Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05799/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business	**Decision & Reasons Promulgated**
On Wednesday 6 January 2021	**On Friday 19 February 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

ALPHA UMARU JALLOH

Respondent

Representation:
For the Appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the Respondent: Mr G Lee, Counsel instructed by Bail for Immigration Detainees

DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. I refer to the parties hereafter as they were before the First-tier Tribunal for ease of reference. The Respondent appeals against the decision of First-tier Tribunal Judge Kudhail promulgated on 25 February 2020 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 14 March 2019 refusing his human rights claims in the context of a decision to deport the Appellant to Sierra Leone.

2. The Appellant came to the UK, in June 1997, then aged fifteen years as an unaccompanied minor. He claimed asylum. The Respondent refused that claim on 11 October 2001. The Appellant appealed but then withdrew his appeal. He was appeal rights exhausted on 4 August 2003. In January 2008, the Appellant wrote to the Respondent challenging the decision and asserting that he was entitled to the benefit of the Respondent's exceptional leave policy in relation to Sierra Leonian asylum seekers.

3. On 31 March 2007, the Appellant made an application for an EEA residence permit as the partner of a Swiss national. He was given approval to marry her in 2008. He was given a five-year permit based on that relationship. His subsequent application to extend the permit was however refused. That relationship has broken down. The Appellant withdrew a further application when the Respondent agreed to grant the Appellant indefinite leave to remain ("ILR") pursuant to her exceptional leave policy. He was granted ILR outside the Immigration Rules ("the Rules") on 9 January 2018.

4. On 26 September 2018, the Appellant was convicted of dangerous driving and using a vehicle whilst uninsured. He was sentenced to nine months in prison on 22 October 2018 and banned from driving for eighteen months. This is the index offence on which the deportation order is based. The deportation order is premised on the Respondent's view that the offence caused serious harm. The Appellant has two earlier convictions, the first in December 2014 of several counts of employee theft and the second in 2017 for driving whilst uninsured and without an appropriate licence. Neither of those offences led to a sentence of imprisonment. Both offences pre-date the granting of ILR to the Appellant.

5. The Judge found at [35] of the Decision that the index offence had not caused serious harm. In consequence, she found at [36] that the Appellant is not a foreign criminal for the purposes of the Rules or Section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C"). The Judge went on to consider whether deportation was justified on the basis that the Appellant's presence is not conducive to the public good (under section 3(5) Immigration Act 1971). Having conducted the balancing exercise between interference with the Appellant's private and family life and the public interest, the Judge concluded that the decision to deport was disproportionate and allowed the appeal.

6. The Respondent appeals on one ground only, namely that the Judge has misdirected herself in law. She submits that the Judge has failed to take into account that the Rules refer to the view of the Secretary of State. It is said that the Judge has failed to give weight to that view. The Respondent also submits that the Judge has failed to take into account other aspects of the offence and the wider harm caused by offences of the nature of the index offence and/or that the Appellant has been assessed as presenting a medium risk of harm of reoffending. It is also asserted in the grounds that the Appellant is a persistent offender and that the Judge has failed to have regard to this issue. The Secretary of State asserts that the Judge has, by reason of her misdirection, failed to apply the Rules in terms of the exceptions to deportation which would apply if the Appellant is classified as a person whose offence has

caused serious harm. She submits that the Appellant is unable to satisfy the exceptions within the Rules. His children live with their mother in Switzerland. He is said to have a partner but, says the Respondent, there is no evidence that the relationship is genuine and subsisting. The Appellant cannot meet the private life exception as he has not lived in the UK lawfully for more than half his life.

7. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchison on 13 March 2020 in the following terms so far as relevant:

> "… 2. It is arguable that the Judge has erred in law by stating that paragraphs 399 and 399A of the Immigration Rules do not apply when the Respondent is required to consider whether they apply as set out in paragraph 398(c) of the Immigration Rules and by failing to take into account the said provisions, instead makes an assessment under the Razgar principles."

8. The Appellant filed a Rule 24 Reply on 12 May 2020 and further submissions on 18 June 2020. Those written submissions were adopted by Mr Lee in oral submissions and I deal with them in substance below.

9. By a Note and Directions sent on 10 June 2020, Upper Tribunal Judge Canavan directed that there should be a remote hearing to determine the error of law issue.

10. So it is that the matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. The hearing was attended by representatives for both parties and by the Appellant himself. There were some technical issues with Mr Clarke's connection which were overcome by short delays whilst the link reconnected. Those issues did not affect the conduct of the hearing overall and all those present indicated that they were able to follow the hearing at all times. I had before me the Appellant's documents as they were before the First-tier Tribunal hearing (referred to hereafter as [AB/xx]) and a bundle provided by the Appellant which included the core documents in relation to the appeal. I also had the Respondent's bundle to which I refer below as [RB/xx]. My attention was drawn to relevant authorities on which the parties relied as set out below.

DISCUSSION AND CONCLUSIONS

11. Before turning to consider the way in which the Judge approached the issues in this appeal, it is appropriate to set out the legal framework.

