IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00199/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 February 2015	**On 27 February 2015**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

C C

Respondent

Representation:
For the Appellant: Ms J Isherwood, Senior Presenting Officer
For the Respondent: Ms E Daykin, instructed by UK Migration Lawyers Ltd

DECISION AND REASONS

INTRODUCTION

1. Although not sought, I have made an anonymity order as this case involves a child. Accordingly, the disclosure or publication of any information relating to these proceedings or any matter likely to lead members of the public to identify any person referred to in these proceedings is prohibited.

2. In my decision dated 12 November 2014 I gave my reasons for finding that the First-tier Tribunal (the Tribunal) had erred in law in allowing the appeal by the respondent (the claimant) against the decision to make a deportation order dated 16 January 2014. My decision which gives the detailed history of this matter is set out as follows:

> "1. The Secretary of State has been granted permission to appeal against the decision of First-tier Tribunal Judge T R Hollingworth who sitting in a panel with Sir Jeffrey James KBE CMG allowed the respondent's appeal under the Immigration Rules and on human rights grounds against the decision to make a deportation order dated 16 January 2014.
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> 3. The respondent (referred to as the claimant) is a national of Turkey where he was born in 10 March 1974. The decision he appealed against stems from a conviction in Nottingham Crown Court of offences of sexual assault on a female on 14 February 2011 and for which he was sentenced on 8 March 2011. The three offences occurred in January, February and April 2010 and involved victims aged 16 and 18½. A sentence of twelve months' imprisonment was imposed made up of six months and eight months on counts relating to one of the complainants to run concurrently and four months in relation to the second complainant to run consecutively. The claimant was subject to notification requirements of the Sexual Offences Act.
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> 4. As to his immigration history, the claimant claims to have entered the United Kingdom in or around 1994. He came to the attention of the authorities in November 1997 after an arrest by the police. On 15 August 2001 he was granted leave to remain for twelve months as a spouse and in the light of this, the claimant withdrew an earlier protection claim that had not been resolved. A child to that relationship was born in April 2002 and in October 2003 the claimant was granted indefinite leave to remain. That marriage broke down. Since 2008 the claimant has been in a relationship with another who is a British citizen.
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> 5. On 1 May 2012 the Secretary of State made a deportation order under s.32 of the UK Borders Act 2007. A judge of the First-tier Tribunal considered the provisions of the 2007 Act (s.38(1)(b)) had been misapplied by the Secretary of State and concluded that the deportation order was not in accordance with the law. The Secretary of State did not appeal that decision.
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> 6. On 26 July 2012 she made a further decision this time to make a deportation order. In a determination dated 19 December 2012 another judge of the First-tier Tribunal allowed an appeal against that decision as not in accordance with the law. It is unnecessary to carry out a detailed analysis of that decision which includes in part a concern expressed regarding the Secretary of State's approach to Article 8 based on a misconception that s.32 of the UK Borders Act 2007 applied.
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> 7. Among her reasons for the decision giving rise to the instant appeal the Secretary of State contended that paragraph 398(c) applied because the three offences of sexual assault came within Schedule 15 of the Criminal Justice Act 2003. As a consequence paragraph 399(a) and (b) was considered as well as 399A. In short the Secretary of State did not accept that the claimant came within any of these

provisions and furthermore there were no exceptional circumstances which would cause deportation to be a breach of Article 8.

8. In allowing the appeal , the judge made these findings:

(i) The claimant was liable to deportation as the Secretary of State had warranted that his continuing presence in the United Kingdom was not conducive to the public good.

(ii) The claimant was not a credible or reliable witness; it appeared to the panel that the sentencing judge had erroneously regarded the claimant as someone of previous good character having been convicted for dishonesty in or around 2005.

(iii) A pre-sentence report had assessed the claimant as at a low risk of serious harm to the public but that he presented a medium risk of harm to children and non-adults.

(iv) The claimant has not re-offended. He has maintained his innocence.

(v) The fact that the claimant received twelve months sentence in total failed to satisfy paragraph 398(b).

