 defines an offence under s5(3) Misuse of Drugs Act 1971 (possession of controlled drug with intent to supply) as a "Serious Offence". As set out in s117C(2) of the 2002 Act, the more serious the offence committed by a foreign criminal, the greater the public interest in deportation of the criminal. The respondent, not unreasonably, takes that view that a person convicted of one or

more violent, drugs or sex offences, will usually be considered to have been convicted of an offence that has caused serious harm.

51. I accept that offences involving drugs, and particularly the possession of drugs with intent to supply, are serious because of the effect of that type of crime on the wider community. The Judge when sentencing the appellant in February 2014 commented that the amounts of drugs "are fairly large amounts for personal consumption, personal use" but rightly followed the jury's verdict to convict the appellant for possessing a class A controlled drug (Crack Cocaine) and a class B controlled drug (Cannabis/Cannabis resin). Those offences were aggravated by the appellant's previous conviction.

52. The words "unduly harsh" do not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. The addition of the adverb "unduly" raises an already elevated standard still higher. Having considered all of the evidence before me, including the appellant's immigration and criminal history, I find that it would not be unduly harsh for Aaliyah to remain in the UK without the appellant.

53. In my judgement paragraph 399 does not therefore apply. I can deal with whether paragraph 399A applies in short order. All three requirements set out in paragraph 399A must be met. I have already set out the appellant's immigration history and I find that he has not been lawfully resident in the UK for most of his life. Equally, the appellant still has on his own account, family in Jamaica. He had lived in Jamaica for many years until his arrival in the UK in 1998. There is no evidence before me of any obstacles that the appellant would face to his integration to Jamaica, let alone evidence of very significant obstacles. I do not accept that there would be very significant obstacles to his integration into Jamaica.

54. In my judgment, paragraphs 399 and 399A do not apply and so 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.

55. It is now well established that insofar as the assessment of an Article 8 claim is concerned, the considerations in a deportation care are different from those applicable to cases of immigration control. In deportation cases, the Immigration Rules provide a 'complete code' and an assessment of proportionality is to be conducted through the lens of the Immigration Rules, rather than as a free standing exercise. In **MF (Nigeria) v SSHD [2013] EWCA Civ 1192** the Court of Appeal concluded that the immigration rules relating to deportation provide a "complete code" to Article 8. This was largely because the provisions contained in paragraph 398 of the immigration rules were deemed to be sufficiently wide to encompass a full proportionality assessment that was compliant with Article 8 of the European Convention.

56. Where, as here, paragraphs 399 and 399A of the rules do not apply it is only in "exceptional circumstances" that the public interest in deportation will be outweighed by other factors. To that end, "exceptional" means something "very compelling"; *See* **MF (Nigeria) –v- SSHD [2013] EWCA Civ 1192**, **LC (China) –v- SSHD [2014] EWCA Civ 1310** and **AJ (Angola) –v- SSHD [2014] EWCA Civ 1636**.

57. No such circumstances are advanced before me. It follows that the appeal is dismissed.

Notice of Decision

58. The appeal is dismissed under the Immigration Rules and on Article 8 grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

59. The First-tier Tribunal made an anonymity direction but that was discharged in the decision of Upper Tribunal Judge O'Connor. No application for an anonymity direction was made before me, and no such direction is made. I have however in this decision referred to the appellant's children by their initials rather than setting out their names.

Signed Date: 12th July 2016

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and there can be no fee award.

Signed Date: 12th July 2016

Deputy Upper Tribunal Judge Mandalia