LEGAL FRAMEWORK

12. The parties' submissions turn on the provisions of the Rules and definitions under Section 117D and it is therefore appropriate to start by setting out those parts which are or might be relevant for my purposes as follows:

The Immigration Rules

"Deportation and Article 8

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) …

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) …;

(b) …; 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."

Section 117

"117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

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

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

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) …

(3) …

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

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

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

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

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

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

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

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

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

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

(4) Exception 1 applies where—

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

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

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

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

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

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

117D Interpretation of this Part

(1) In this Part—

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

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

(a) is a British citizen, or

(b) …

(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."

13. It is common ground that the Appellant does not meet the criteria for automatic deportation based on the length of his sentence. That sentence was one of less than twelve months. Accordingly, to bring the Appellant within the Rules at paragraphs 399 and 399A and Section 117C (via Section 117D definitions) the Respondent has to show that the Appellant has committed an offence which causes serious harm or is a persistent offender. It is worth noting that the Respondent does not rely on the Appellant's offending as being persistent in her reasons for deportation.

14. Although the Respondent's grounds do not cite authority in support of her propositions, Mr Clarke drew my attention to SC (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 929 ("SC (Zimbabwe)"), and in particular what is said about the case of LT (Kosovo) and another v Secretary of State for the Home Department [2016] EWCA Civ 1246 ("LT (Kosovo)") at [17] to [22] of the judgment. The case of LT (Kosovo) might be said to support the Respondent's case and I therefore set out the relevant extract from the judgment in SC (Zimbabwe) dealing with that case as follows:

> "17. Mr Pilgerstorfer for the respondent took three points on the 'persistent offender' issue which is at the heart of this appeal. First, he submitted that, having regard to the wording of paragraph 398(c) of the Rules ('…in the view of the Secretary of State …[X] is a persistent offender who shows a particular regard for the law'), it is necessary for the FTT and UT to attach 'significant weight' to the respondent's view on the point. …
>
> 18. Mr Pilgerstorfer supported his first argument by citing this court's decision in *LT (Kosovo) & anor. v SSHD* [2016] EWCA Civ 1246. The question in the case was whether an offence of supplying a Class A drug fell to be treated as within the 'serious harm' limb of paragraph 398(c) of the Rules. The Secretary of State had decided that the offences in those cases were offences which caused serious harm. It was submitted that substantial weight should be given to that view. Laws LJ (with whom Tomlinson and Lewison LJJ agreed) said (at paragraph 21):
>
> > '21. If it were suggested that the tribunals were bound by the Secretary of State's opinion as to serious harm I would disagree. Such a conclusion would nullify the right of appeal and reduce it to a residual Wednesbury review [1948] 1 KB 23, whereas it is elementary that the right of appeal to the FTT is on the merits (see now section 84 of the Nationality, Immigration & Asylum Act 2002, to which Mr Sedon took us this morning). That position is not shifted by the reference in paragraph 398(c) to the Secretary of State's view. That feature of the language of the rule cannot, in my judgment, deprive the appellants of their right to merits appeal. This approach is, I think, supported by Bah [2012] UKUT 00196 and again Rehman [2001] 1 AC 153. But that is not to say that the reference to the Secretary of State's view is of no significance. The Secretary of State is the primary decision-maker. She has a constitutional responsibility to make judgments as to the force of the public interest in deportation cases. That circumstance has to be balanced against the appellants' right to a merits appeal. In my judgment, that is to be done by requiring the tribunals in a paragraph 398(c) case, while considering all the facts put before them, to accord significant weight to the Secretary of State's view of 'serious harm'. They are not to be bound by it but they are to treat [sic] is an important relevant factor. I should add that I cannot see that this approach is in any way undermined by the new provisions in section 117C and D of the Nationality, Immigration & Asylum Act 2002, to which Mr Sedon referred this morning.'
>
> 19. The *LT* case was concerned solely with the application of paragraph 398(c) of the Rules. With respect to the short obiter dictum in the last sentence of the passage just quoted, I do not agree. It seems to me to be quite clear that once the matter comes before a tribunal or a court, what has to be applied is s.117D (c) of

the Act. The words of that provision are the words which Parliament has chosen to enact, without more. The three elements of that paragraph of the subsection are in clear terms and do not require any gloss to be put upon them by the reference to the Rules. The view of the Secretary of State or indeed of a judge in sentencing remarks may be of assistance to a tribunal or court in deciding whether an offence has caused serious harm or whether an offender is a persistent offender, but I do not see that the statutory words compel any particular weight to be given to the Secretary of State's view on either in the assessment. I would, therefore, reject Mr Pilgerstorfer's first submission.

20. As to the second and third arguments made by Mr Pilgerstorfer, it is necessary to consider the helpful decision of the Upper Tribunal (Andrews J and Upper Tribunal Judge Southern) in *Chege v SSHD* [2016] UKUT 00187 (IAC).