(vi) Schedule 15 of the Criminal Justice Act 2003 is in respect of offenders who are dangerous as defined by that Act requiring them to be remanded in custody indefinitely until they no longer present a risk of harm to the public. The claimant was not in such a category as the sentence indicated.

(vii) The Secretary of State had failed to apply paragraph 398(c) correctly having regard to her own guidance when evaluating "serious harm".

(viii) The claimant could not be said to be in a genuine and subsisting relationship with his child with reference to paragraph 399(a).

(ix) As to paragraph 399(b), the expectation for the claimant's partner to accompany him to Turkey would result in unjustifiably harsh consequences. Expulsion of the claimant on the basis of the conducive provisions would lead to his family relationship ceasing. The individual circumstances of the claimant's partner and her mother did not result in a finding of exceptional circumstances.

9. Having set out the above matters, the tribunal stated that the appeal was allowed "in respect of the respondent's interpretation of the Immigration Rules".

10. The tribunal then turned to Article 8. Although it was not accepted that the claimant had arrived in the United Kingdom in 1994, to expect his partner to move to Turkey would have unjustifiably harsh consequences and taking account of the offence, the public interest did not require expulsion and thus the appeal was allowed on human rights grounds.

11. The grounds of challenge are that-

(i) The panel had materially misdirected itself in respect of its consideration of paragraph 398(c).

(ii) The insurmountable obstacles found under paragraph 399(b) reflected the challenges any couple would face in choosing to establish themselves in a new country. The claimant had failed to establish that relocation would be exceptionally difficult for him and his partner.

(iii) The findings on Article 8 failed to afford proper regard to the public interest. The risk of re-offending had been acknowledged but the tribunal had failed to acknowledge that deportation is not one dimensional and that there were other legitimate aims engaged such as deterrence, the maintenance of public confidence in a system of control and expression of societal abhorrence to criminality.

11. By way of a rule 24 response, it is argued that the first ground is misconceived. The only reason the Secretary of State had given for concluding that the offending caused serious harm was because it fell within Schedule 15 of the 2003 Act. The panel had correctly identified that the schedule referred to related to offenders who were dangerous as defined in the 2003 Act. The claimant was not in such a category as indicated by his sentence. The panel had identified that the Secretary of State had failed to comply with her own guidance and finally the panel had proper regard to the previous determination of the First-tier Tribunal of December 2012 which had been allowed as the Secretary of State had failed to differentiate between the fact of the conviction from the consequences and terms of causation of serious harm.

12. As to the second ground it is argued that the Secretary of State had failed to find an error of law and the challenge amounted to a disagreement. The reference to *Gurung* [2012] EWCA Civ 62 in the challenge to the third ground was misplaced as it concerned automatic deportation under s.32 of the UK Borders Act 2007.

13. I take each ground in turn.

14. Paragraph 398 of the Immigration Rules identifies three categories of criminality. The Secretary of State decided that the third applied –

"(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."

15. It is correct that the reasons letter accompanying the immigration decision relies on the status of the offences under Schedule 15 of the Criminal Justice Act 2003 as justification for paragraph 398(c) to apply. As accepted by Ms Peterson, an offence under s.3 of the Sexual Offences Act 2003 (Sexual Assault) is included in Schedule 15 to the Criminal Justice Act 2003 as a specified offence for the purposes of Chapter 5 of Part 12. Chapter 5 provides for dangerous offenders. "Specified offence" is defined as one that is "a specified violent offence or a specified sexual offence". It further provides that a "specified sexual offence" means an offence specified in part 2 of [Schedule 15]" specific to the offence of which the claimant had been convicted. The skeleton argument on behalf of the

claimant before the panel referred to this legislation allowing the sentencing court to impose a sentence for public protection if required. I consider that the tribunal erred by concluding that schedule 15 was in respect of offenders who were dangerous as defined.

