



Upper Tribunal  
Immigration and Asylum Chamber

Appeal Number DA/00127/2015

**THE IMMIGRATION ACTS**

Heard at Field House  
On 23<sup>rd</sup> March 2017

Decision and Reasons Promulgated  
On 29<sup>th</sup> June 2017

Before

UPPER TRIBUNAL JUDGE EYRE QC

Between

CURTIS ALEXANDER FRASER

**Appellant**

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

**Respondent**

**Representation:**

For the Appellant: Mr. A. Seelhoff (A. Seelhoff Solicitors)

For the Respondent: Mr. T. Melvin (Home Office Presenting Officer)

**DECISION AND REASONS**

- 1) At the hearing in front of me on 23<sup>rd</sup> March 2017 the Appellant and the Respondent agreed that if I were to conclude that the Appellant was not a person whose offending had caused “serious harm” within the meaning of Rule 398 (c) of the Immigration Rules then he would not be liable to deportation and the appeal would succeed. Having heard argument on 23<sup>rd</sup> March 2017 I informed the parties of my conclusion that the Appellant was not such a person and ordered that the deportation order and liability for deportation notice affecting the Appellant be reversed. This judgment sets out my reasoning.

**The Factual History.**

- 2) There is no dispute about the facts of this matter and I can summarise the general background very briefly. The Appellant is a Jamaican citizen. He was born on 4<sup>th</sup> December 1965. He has been in the United Kingdom since 1<sup>st</sup> August 1998 but his presence after 30<sup>th</sup> December 1999 appears to have been as an unlawful overstayer. The papers contain material about the Appellant's family and domestic circumstances but in the light of my conclusion about the interpretation of Rule 398 (c) it was not necessary for me to assess the proportionality of deportation and I need not recite that material here.
- 3) The Appellant has been sentenced by Inner London Crown Court on two occasions.
  - a) On 20<sup>th</sup> December 2011 he received concurrent community orders of twenty-four months each coupled with Drug Rehabilitation Requirements for two offences committed on 21<sup>st</sup> April 2011. Those were offences of possessing Class A drugs (namely crack cocaine) with intent to supply and possession of cannabis. It appears that the Appellant was in possession of £1,930 in cash; crack cocaine valued at £3,240; and three wraps of herbal cannabis.
- 4) On 20<sup>th</sup> February 2014 the Appellant received concurrent sentences of eight months and two months imprisonment for two offences committed on 14<sup>th</sup> August 2013. Those were respectively offences of simple possession of crack cocaine and simple possession of cannabis. It appears from the judge's sentencing remarks that the Appellant had been charged with the offence of possession with intent to supply. He had pleaded guilty to simple possession but that plea had not been accepted by the Prosecution. There had then been a trial which had resulted in the Appellant's acquittal on the charges of possession with intent the jury having accepted the contention that the Appellant had possession of the drugs for his personal use. The Appellant had been remanded in custody awaiting trial and in the light of that the effect of the sentence of eight months was that the Appellant was released immediately.
- 5) On 18<sup>th</sup> June 2014 the Secretary of State served the Appellant with notice of his Liability to Deportation. In that notice the Secretary of State set out her conclusion that the Appellant's offending had caused serious harm within the meaning of Rule 398 (c). A deportation order followed.

**The Procedural History.**

- 6) The appeal against the deportation order has had a somewhat involved history.
- 7) After a hearing on 21<sup>st</sup> July 2015 First Tier Tribunal Judge Oxlade dismissed the appeal. Permission to appeal was granted by First Tier Tribunal Judge Simpson. On 7<sup>th</sup> December 2015 Upper Tribunal Judge O'Connor allowed the appeal and set aside the decision of the First Tier Tribunal. He did so having concluded that Judge Oxlade had erred in law in his treatment of the issue of whether the Appellant's offending had caused serious harm. The First Tier Tribunal decision was set aside and Upper Tribunal Judge O'Connor directed that the "consideration of the Article 8 grounds,

and in particular paragraph 398 of the Immigration Rules” be undertaken *de novo* in the Upper Tribunal.