…

22. On the route to that decision, the UT considered the wording of rule 398(c), both as to 'serious harm' and 'particular disregard for the law', but did not express any view on the weight to be attached to the Secretary of State's view as urged by Mr Pilgerstorfer in his first submission which I have rejected. They did, however, say this in paragraph 33 of the Decision:

> '33. … However since, in order for s.117D(2)(c) to be engaged, the Secretary of State must already have formed the view that paragraph 398(c) of the Rules applies, the Tribunal would not be applying s.117C to anyone, however persistent their offending, that the Secretary of State has not already considered showed a particular disregard for the law in the sense explained above.'"

15. The Appellant's Rule 24 submissions rely on the Court of Appeal's judgment in R (oao) Mahmood and others v Secretary of State for the Home Department [2020] EWCA 717 (Civ) ("Mahmood") which also incorporates reference to SC (Zimbabwe). At [35] to [42], the Court made a number of observations about deportation in the context of an offence said to cause serious harm as follows:

> "35. First, the three categories in subsection (2)(c) have a potential to overlap. Plainly an offender who has received a sentence of more than 12 months may have done so because he committed an offence which caused serious harm. Equally, an offender who persistently offends is likely to receive a longer sentence (and more than 12 months) because of a poor antecedent history.
>
> 36. Second, the provision must be given its ordinary meaning informed by its context. The three categories must be read together. This is more than simply a conventional approach to statutory interpretation. It is plain, for example, from the structure of the provision that an offender who has been sentenced to a term of less than 12 months for an offence may nevertheless be treated as a 'foreign criminal' if the offence caused serious harm; and that 'serious harm' will only be relevant when the sentence for an offence is less than 12 months. This throws light on what may be encompassed by an offence which causes serious harm. While it is possible to think of offences which, despite causing the most serious harm, would not typically attract an immediate prison sentence of at least 12 months (causing death by careless driving is an example), in general paragraph (c)(ii) is not concerned with the most serious kind of harm which comes before the Crown Court.

37. Third, Mr Biggs drew our attention to s.32(1)-(5) of the UK Borders Act 2007 ('UKBA 2007'). Section 32(3) provides that, where an offender is sentenced to imprisonment for an offence specified by the Secretary of State by order, a deportation order may be made under s.5(1) of the IA 1971. His submission was that allowing the 'serious harm' test under s.117D(2)(c)(ii) to be satisfied where a given type of offence has been committed, merely because of a perceived generalised harm caused by such offending, would 'trespass into territory' covered by s.32(3) of the UKBA. We are not persuaded that there is any merit in this argument. Section 32(3) has not been brought into legislative effect and the Secretary of State has not made any order as envisaged; and part 5A of the NIAA 2002 was introduced so as to provide a structured approach to the issue of deporting foreign criminals by reference to rights under article 8 of the ECHR.

38. Although, Mr Biggs in his attractive submissions sought to confine the ambit of section 117D(2)(c)(ii) by reference to the words 'caused' and 'harm', these are words in common usage and do not call for extensive commentary.

39. So far as the word 'caused' is concerned, the harm must plainly be causatively linked to the offence. In the case of an offence of violence, injury will be caused to the immediate victim and possibly others. However, what matters is the harm caused by the particular offence. The prevalence of (even minor) offending may cause serious harm to society, but that does not mean that an individual offence considered in isolation has done so. Shoplifting, for example, may be a significant social problem, causing serious economic harm and distress to the owner of a modest corner shop; and a thief who steals a single item of low value may contribute to that harm, but it cannot realistically be said that such a thief caused serious harm himself, either to the owner or to society in general. Beyond this, we are doubtful that a more general analysis of how the law approaches causation in other fields is helpful.

40. As to 'harm', often it will be clear from the nature of the offence that harm has been caused. Assault Occasioning Actual Bodily Harm under s.47 of the Offences Against the Person Act 1861 is an obvious example.

41. Mr Biggs argued on behalf of Mahmood that the harm must be physical or psychological harm to an identifiable individual that is identifiable and quantifiable. We see no good reason for interpreting the provision in this way. The criminal law is designed to prevent harm that may include psychological, emotional or economic harm. Nor is there good reason to suppose a statutory intent to limit the harm to an individual. Some crimes, for example, supplying class A drugs, money laundering, possession of firearms, cybercrimes, perjury and perverting the course of public justice may cause societal harm. In most cases the nature of the harm will be apparent from the nature of the offence itself, the sentencing remarks or from victim statements. However, we agree with Mr Biggs, at least to this extent: harm in this context does not include the potential for harm or an intention to do harm. Where there is a conviction for a serious attempt offence, it is likely that the sentence will be more than 12 months.

42. The adjective 'serious' qualifies the extent of the harm; but provides no precise criteria. It is implicit that an evaluative judgment has to be made in the light of the facts and circumstances of the offending. There can be no general and all-embracing test of seriousness. In some cases, it will be a straightforward evaluation and will not need specific evidence of the extent of the harm; but in

every case, it will be for the tribunal to evaluate the extent of the harm on the basis of the evidence that is available and drawing common sense conclusions."