16. The tribunal had observed that the Secretary of State had failed to consider 398(c) adequately. Whilst such a view may have been open to the tribunal, it was then incumbent upon it to conclude whether 398(c) was engaged notwithstanding the deficiencies in the Secretary of State's own reasoning. I am unable to accept Ms Peterson's argument that it was implicit in the tribunal's reasoning that such a conclusion had been reached by reference to the earlier decision in December 2012. In that decision, First-tier Tribunal Judge P Hollingworth concluded that the Secretary of State had failed to correctly apply 398(c) which led him to his conclusion that the decision was not in accordance with the law. I am unable to discern from his decision a clear finding that the offences had not caused serious harm anymore than I am able to discern such a finding in the determination under challenge.

17. I consider this error material. I do not accept that the tribunal was bound to find that the offences had not caused serious harm. The sentencing remarks refer to the adverse effect the assault had on the older of the two victims and the obligation felt by the younger to give up her job in order to ensure she was not treated in the same way again. These remarks read with the pre-sentence report suggest that it could certainly be open to a judge to conclude that paragraph 398(c) was engaged.

18. Turning to the second ground, it is unclear why the tribunal proceeded to consider paragraphs 399(a) and (b) since they were of no applicability if the claimant was outside the reach of paragraph 398. Specifically in respect of paragraph 399(b) there was a failure by the judge to consider the residential requirement of fifteen years valid leave immediately preceding the date of decision (paragraph 399(b) (i)).

19. There appears to me to be no basis on which the claimant could have succeeded on paragraph 399(b) as a consequence.

20. It is not clear from the determination whether the tribunal considered it was necessary to address "exceptional circumstances" because 398(c) applied having regard to the concluding paragraph of 398 which is in terms...."if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors". Or whether it was considered there was a need to follow this approach in accordance with paragraph 397. In any event I am satisfied that the tribunal erred in its Article 8 consideration. At [82] the tribunal correctly observed that the claimant was not faced with automatic deportation and said

> '82. Although we have no doubt that the offences committed by the appellant were serious, nonetheless, the respondent has not satisfied the requirements of the Rules regarding serious harm. So that, looked at as a whole, the maximum sentence the appellant received for the most serious individual offence was eight months.

> 83. We understand the appellant to be a medium risk of harm in the community according to the OASYS Report. But, with respect, that evaluation is almost three years old by the date of the appeal. In considering the appellant's risk of re-offending and the waiting exercise he has not re-offended.'

21. If paragraph 398(c) applied, the scales would be more heavily weighted in favour of the Secretary of State than if they did not. The error by the judge in failing to decide whether 398(c) applied materially infects the Article 8 exercise.

22. Accordingly I set aside the decision of the First-tier Tribunal. Ms Peterson acknowledged that no new evidence had been filed and accordingly the decision will be re-made in the Upper Tribunal based on submissions only. Those submissions will need to include the relevant provisions of the Immigration Act 2014, the revisions to the Immigration Rules and the Secretary of State's current guidance in the light of a decision in *YM (Uganda) v SSHD* [2014] EWCA Civ 1292."

RE-MAKING THE DECISION

2. I am grateful to Ms Isherwood and Ms Daykin for their submissions and in particular to Ms Daykin's for her skeleton argument as well as providing a copy of the Immigration Directorate Instructions, Chapter 13: Criminality Guidance in Article 8 ECHR cases, Version 5.0, 28 July 2014.

3. As I said in the concluding paragraph of the above decision the amending provisions under the Immigration Act 2014 to the 2002 Act and revisions to the Immigration Rules apply in this case.

4. The starting point is s.3(5)(a) of the Immigration Act 1971:

> "*A person who is not a British citizen is liable to deportation from the United Kingdom if –*
>
> *(a) the Secretary of State deems his deportation to be conducive to the public good...*".

5. This is not an automatic deportation case. Accordingly s.32 of the UK Borders Act 2007 does not apply. Although the claimant was sentenced to a total of twelve months' imprisonment, the usual trigger for automatic deportation, it was made up of six months and eight months on counts in relation to some of the victims to run concurrently and four months in relation to the other to run consecutively. Instead, it is a decision to make a deportation order. The Secretary of State explained in her decision letter she deemed it to be conducive to the public good to make a deportation order against the claimant, hence the liability under s.3(5)(a) above.