- 8) That reconsideration took place before Deputy Upper Tribunal Judge Mandalia at a hearing in February 2016 with the Deputy Judge’s decision being promulgated on 12<sup>th</sup> July 2016. The Deputy Judge dismissed the appeal. Unfortunately, he fell into error because he failed to address the question of whether the Secretary of State was correct in concluding that the Appellant’s offending had caused serious harm or rather he approached the case on the footing that the Secretary of State’s expression of her view was conclusive as to this aspect of the case
- 9) The Appellant appealed to the Court of Appeal with the permission of the President of the Upper Tribunal (Immigration and Asylum Chamber). On 5<sup>th</sup> December 2016 with the consent of the parties the Court of Appeal allowed the appeal and directed that the matter be reconsidered by the Upper Tribunal. The order of the Court of Appeal recited the parties’ agreement that the appeal be remitted to the Upper Tribunal for “a substantive determination of the appeal in relation to paragraph 398 of the Immigration Rules and the Appellant’s reliance on Article 8 grounds.” As a consequence the matter came before me on 23<sup>rd</sup> March 2017.

### **The Applicable Test.**

- 10) The starting point is the wording of paragraph 398 of the Immigration Rules. In particular the question to be addressed is whether the Appellant falls within the scope of paragraph 398 (c) on the footing that “in the view of the Secretary of State [his] offending has caused serious harm”. I have already explained that it was common ground that if the Appellant did not fall within the scope of that paragraph he was not, in his particular circumstances, liable to deportation and his appeal must succeed. It was also common ground that if the Appellant did fall within the scope of that paragraph consideration would need to be given to his assertion of family life and private life rights such that deportation would be a disproportionate interference with those rights.
- 11) It was also common ground between the parties that the error into which Deputy Judge Mandalia had fallen was that of proceeding on the basis that the Tribunal could not go behind the Secretary of State’s view that the Appellant’s offending had caused serious harm.
- 12) What I must do is consider what is meant by “offending [which] has caused serious harm” and then consider whether the Appellant’s offending could properly be found to have been such offending.
- 13) The term “offending [which] has caused serious harm” is not defined in the Immigration Rules. Neither Mr. Seelhoff for the Appellant nor Mr. Melvin for the Secretary of State sought to put before me any authority addressing the meaning of these words.
- 14) Mr. Seelhoff for the Appellant relied on the contentions made in his skeleton argument dated 28<sup>th</sup> January 2016. The passage relevant to the meaning of “offending

[which] has caused serious harm” is that at paragraph 17. There Mr. Seelhoff said that something more than “simple harm” was needed. He said that the matter must be assessed in the round taking account of the circumstances of the specific offence; the particular harm caused by the offence; the number and type of offences; the length of any custodial sentence or sentences; and any particular reason for a longer or shorter sentence than might have been expected having been imposed.

15) For the Secretary of State Mr. Melvin relied strongly on the Secretary of State’s published guidance to her staff. I was provided with a copy of the guidance published on 22<sup>nd</sup> February 2017 in respect of “Criminality: Article 8 ECHR cases”. Although published in February 2017 it is apparent that this is, at least in part a revision of guidance published previously.

16) The relevant part of the guidance appears at page 7 which recites the definition of foreign criminal from Section 117D (2) of the Nationality, Immigration, and Asylum Act 2002 and which then purports to define serious harm saying:

‘It is at the discretion of the Secretary of State whether she 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 to 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.’

17) Mr. Melvin pressed me to regard this guidance as conclusive as to the meaning of the Rule. He contended that it set out a definition which I should assume had been the result of expert assessment and consideration. Mr. Seelhoff was critical of the guidance. He pointed out that it had not been laid before Parliament and he invited me to take account of the approach laid down by the Supreme Court in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33 [2012] 1 WLR 2208. Addressing an earlier iteration of the guidance in his skeleton argument Mr. Seelhoff contended that the guidance was “fundamentally flawed and incompatible with the law”. Before me Mr. Seelhoff’s stance was that little, if any, weight should be attached to the guidance.

18) I have decided that I should not follow either of these radically opposed approaches to the guidance. In *Alvi* the Supreme Court was dealing with a rather different situation. Their lordships expressly envisaged it being legitimate and appropriate for the Secretary of State to issue guidance. What is not permissible is for there to be an

attempt to impose additional requirements over and above those provided for in the Immigration Rules without the same having been laid before Parliament. The guidance here sets out the view of the Secretary of State as to the interpretation of Rule 398 (c). It is a reasoned document which gives every appearance of having been the fruit of careful consideration. In those circumstances it is not appropriate for me simply to disregard it as Mr. Seelhoff came close to suggesting I should do. However, Mr. Melvin goes very substantially too far when he invited me to regard it as conclusive. For me to do that would be to fall into the same error as Deputy Judge Mandalia. The position is governed by the Immigration Rules and I must consider the meaning of the provision in the Rules. The view of the Secretary of State cannot be determinative of that meaning whether that view is expressed in the form of general guidance or in the form of a decision in a particular case. Nonetheless, the guidance is relevant when considering what is meant by “offending [which] has caused serious harm. This is not just because the guidance is the product of careful consideration but also because the Immigration Rules provide that it is the Secretary of State who is to be the decision maker on this issue. The guidance is, accordingly, the considered view on definition of the person charged under the Rules with determining the application of that definition.