16. It is not disputed that the burden of proving that an offence has caused serious harm falls on the Respondent to the civil standard ([47] of the judgment in Mahmood). The Court of Appeal went on to make various observations about the nature and extent of evidence which would be relevant to that assessment. In relation to the relevance of the Respondent's view, the Court said the following by reference to other cases:

> "54. As noted above, an issue arises as to the weight to be given to the views of the Secretary of State.
>
> 55. In *SC (Zimbabwe) v Secretary of State for the Home Department* [2018] EWCA Civ 929, the Court of Appeal, in the context of s.117D(2)(c)(iii) of the NIAA 2002 ('persistent offender'), doubted the observation in *LT (Kosovo)* (above) at [21] that the Secretary of State's view as to 'serious harm' was 'an important relevant factor' when applying s.117(2)(c)(iii). McCombe LJ, with whom Lindblom and Leggatt LJJ agreed, noted that it was an *obiter* observation:
>
> > '19. …The view of the Secretary of State or indeed of a judge in sentencing remarks may be of assistance to a tribunal or court in deciding whether an offence has caused serious harm or whether an offender is a persistent offender, but I do not see that the statutory words compel any particular weight to be given to the Secretary of State's view on either in the assessment…'
>
> 56. We agree. The views of the Secretary of State are a starting point and the reasoning of a decision letter may be compelling; but ultimately the issues that arise under s.117D(2)(c)(ii) will be a matter for the FtT. Provided the tribunal has taken into account all relevant factors, has not taken into account immaterial factors and has reached a conclusion which is not perverse, its conclusion will not give rise to an actionable error of law."

17. The principles enunciated by the Court of Appeal are adopted by this Tribunal in the headnote to the case of Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 00350 (IAC) ("Wilson"). I need not set out [1] and [2] of the headnote which are encapsulated in the extracts from Mahmood above. However, [3] of the headnote contains a useful summary of how the evidence should be approached as follows:

> "(3) In determining what factors are relevant or irrelevant, the following should be borne in mind:
>
> > (a) The Secretary of State's view of whether the offence has caused serious harm is a starting point;
> >
> > (b) The sentencing remarks should be carefully considered, as they will often contain valuable information; not least what may be said about the offence having caused "serious harm", as categorised in the Sentencing Council Guidelines;
> >
> > (c) A victim statement adduced in the criminal proceedings will be relevant;

> (d) Whilst the Secretary of State bears the burden of showing that the offence has caused serious harm, she does not need to adduce evidence from the victim at a hearing before the First-tier Tribunal;
>
> (e) The appellant's own evidence to the First-tier Tribunal on the issue of seriousness will usually need to be treated with caution;
>
> (f) Serious harm can involve physical, emotional or economic harm and does not need to be limited to an individual;
>
> (g) The mere potential for harm is irrelevant;
>
> (h) The fact that a particular type of offence contributes to a serious/widespread problem is not sufficient; there must be some evidence that the actual offence has caused serious harm."

18. The Tribunal's decision in Wilson and indeed the Court of Appeal's judgment in Mahmood post-date the Decision but form a useful backdrop against which to assess the Judge's reasoning in this appeal. The Judge herself made reference to [19] of the judgment in SC (Zimbabwe) as I note below.

19. In relation to the subsidiary issue whether the Appellant is a persistent offender or, more accurately, whether the Judge has erred in failing to deal with this point, I have already noted that the Respondent's decision does not rely on the Appellant being a persistent offender. Although, in Mahmood, the Respondent was permitted to add this as an additional reason for deportation in the Court of Appeal (in the linked case of Estnerie), the Appellant refers to the way in which discretion ought to be exercised where an additional reason is relied upon at [68] of the judgment as follows:

> "68. It is established that this court has a discretion to allow a point to be argued on appeal from the UT notwithstanding that it was not taken in the proceedings before the FtT and the UT. That discretion must be exercised with caution so as to ensure that the other party is not unfairly prejudiced. In particular, the discretion should rarely if ever be exercised unless all the necessary facts have been found or if the tribunal's findings would or might have been affected by evidence which was not adduced in the proceedings below…"

20. In relation to persistent offending, the Respondent places reliance on the Tribunal's decision in Chege ("is a persistent offender") [2016] UKUT 00187 (IAC) ("Chege"). The headnote in that case reads as follows:

> "1. The question whether the appellant "is a persistent offender" is a question of mixed fact and law and falls to be determined by the Tribunal as at the date of the hearing before it.
>
> 2. The phrase "persistent offender" in s.117D(2)(c) of the 2002 Act must mean the same thing as "persistent offender" in paragraph 398(c) of the Immigration Rules.
>
> 3. A "persistent offender" is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or that the continuity of the offending cannot be broken. A "persistent offender" is not a permanent status that can never be lost once it is acquired, but an individual can be regarded as a "persistent offender" for the

> purpose of the Rules and the 2002 Act even though he may not have offended for some time. The question whether he fits that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts."