6. Paragraph 396 of the Immigration Rules (the Rules) provides –

> "*396. Where a person is liable to deportation the presumption shall be the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with s.32 of the UK Borders Act 2007.*"

7. Paragraph 397 of the Rules is in these terms:

> "*397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Their deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed*."

8. As was made clear in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 the rules on deportation comprise a complete code regulating how the question of deportation should be addressed where it is claimed that such deportation would be contrary to Article 8 of the Human Rights Convention. Specific to the circumstances of the case before me 398(c) provides:

> "*(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...*"

9. If the claimant's circumstances are captured by 398(c), consideration needs to be given to whether paragraph 399 or 399A applies. Unless one of the categories is met, *the public interest in deportation only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.*

10. The claimant relies on his relationship with a British citizen and thus 399(b) which provides –

> "*(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 is not precarious; and*
>
> *(ii) it would be unduly harsh for that partner to live in a country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX. 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.*"

11. Section EX.2 is in these terms:

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

12. The Immigration Act 2014 amended Part 5 of the Nationality, Immigration and Asylum Act 2002 with the insertion of part 5A: *Article 8 of the ECHR: Public Interest Considerations.* Again, specific to the case before me s.117A(2) is in these terms:

> "*117A –*

(2) In considering the public interest, the court or Tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in Section 117B, and

(b) in all cases concerning the deportation of foreign criminals, to the considerations listed in Section 117C.

(3) In sub-Section (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)."

13. Section 117C *Article 8: additional considerations in cases involving foreign criminals* provides:

"*(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 being 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.

...

(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.

...

(7) The considerations in sub-sections (1), (2), (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."

14. Finally, s.117D provides this interpretation of a foreign criminal 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."

15. The starting point is the rules and the first question is with reference to 398(c) whether the claimant has been convicted of an offence that has caused serious harm. It is not the Respondent's case that he is a persistent offender. I have had careful regard to Ms Daykin's argument that the Secretary of State has failed to produce any evidence of "serious harm" caused in this case. I accept that the burden is on the Secretary of State to prove this aspect.

16. It is correct that the author of the pre-sentence report did not see the witness statements or the victims' statements despite attempts to obtain them. The offences are analysed in paragraphs 4 and 5 of the report which reveals that both victims worked as waitresses in the claimant's cafeteria. As to the first victim, the first incident of a sexual nature occurred when she explained that she was not being paid enough for the tip to be put into the shared pot. Quoting from the report:

> "According to the Crown Prosecution Service evidence Mr [C] made a remark that she could 'earn more money if she gave him a blowjob'. Following this incident Mr [C] is then reported to have touched the victim on the bottom and the breasts on a number of occasions leading to the current convictions."

17. As to the second victim, the report observes:

> "In respect of the second victim, this is in relation to one count of sexual assault occurring on 5 April 2010. The Crown Prosecution Service case summary outlines that the victim was employed as a part time waitress at the defendant's cafeteria. On the date of the offence Mr [C] asked the victim to go downstairs to the basement to assist him in washing up. Once in the basement Mr [C] made the victim an alcoholic drink and began to talk to her about sex. He then grabbed the victim, pulling her towards him so that their groins were touching. The case summary outlines that Mr [C] then ground his erect penis against the victim's vagina before she was able to push him away and return upstairs. Within interview Mr [C] claims that he simply lifted the victim up so that she could 'kiss' another employee. He denies that he touched her in a sexual way and denies the offence."

18. The probation officer sets out his view regarding impact on the victims at paragraph 6 as follows:

> "6. At the time of the index offences the victims were employed by the defendant in his café as waitresses. As I do not hold a copy of the witness and victim statements I have been unable to make direct reference to the impact of the defendant's actions on the victims. In my assessment the offences will have had an enduring impact on the victim's emotional and psychological wellbeing. The victims would have felt scared and intimidated by the defendant's actions. This may lead to her struggling to develop appropriate relationships in the future. She will undoubtedly find it difficult to trust future partners due to the breach of trust perpetrated by the defendant."