- 19) The effect of this is that I must assess the meaning of “offending [which] has caused serious harm” as a matter of principle considering the language used and the context in which it is used together with the purpose of the provision. In doing so I will take account of the Secretary of State’s guidance as being the result of careful reflection and consideration by the appropriate decision maker and, as such, carrying considerable persuasive weight in respect of the interpretation of this term but not as being conclusive in that regard.
- 20) In considering the meaning of this term its context is highly significant. The relevant part of the Immigration Rules is considering the circumstances in which a foreign criminal will be liable to be deported. The Rules provide separately for the deportation of those who have received sentences of imprisonment of more than four years and of between one and four years. They also provide separately for those persons who are “persistent” offenders showing “a particular disregard for the law”. The consequence is that those who fall to be considered as offenders whose offending has caused serious harm are those who are not persistent offenders and who have not been sentenced to a prison sentence of at least one year or more. The Rules envisage that such persons can nonetheless be offenders whose offending has caused serious harm. In considering the context it is important to remember that the provisions govern the deportation of those lawfully in the United Kingdom. In the current case the Appellant appears to be an unlawful overstayer but there are other mechanisms in place for removing such persons. The deportation provisions apply to those lawfully here and are to be interpreted in that context.
- 21) In that context I have concluded that “serious harm” must require the presence of some harm over and above the fact that a crime has been committed. There must moreover be a level of seriousness such that it is *prima facie* appropriate as being conducive to the public good and in the public interest for a person lawfully here to

be required to leave the United Kingdom by reason of that offending. A level of seriousness is required viewing the offending objectively but it is to be remembered that it is not necessary for the harm to be of the gravest type nor even very serious (an aspect which is apparent from the fact that this provision applies to those who will have received prison sentences of less than one year and to those whose offending will not have resulted in a prison sentence).

- 22) If that is correct as a definition of what is required for there to have been serious harm then there will need to be consideration of the particular offending and of the harm actually resulting from it. The variety of offences and the differing degrees of harm which can result from apparently similar offending mean that attention must be paid to the particular circumstances and consequences of the actual offending of the person whose case is being considered.
- 23) In considering whether the offending of a particular person is “offending [which] has caused serious harm” the Secretary of State will need to consider:
  - a) The offending as a whole. This will involve consideration of the length of time over which the offending has occurred and the nature of the particular offences.
  - b) The effect of the offending as a whole on the actual victims of that offending.
  - c) The seriousness of the offences committed when compared with other offences of the same kind. In this regard the sentence passed will be a potent indication of the gravity of the offence as demonstrating the assessment of the sentencing judge. That assessment will need to be accorded substantial weight but it must be remembered that the Secretary of State will *ex hypothesi* be considering those sentenced to less than one year in prison. Moreover, there can be reasons other than gravity of offending or seriousness of harm which can result in a lesser sentence than might otherwise have been expected being imposed.
- 24) The Secretary of State’s guidance states that an offence “that has contributed to a widespread problem that causes serious harm to a community or to society in general” is to be regarded as an offence that has caused serious harm. In my judgement considerable caution is needed in this regard. In assessing whether offending has caused serious harm then it is appropriate to look to the impact not just on the immediate victims of a particular offence or offences but also to the harm caused to the wider community by the offending in question. Thus a night-time street robber harms not just the person who he robs but also the wider community by contributing to a greater or lesser extent to causing others to be fearful of being on the streets at night-time. In addition it is appropriate for some account to be taken of the overall impact of offending of the type committed by the particular offender. However, this latter aspect can only be of very limited assistance in the application of Rule 398 (c). This is because what is required is that the offending of the particular person is “offending [which] has caused serious harm”. It is not sufficient that it be offending which has the potential to cause serious harm nor that it is offending of a kind which as a whole causes serious harm unless it can be seen as contributing in a real sense to that serious harm.
- 25) The third paragraph of the Secretary of State’s guidance is somewhat opaque. What