21. The Appellant's Rule 24 submissions draw attention to [54] of the judgment in Chege which is cited by the Court of Appeal with approval at [24] and [25] of the judgment in SC (Zimbabwe) as follows:

> "Plainly a persistent offender is not simply someone who offends more than once. There has to be repeat offending but that repetition, in and of itself, will not be enough to show persistence. There has to be a history of repeated criminal conduct carried out over a sufficiently long period to indicate that the person concerned is someone who keeps on reoffending. However, determining whether the offending is persistent is not just a mathematical exercise. How long a period and how many offences will be enough will depend very much on the facts of the particular case and the nature and circumstances of the offending. The criminal offences need not be the same, or even of the same character as each other. Persistence may be shown by the fact that a person keeps committing the same type of offence, but it may equally be shown by the fact that he has committed a wide variety of different offences over a period of time."

22. Finally, in relation to the weight to be given to the Secretary of State's view of the offending and in particular as to the importance of that view when dealing with the public interest in the Article 8 balance under the Rules, Mr Clarke relied on the Supreme Court judgment in Agyarko and Ikuga v Secretary of State for the Home Department [2017] UKSC 11 ("Agyarko") at [46] and [47] as follows:

> "46. In considering that question, it is important to appreciate that the Rules are not simply the product of a legal analysis: they are not intended to be a summary of the Strasbourg case law on article 8. As was explained at para 10 above, they are statements of the practice to be followed, which are approved by Parliament, and are based on the Secretary of State's policy as to how individual rights under article 8 should be balanced against the competing public interests. They are designed to operate on the basis that decisions taken in accordance with them are compatible with article 8 in all but exceptional cases. The Secretary of State is in principle entitled to have a policy of the kind which underpins the Rules. While the European court has provided guidance as to factors which should be taken into account, it has acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The margin of appreciation of national authorities is not unlimited, but it is nevertheless real and important. Immigration control is an intensely political issue, on which differing views are held within the contracting states, and as between those states. The ECHR has therefore to be applied in a manner which is capable of accommodating different approaches, within limits. Under the constitutional arrangements existing within the UK, the courts can review the compatibility of decision-making in relation to immigration with the Convention rights, but the authorities responsible for determining policy in relation to immigration, within the limits of the national margin of appreciation, are the Secretary of State and Parliament.

> 47. The Rules therefore reflect the responsible Minister's assessment, at a general level, of the relative weight of the competing factors when striking a fair balance under article 8. The courts can review that general assessment in the event that the decision-making process is challenged as being incompatible with Convention rights or based on an erroneous understanding of the law, but they have to bear in mind the Secretary of State's constitutional responsibility for policy in this area, and the endorsement of the Rules by Parliament. It is also the function of the courts to consider individual cases which come before them on appeal or by way of judicial review, and that will require them to consider how the balance is struck in individual cases. In doing so, they have to take the Secretary of State's policy into account and to attach considerable weight to it at a general level, as well as considering all the factors which are relevant to the particular case. This was explained in *Hesham Ali* at paras 44-46, 50 and 53."

THE DECISION AND RELEVANT EVIDENCE

23. In order to set the parties' competing submissions in context, I set out the relevant passages from the Decision as well as extracts from the evidence upon which reliance was placed in the course of submissions.

24. The Judge considers the issue whether the Appellant has committed an offence which has caused serious harm at [31] to [36] of the Decision as follows:

> "31. The appellant has made a human rights claim, as a result the respondent considered the claim under paragraph 398 of the immigration rules as she is required to do. Section 117C of the Nationality, Immigration and Asylum Act 2002as amended is a mirror image of the requirements. The first consideration in this case is whether appellant is a Foreign Criminal as defined. In this case the respondent argues that the appellant has been convicted of an offence which has caused serious harm as per Section 117D of the Nationality, Immigration and Asylum Act 2002 as amended. In doing so she points to the appellant's criminal offence of '*dangerous driving and using a vehicle whilst uninsured*' as her primary reason for this, effectively the trigger offence. The appellant received a 9 months sentence for this offence. At the time of the decision, taken on 29 November 2018, the appellant also had other previous convictions of (1) five counts of employee theft receiving a 160 hours voluntary service and a fine; and (2) driving without a license [sic] and using an uninsured vehicle receiving fines and 6 points on his license [sic]. These have not been referred to as the reason for the decision that serious harm was caused (paragraph 25/RFRL/p24/AB).
>
> 32. The first question given all of the above is whether the appellant's offending amounts to causing serious harm. In the Respondents Guidance 'Criminality: Article 8 ECHR cases Version 8.0, 13 May 2019', it states:
>
> > *'Serious harm*
> >
> > *It is at the discretion of the Secretary of State whether he considers an offence to have caused serious harm.*
> >
> > *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 a widespread problem that causes serious harm to a community or society in general.*

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

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

33. In SC (Zimbabwe) v Secretary of State for the Home Department [2018] EWCA Civ 929, Lord Justice McCombe gives comment on the weight the Courts should give to the Secretary of State view or the sentencing judges remarks when considering serious harm or persistent offending, he states:

'19. … It seems to me to be quite clear that once the matter comes before a tribunal or a court, what has to be applied is s.117D(c) of the Act. The words of that provision are the words which Parliament has chosen to enact, without more. The three elements of that paragraph of the subsection are in clear terms and do not require any gloss to be put upon them by the reference to the Rules. The view of the Secretary of State or indeed of a judge in sentencing remarks may be of assistance to a tribunal or court in deciding whether an offence has caused serious harm or whether an offender is a persistent offender, but I do not see that the statutory words compel any particular weight to be given to the Secretary of State's view on either in the assessment."