19. The impact on the victim was also considered in the OASys Report. There is no indication that the author had any additional evidence from the victims. The conclusion expressed at paragraph 2.5 is in these terms:

> "Impact to the Victims
>
> It was assessed by the previous PSR author that the offences may have an enduring impact on the victims' emotional and psychological wellbeing. The victims would have felt fearful and intimidated by Mr [C]'s actions. This may lead to the victims finding it difficult to trust people in similar positions of power in the future and could have an impact on future relationships."

20. His Honour, Judge Stokes QC had this to say in his sentencing remarks:

> "I have considered everything that has been said on your behalf and everything that is set out in the report, but it has to be made absolutely clear that men of any age who take advantage of young girls, particularly in the employment environment, it has to be made absolutely plain that this sort of behaviour will not be tolerated, particularly when it is repeated.
>
> There has to be, in my judgment, an immediate custodial sentence in order to underline the seriousness of this sort of behaviour. We know in relation to the 18 year old, the adverse effect it has had on her; and the 16 year old felt obliged to give up her job in order to ensure that she was not treated in this way again."

21. Ms Daykin referred me to the Secretary of State's guidance set out in chapter 13 – Criminality Guidance in Article 8 ECHR cases 28 July 2014. Serious harm is defined as "an offence that has caused serious physical or psychological harm to a victim or victims, or that has contributed to a widespread problem that causes serious harm to a community or to society in general."

22. The Secretary of State's guidance does not form part of the Rules. Instead, it is an expression of her understanding of the rules and in this case, primary legislation. I do not consider that the words however require any elaboration or substitution as their meaning is self evident.

23. Although the author of the pre-sentence report did not see the victim impact statements, he had a clear picture of the offences and furthermore weight can be legitimately given to the views expressed as to the likely impact in the light of his experience as a probation officer. The OASys Report does not add anything new of a material nature but it reinforces the impact view given in the earlier report.

24. It is clear from the sentencing remarks that, although not particularised, there was an adverse effect on the first victim. The context suggests the possibility of this being serious. To my mind the fact that the second victim needed to change her employment is unambiguously indicative of the serious harm that the offending caused.

25. Taking these evidential matters into account and having regard to the nature of the offences committed, the ages of the victims and the circumstances in which this occurred, I am satisfied that the offending brought the case within 398(c)

26. The next step is to consider whether paragraph 399(b) is met. The impact difference between this provision and *Exception (2)* in s.117C is that the rules give rise to the possibility of specific leave (399B) whereas Part 5A does not. It seems to me that the Part 5A provisions take effect if the case does not result in leave under the rules hence the order in which I am to carry out my analysis.

27. Ms Daykin argued that *Exception (2)* under s.117C was less onerous than paragraph 399(b) when read with EX.2. The focus of her submissions was on Part 5A as she acknowledged that the claimant would struggle under the rules. Even if this is correct, it does not mean in the absence of a clear concession that I can ignore the rules. In any event, if 399 and 399A do not apply then as 398 concludes, "*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.* Thus the public interest is to be assessed against this testing requirement as well as the provisions in part 5A. I do not consider that latter is more generous for the reasons I give below.

28. The journey through the provisions of the rules is as follows. Paragraph 399(b)(i): it is not in dispute that the claimant's relationship with Ms K began in 2008, well after the grant of indefinite leave to remain on 7 October 2003. Ms K is a British citizen and there is no dispute as to the genuineness of the relationship.

29. Paragraph 399(b)(ii) and (iii): the Tribunal did not reach a conclusion on whether Ms K would accompany the claimant or remain behind. According to her statement dated 26 April 2014, his deportation would mark the end of their relationship as she could not leave her mother and children as well as her job behind. Specifically she explains -

    (i) Having had previous health difficulties, although not seriously unwell the claimant resides in a village 23 kilometres from the nearest hospital in Aksaray.

    (ii) Just because Ms K is able to work it does not mean she is not in ill-health having regard to two heart attacks she suffered in December 2009 and the provision of a coronary artery stint as well as suffering from diabetes, arthritis and eye related problems.