is being said there may be of relevance in relation to some kinds of offence where the harm caused is not confined by the wording of the provision defining the offence. Thus it would be open to the Secretary of State to conclude that an offender convicted of an assault occasioning actual bodily harm had in the particular circumstances caused serious harm even though there had not been any conviction of causing grievous bodily harm. If all that is being said in the guidance is that reference must be made to the actual harm caused by the actual offending without that assessment being constrained by the labelling of the offence then that is sensible and appropriate. However, if it is being said that the person in question can be treated as having engaged in offending for which he has not been convicted then that cannot be appropriate. In the context of the current case the Appellant was tried on the charges of possession with intent to supply and was acquitted. The Secretary of State cannot go behind that acquittal and she must proceed on the basis that the offending in 2013 was limited to that of simple possession of the drugs in question.

- 26) I have said that the assessment of whether there is “offending [which] has caused serious harm” must be focussed on the particular offending and the harm caused by that offending. I am reinforced in that view by noting that the Secretary of State’s guidance states that those who have been convicted of “one or more violent, drugs, or sex offences” will “usually” be considered to have caused serious harm. This makes it clear that the Secretary of State does not regard it as an invariable consequence even of such offending that serious harm will have been caused.

**The Application of the Test to the Circumstances of this Case.**

- 27) There are a number of factors present here which could be said to support the view that the Appellant’s offending had caused serious harm.
- a) The Appellant engaged in offending on two separate occasions.
  - b) The second instance of offending appears to have been at a time when he was still subject to a community order in respect of the earlier offending albeit very much at the end of that period.
  - c) The first offence was one of the possession of Class A drugs with the intent to supply. That is a serious matter because of the potential for Class A drugs to cause harm to the users of the drugs and to society more generally.
  - d) The second instance of offending shows that there was renewed involvement with Class A drugs despite the Appellant having been given the support of a Drug Rehabilitation Requirement.
- 28) There are also a number of factors supporting the view that this offending had not caused serious harm.
- a) The most significant is the fact that the sentence imposed for the offence of possession of Class A drugs with intention to supply was a community order. This must be taken to have been an indication by the sentencing judge of his or her view of the gravity of the offence. It is to be noted that the community order was coupled with a Drug Rehabilitation Requirement and so it appears that the Appellant was being given an opportunity to get himself clear of drugs. The

giving of such an opportunity might lead to the making of a community order where one would not otherwise be warranted. Nonetheless, the fact that the sentence for possession of Class A drugs with intention to supply was a community order must be taken as an indication that the sentencing judge regarded this offending as very much at the lower end of the scale of seriousness for such offences.

- b) The convictions in February 2014 were for offences of simple possession and as explained above the Appellant is to be dealt with on the basis that this was the totality of the offending in August 2013. The Appellant is not to be regarded as having engaged again in possession with intent to supply when a jury had acquitted him of that charge.
  - c) The sentence imposed in February 2014 is also significant. It was a prison sentence but it was imposed in the light of the fact that the Appellant had spent time in custody on remand and it appears to have been calculated with a view to ensuring the immediate release of the Appellant. In that regard I note that having stated the term of imprisonment the sentencing judge said to the Appellant "that means you should not now be going back into custody ... you have paid your debt for these offences effectively...".
  - d) The overall position in respect of the Appellant's offending is that he has one conviction for possession of Class A drugs with intent to supply for which he received a community order together with convictions for the possession of cannabis and for the possession of cocaine in respect of which he received on the first occasion a community order and latterly a prison sentence calibrated so as to ensure his immediate release. Those sentences must be seen as indicating the views of the judges dealing with the Appellant in respect of the seriousness of his offending.
- 29) I do not overlook the inherent seriousness of all offending which involves Class A drugs. Offending which involves repeated instances of supply to others or repeated instances of possession with intent to supply is likely to be almost inevitably offending which causes serious harm because of the scope for real harm to multiple victims and to society. Here there is only one instance of such possession and, as already explained, that is to be regarded as being very much at the lower end of the scale of gravity for such offences. In those circumstances I concluded that it could not properly be said that the Appellant's offending was offending which had caused serious harm within the meaning of Rule 398 (c). It followed that the Appellant was not liable to deportation and for those reasons the appeal was allowed.

Signed: Stephen Eyre

Upper Tribunal Judge Eyre QC  
Dated: 24<sup>th</sup> March 2017