34. I have considered the appellant evidence's [sic] with regards to the circumstances of the offence and how it occurred. I also have the sentencing judges remarks which I have considered. The sentencing judge does not make comment on the serious harm caused on the passenger in the vehicle at the time the appellant was driving. He does however refer to the hysteria in the case and the fact she was calling the police at the time. This I find, is a natural reaction to the circumstances she found herself in.

35. I also take into account the police chase and damage caused to property. The appellants evidence is that he has apologised to the victim and they are now on speaking terms. There was no witness statement from the victim on this. Neither did I have a victim impact statement. Therefore, this is neutral and does not take me further forward with regards to the serious harm. The Probation report dated 26 August 2018 (p83/AB), refers to the appellant's risk of reconviction as low and that he has a *'medium risk of serious harm to the general public'*. However, the Probation report dated 07 August 2019, refers to the appellant seeking to undertake volunteering work and his compliance with his probation requirements. Taking the above into account and applying it to the facts of this case I conclude that the appellant has not caused serious harm due to his offending as there is no evidence supporting serious psychological or physical harm to the victim or that he contributed to a widespread problem that causes serious harm to a community or to society in general.

36. As a consequence, the appellant is therefore not a foreign criminal for the purposes of Section 117C and the provisions of paragraph 398,399 or 399A of the immigration rules do not apply to him. This leaves me with a decision by the respondent to make a deportation order under section 3(5) of the Immigration

Act 1971 for the purposes of the refusal of the human rights claim. This requires an assessment under *Razgar.*"

25. In light of the Judge's reliance on the sentencing remarks, I set those out in full. They appear at [RB/261-262]:

"RECORDER HUNTER: Mr Jalloh if you would please stand up.

You are now aged 36, having been born on the 7th of March of 1982, and on the 26th of September of this year, you pleaded guilty of two offences, for dangerous driving, about which I have heard and also an offence of no insurance because you don't have a valid driving licence. There were other offences I haven't heard anything about and I disregard them for the purposes of sentencing you.

This is your second offence, however, for driving without insurance, when just over a year ago you were fined £120 and your licence endorsed with six penalty points. Following your plea of guilty, you were committed to this court for sentence. I accept the remorse that has been urged on the court that you now demonstrate, but you weren't demonstrating any during the piece of shocking driving, and it can only be described in that way.

Your reasons that you have given for driving in that way, as they've been urged upon this court, I don't entirely accept because I've also read what else was in the car and the circumstances of the passenger and the degree of hysteria that you placed her in. This was, as I say, a shocking piece of driving. You were driving between 50 and 60 miles an hour in residential streets where the speed limit is 30 miles an hour. You drove at speeds of over 110 miles an hour on roads where the speed limit was 40 miles an hour. You skidded through red traffic lights. You forced a private vehicle off the road. You drove erratically over speed bumps and mini roundabouts, you overtook vehicles. You rammed one police car, damaged another and, as I say, the offence is further aggravated by the fact that you were carrying a passenger who was hysterical and herself phoning the police whilst urging you to stop.

A number of police vehicles had to be engaged in pursuit of you, and were only capable of stopping you when you damaged your vehicle to the extent that it was almost impossible for you to drive off further. You disregarded the warnings of others and when stopped had to be placed on the floor. At that point you immediately conceded that your driving had been dangerous, although you claimed in your handcuff predicament that you were not dangerous and agreed that you had severely f***** up, I think your words.

I've read the pre-sentence report and considered carefully what it suggested and I've read the references that were uploaded shortly before I cam into court and I of course give you credit for pleading guilty. But this offence, as your own counsel clearly concedes, crosses the custody threshold and I'm afraid this is an offence for which the only appropriate punishment that can be achieved is the imposition of an immediate custodial sentence. And so, for this piece of driving, which would have received a sentence of imprisonment of 12 months, had you not pleaded guilty, I pass a sentence of imprisonment for nine months, of which you will serve half.

> You will be disqualified from driving for a period of 18 months, longer than the minimum 12 months because you will spend the first part of that period in custody. You will remain disqualified until you have passed an extended retest.
>
> For the offence of no insurance, of course, you would have been a totter in any event, and you're already disqualified, so your licence will be endorsed and I order whatever is the appropriate Victim Surcharge."