    (iii) Ms K's children reside in the UK where she has a job which she has had for a number of years. She has considerable ties she would not want to lose. She has only ever visited Turkey on holiday and never resided there for a lengthy period of time where her job prospects would be very limited.

    (iv) She would not have anywhere to live in Turkey as the claimant's parents live in a one-bedroom studio flat and as a consequence they would be homeless.

    (v) Ms K and the claimant co-habit with her mother who has longstanding health complications suffering from a prolapsed bladder, a prolapsed bowel and is currently under regular supervision with a neurologist as she just had a fall before the claimant was imprisoned. Her father died on 20 September 2013.

The claimant is currently the full-time carer for her mother and he had also cared for her father when he was alive.

(vi) Ms K's daughter, although residing in the UK, is unable to care for her grandmother as she currently cares for her father, Ms K's ex-husband who suffered severe brain injuries in a motorcycle accident. Ms K's brother who also resides in the UK does not help the claimant care for his mother. He has never offered this help and does not want to be burdened with this. He also has ill-health and cannot take care of her.

30. It is correct that the Tribunal considered the expectation for Ms K to accompany the claimant would result in unjustifiably harsh consequences. Ms Daykin argued that the finding on this aspect should stand as this conclusion had not been vitiated by any error of law. Under the revised provisions in 399(b) whether it would be unduly harsh for the partner to live abroad now requires demonstration of compelling circumstances over and above those described in EX.2. It is a more demanding test. Ms Isherwood resisted the argument that the earlier finding should be preserved. That finding had been challenged in the application for permission to appeal and addressed in my decision.

31. I accept Ms Isherwood's argument. The grounds of challenge make it clear that the Secretary of State had not accepted that the circumstances amounted to insurmountable obstacles. In my decision I explained the legal error by the Tribunal in its conclusion that the claimant could succeed under paragraph 399(b) (see [18] and [19]). I also explained in [20] that the Tribunal had erred in its Article 8 consideration. The re-making of the decision is unarguably to be in accordance with the new rules; the findings reached by reference to the old test do not have any currency in that exercise.

32. Limited knowledge of the country, unfamiliarity with the language and culture and uncertainty where the couple might live would not in my view render the option of Ms K accompanying the claimant unduly harsh. Nor would the fact that she has spent the whole of her life in the United Kingdom. Turkey is within reasonable reach of the UK and she would be able to travel regularly between the countries to maintain connections which could be maintained in the interim through social media.

33. I turn to the impact on Ms K of separation from her mother. According to her statement she is unable to care for her due to her working hours and the financial responsibility she has in discharging the debts that she and the claimant had incurred in running their business. As to her mother's condition, she has explained that she suffers from a prolapsed bladder, prolapsed bowel and is currently under regular supervision with a neurologist as she had a fall just before the claimant was imprisoned. She is stated to be at times confused and suffers memory loss.

34. The medical evidence from the GP and Sherwood Forest Hospitals indicates that the prolapse had been repaired in late 2012. In February 2014 the consultant considered there was no indication for any surgical treatment and that an appointment was

given to return should there be any symptoms within the next six months. There is no indication in the evidence that Ms K's mother has had to return. She was seen again by a different consultant in the department of neurology on 24 March 2014 when she reported that her symptoms were getting better. No routine neurology follow-up was required unless the scan came back with abnormal results. There is no indication that further treatment has proved to be necessary.

35. The Tribunal acknowledged that in the event of Ms K accompanying the claimant to Turkey, social services might be able to assist her mother. This was in the context of its consideration under paragraph 399(b). In respect of exceptional circumstances the Tribunal found the likelihood being that she would be a candidate for assistance from social services if her daughter is not on hand. It was open to the claimant's representatives to produce further evidence on this aspect including an assessment of Ms K's mother's care needs. I do not consider that the evidence of a medical condition indicates that the degree of care as the claimant has provided could not be sourced from social services.

36. Ms K makes it clear in her statement that she cannot relocate with the claimant to Turkey. That is a matter for her but I am not satisfied on the evidence that the option could not be reasonably exercised. This is not a case where it can be said that very significant difficulties would be faced by the couple continuing their life in Turkey. If Ms K's mother falls ill, it is open to her to return to be with her if that is required. Given that the option of relocation to Turkey is open to the parties, it would not be unduly harsh for Ms K to elect to stay here as she is unquestionably entitled to as a British citizen.

37. The claimant's relationship with his child who is a British citizen born in 2002 has not been advanced under 399(a). For the sake of completeness, I note that on 30 July 2010 a care order was made in favour of the local authority with a care plan for her to be placed with a Miss P, a family friend, for long-term fostering. According to a letter from the local authority dated 14 September 2012 it was arranged for the claimant to have direct contact twice a year and telephone contact once every fortnight. This was reduced to once a month, being carefully monitored. The concern appears to have arisen out of a suggestion the claimant might seek for her to be placed with a relative abroad. On 25 March 2014 the local authority indicated that the child had articulated a view to commence telephone contact and that she had accepted a proposal of five minutes every alternate month.

38. According to the claimant's statement he hoped to regain personal contact with his daughter in the near future. That was in April 2014. There is no more recent evidence to indicate that direct contact has been implemented. There is no reason why such telephone contact cannot continue from abroad. In the absence of any clear indication on the evidence that direct contact is likely to be resumed, I do not consider that the child's best interests are undermined in any significant way by virtue of the claimant's deportation.

39. The Secretary of State did not accept that the claimant was in a genuine and subsisting relationship with the child, observing that he had been denied telephone contact since September 2012. It was noted that he had provided evidence that contact had been maintained by sending letters.

40. Accordingly a case under 399(b) (or 399(a)) is not made out and the enquiry must whether there are very compelling circumstances over and above the factors that I have considered above.

41. I drew the attention of the parties to the most recent decision by the Court of Appeal on the approach to Article 8 in criminal deportation cases. Sales LJ in *SSHD v AJ (Angola)* [2014] EWCA Civ 1636 emphasises at [39] the consequence of the Rules operating as a comprehensive code. At [40] he observed:

> "The requirement that claims by appellants who are foreign criminals for leave to remain, based on the Convention rights of themselves or their partners, relations or children, should be assessed under the new rules and through their lens is important, as the Court of Appeal in *MF (Nigeria)* has emphasised. It seeks to ensure uniformity of approach between different officials, tribunals and courts who have to assess such claims, in the interests of fair and equal treatment of different appellants with similar cases on the facts...".

42. I do not find that there are very compelling circumstances in this case. There is no additional factor over and above those already considered under the rules that compels a different outcome.

43. This leaves the question of the impact of Part 5A, s.117C *Exception 2.* There is no dispute that Ms K is a qualifying partner in the light of her nationality. I have found that it would not be unduly harsh (as defined in the rules) for the couple to live in Turkey as there are no insurmountable obstacles to such a course being adopted. I am not persuaded that *Exception 2* envisages a less demanding test than the rule. The rule specifically defines what is meant by unduly harsh. Section 117C(2) explains that the more serious the offence, the greater the public interest in deportation. Thus consideration of whether it would be unduly harsh must include reference to the claimant's offending when measuring the effect on Ms K. The offending was sufficiently serious to bring him within the Rules and it would be illogical if, when considering proportionality under the Act, its impact is somehow lessened.

44. Ms K is unquestionably entitled to remain as a British citizen in the UK. It would not be unduly harsh for her to exercise that right as she has the option of going with her husband. Even if she decides to stay she can visit him on a regular basis. Accordingly *Exception 2* is not made out in respect of Ms K. No case has been argued in respect of the claimant's child from whom he is estranged with only limited contact of a kind that can continue abroad.

45. By way of conclusion under Part 5A, the interference with the Article 8 rights in play is justified by the public interest in the claimant's deportation.

46. By way of summary therefore the decision of the Tribunal is set aside for error of law. I have re-made that decision and dismiss the appeal by the claimant under part 5A of the 2002 Act, the Immigration Rules and on Article 8 grounds against the decision to make a deportation order.

Signed Date 27 February 2015

Upper Tribunal Judge Dawson