26. Since it is the Respondent's case, in effect, that the Judge has failed to give sufficient weight to her views, and since Mr Lee relied on the paucity of the Respondent's reasoning in that regard, I set out also the relevant extract from the Respondent's decision letter (at [AB/30-55]) which is indeed brief as follows:

> "25. Your deportation is conducive to the public good and in the public interest because you have been convicted of an offence which has caused serious harm. This is because dangerous driving and using a vehicle while uninsured. Therefore, in accordance with paragraph 398 of the Immigration Rules, the public interest requires your deportation unless an exception to deportation applies. The exceptions are set out at paragraphs 399 and 399A of the Immigration Rules."

I note the incorporation of the sentencing remarks as set out above at [18] of the decision letter.

DISCUSSION

27. I begin with the thrust of the Respondent's argument concerning the wording of the Rules. It is asserted in the grounds that, because paragraph 398(c) of the Rules refers to the Respondent's view whether the offence has caused serious harm, the Judge has erred by failing to acknowledge this factor.

28. It is not suggested by the Respondent and nor could it be that the Judge was bound to accept the Respondent's view as determinative. The argument concerns the weight to be given to her view.

29. I begin with the Rules themselves. Paragraph 398(c) does indeed make reference to the view whether an offence has caused serious harm to be that of the Secretary of State. That is an express reference which does not appear in all paragraphs of the Rules. However, it is implicit from any decision of the Respondent that it must be the view of the Respondent (or more accurately the person making the decision on her behalf) that a person either satisfies or does not satisfy a particular requirement of those Rules. That may be said of the Rules in any context and not simply deportation cases or cases involving consideration of the public interest. It is also worthy of note that paragraph 398(c) refers to the requirement to consider paragraphs 399 and 399A being placed on the Secretary of State where the assessment is reached. As one would expect, the rule says nothing about that obligation being placed on a Tribunal or Court simply because the Secretary of State has made the assessment that the offence has caused serious harm.

30. Mr Clarke relies on Agyarko as requiring particular weight to be given to the Respondent's view in a case such as this. He says that this is because the rule in

question imports a public interest consideration which it is for the Respondent to determine in the first instance. However, although Agyarko supports the proposition that it is for the Respondent in the first instance to determine the general policy position in relation to the balance to be struck between the rights of the individual and the public interest, the judgment does not extend to the assessment of a Tribunal or Court which is reaching a determination of the rights of the individual and the public interest in a particular case.

31. That position can be illustrated in this case by the following example. If the Judge in this case had concluded that the Appellant's offence had indeed caused serious harm, but this was not a sufficient justification for deportation generally (rather than by balancing that factor against the interference), that would amount to a clear error of law. The Respondent has set out her views in the Rules and in statute to indicate that the public interest requires an offender to be deported if the offence is one which has caused serious harm unless the exceptions are met or there are other very compelling circumstances over and above those exceptions which outweigh the public interest. However, the issue whether the offence is one which has caused serious harm is a matter of assessment for the Judge in the individual case. It is only if the assessment is that serious harm has been caused that the exceptions under the Rules or Section 117C have to be considered.

32. I accept that LT (Kosovo) as cited in SC (Zimbabwe) might lend support to the Respondent's argument that, when reaching the assessment whether an offence has caused serious harm, a "significant weight" should be given to the Respondent's view (see [21] of that judgment as cited in SC (Zimbabwe) and set out at [14] above). That arises from "the constitutional responsibility [placed on the Respondent] to make judgments as to the force of the public interest in deportation cases".

33. What is said in LT (Kosovo) though has to be read now with both Section 117 and the later Court of Appeal judgments following the introduction of that legislation. As noted by the Court of Appeal in SC (Zimbabwe) at [19] of its judgment, the remarks of the Court of Appeal in LT (Kosovo) regarding the introduction of Section 117 were obiter. The Court of Appeal in SC (Zimbabwe) expressly disagreed with those remarks and made plain in that paragraph that "once the matter comes before a tribunal or a court, what has to be applied is s.117D(c) of the Act". That is part of the extract cited by the Judge. The Court of Appeal in Mahmood expressly agreed with the view expressed in SC (Zimbabwe) that "the statutory words [do not] compel any particular weight to be given to the Secretary of State's view". The Court on that occasion held that "[t]he views of the Secretary of State are a starting point". That is the wording adopted by this Tribunal in Wilson.

34. Although both Mahmood and Wilson post-date the Decision, Judge Kudhail was bound by the Court of Appeal's judgment in SC (Zimbabwe) which she cited and on which she placed reliance. There can be no error in her doing so.

35. Insofar as the Respondent's grounds assert that the Judge has failed to "acknowledge the fact that 398(c) specifies that it is the Secretary of State's view as to whether the

deportation of the person is conducive to the public interest", that submission has no merit. The Judge begins her consideration at [31] of the Decision with reference to the Respondent's view. She reminds herself of and sets out at [32] of the Decision the Respondent's policy concerning the meaning of "serious harm".

36. The question thereafter is one of the appropriate weight to be given to the Respondent's view in this case. Much must depend in this context on the extent of the evidence and reasoning on which the Respondent relies. The issue is, as I have already noted, one on which the Respondent bears the burden. I have cited at [26] above from the Respondent's decision letter. Although I do not accept that the reference to the sentencing remarks in the decision is, as Mr Lee submitted, irrelevant to the Respondent's consideration, her reasoning is no more than mere assertion; it is undeveloped by reference to the nature and components of the offence. That is reflected in the Judge's analysis at [31] of the Decision.

37. For those reasons, I am unpersuaded by the submission that the Judge has failed to have regard to the Respondent's view when dealing with the issue of serious harm. She has given it some weight but the weight which she could give it is impacted by the level of the reasoning given.

38. Turning then to the other aspects of the Judge's reasoning which are criticised in the Respondent's grounds, it is said that the Judge has relied on the absence in the sentencing remarks of mention of harm caused to the passenger of the car who was one of the victims of the offence. That criticism has no merit. I have set out the sentencing remarks at [25] above. Those remarks clearly encompass the impact of the offence on the victim. Judge Kudhail clearly has regard to what is said in those sentencing remarks about the impact ([34] of the Decision). It might be said that, at [35] of the Decision, the Judge did not exercise the sort of caution towards the Appellant's own evidence which the guidance in Wilson advocates. However, when that paragraph is read with [34] of the Decision, it is clear that the Judge discounts the Appellant's evidence about the longer-term impact due to lack of evidence from the victim herself but, at the same time, did not give weight adversely to the Appellant due to lack of evidence about what that impact was. Whilst the authorities make clear that the Respondent is not required to disclose the victim impact statement (even assuming she has it in her possession), the burden in relation to demonstrating serious harm is on the Respondent and it is for her to point to whatever evidence she has in that regard or to the factors on which she relies.

39. Nor can it be said that the Judge has failed to have regard to the other potential victims of this offence. As Mr Clarke submitted and I accept, given the description of the extent and nature of the offence as set out in the sentencing remarks, it is extremely fortuitous that no-one was injured or even killed by the Appellant's "shocking" driving. However, albeit a brief reference, it cannot be said that the Judge has failed to note the other components of the offence. She refers at [35] of the Decision to the police chase and damage to property caused. As is made clear in the authorities, it is not the potential for harm which is relevant but the harm which has been caused.

40. That also is the answer to Mr Clarke's reliance on the characterisation of the offence as "dangerous driving". As Mr Lee submitted and I accept, the question is whether the offence has caused harm and not whether it has given rise to danger. That the driving was undoubtedly dangerous, as the Appellant accepts, gives rise to the potential for harm but that is not enough to satisfy the requirement for the offence to cause harm.

41. Neither can it be said that the Judge has ignored the wider implications of this type of offending. The Judge refers to the "widespread problem that causes serious harm to a community or to society in general" at [35] of the Decision. As Mr Lee submitted and I accept, that perhaps goes too far in terms of relevant considerations (see in particular [3(h)] of the guidance in Wilson). Any error in that regard however cannot assist the Respondent.

42. Ultimately, as the Judge noted at [35] of the Decision, she had to assess whether the offence caused serious harm on the evidence before her. As the Tribunal indicated in Wilson, if the Judge has had regard to all relevant factors, has not had regard to irrelevant factors and has not reached a decision which is perverse, there is no error. The conclusion reached by the Judge may not be that which many other Judges (including myself) would have reached on these facts but, ultimately, the conclusion was one for this Judge on her assessment of the evidence and the only issue for me is whether her assessment contains errors of law. It does not.

43. Although not the subject of submissions before me, I also observe that, notwithstanding the conclusion of the Judge that Section 117C was not triggered, her assessment of the Appellant's private life in particular at [46] to [59] of the Decision closely mirrors the considerations which would arise if this case were being considered applying Section 117C (viz length of lawful residence, social and cultural integration and obstacles to integration in home country).

44. I deal finally and very briefly with the alternative submission that the Judge has not considered whether the Appellant's offending amounts to persistent offending. Not only is that not a reason given for deportation by the Respondent in her decision, but it is not clearly suggested by the facts in this case. As Mr Clarke pointed out and I accept, in Estnerie which was one of the linked cases in Mahmood, the Court of Appeal permitted the Secretary of State to introduce this at a very late stage notwithstanding the omission of it as a reason from the outset. That has to be set in the context of what is said about that appellant's offending at [71] of the judgment in Mahmood. In this case, as Mr Lee pointed out and I accept, the Appellant has been found guilty of other offences on two separate occasions, in 2014 and 2017. However, as the Judge noted at [49] of the Decision, those convictions pre-dated the granting of ILR to the Appellant in January 2018 and could not of themselves have been considered by the Respondent at that time to be grounds for deportation. Not only is it the case that the facts do not suggest that the offending was also persistent but the Judge's finding in relation to the previous offences is fatal to the Respondent's alternative submission.

CONCLUSION

45. For the foregoing reasons, I am satisfied that the grounds do not disclose an error of law in the Decision. I therefore uphold it with the result that the Appellant's appeal remains allowed.

DECISION AND DIRECTIONS

The Decision of First-tier Tribunal Judge Kudhail promulgated on 25 February 2020 does not involve the making of an error on a point of law. I therefore uphold the Decision.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 25 January 2021