

**THE IMMIGRATION ACTS**

Heard at Field House  
On 15 January 2015

Determination Promulgated  
On 10 February 2015

Before:

UPPER TRIBUNAL JUDGE GILL

Between:

Secretary of State for the Home Department

Appellant

And

SOA  
(ANONYMITY ORDER CONTINUED)

Respondent

**Representation:**

For the Appellant:

Ms. F. Allen, of Counsel, instructed by Barnes Harrild & Dyer Solicitors.

For the Respondent:

Mr. E. Tufan, Home Office Presenting Officer

**DETERMINATION AND REASONS**

**Introduction**

1. The Secretary of State has been granted permission to appeal the determination of Judge of the First-tier Tribunal M J Gillespie who, following a hearing on 9 October 2014, allowed the appeal of SOA (a national of Ghana born in February 1987) against a decision of the Secretary of State of 20 December 2013 that SOA was liable to automatic deportation. The judge allowed the appeal on the ground that SOA came within exception 3 from automatic deportation under s.33 of the U.K. Borders Act 2007 (the "2007 ACT"), i.e. that his deportation would be in breach of Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).
2. I shall hereafter refer to the parties as they were before the First-tier Tribunal (FtT), the Secretary of State as the respondent and SOA as the appellant.

**The appellant's criminal convictions**

3. The appellant claimed to have arrived in the United Kingdom as an infant, in about 1988. He was granted indefinite leave to remain on 19 January 1998. His application in January 2005 for British nationality was refused because he had received a caution for shoplifting as a minor, in 2000. His second application for naturalisation (in April 2008) was also refused. By

this time, he had been convicted of an offence of driving whilst disqualified, using a vehicle whilst uninsured and failing to give his name and address. He was sentenced to unpaid work.

4. On 14 September 2010, the appellant pleaded guilty to offences of possession with intent to supply a quantity of cocaine and cannabis (together valued at about £2,000) and of possession of a prohibited weapon (a canister of CS gas). The offences of September 2010 triggered deportation action. On 2 November 2010, he was sentenced to 3 years' imprisonment. On 12 January 2012, when he was due to be released from his sentence of imprisonment on licence, the appellant was taken into immigration detention and served with documents informing him of his liability to an order of automatic deportation. On 21 May 2012, he was admitted to bail by a judge of the FtT.

### **The respondent's grounds and submissions at the hearing**

5. The respondent's grounds contend (in summary) as follows:
  - i) The judge misdirected himself in law, in that, he commenced his consideration of the appellant's Article 8 claim by considering s.117 of Part 5A of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") as opposed to the requirements under the relevant provisions of the Statement of Changes in the Immigration Rules HC 395 (as amended) (the "IRs").
  - ii) In reaching his finding that there would be very significant obstacles to the appellant's integration into Ghana, the judge had taken into account the fact that the appellant does not speak any indigenous language of Ghana but he failed to take into account the fact that he speaks English and that English is the official language of Ghana.
  - iii) The grounds contend that, as the appellant's family were originally from Ghana, it was reasonable to assume that he would have some familiarity with social and cultural customs in Ghana by virtue of his upbringing within a Ghanaian family; that he would be able to seek emotional and financial assistance from his family members in the United Kingdom with integration; and that it would be open to family members to accompany him, in an interim capacity or more permanently if they chose to do so, to assist with his integration.
  - iv) The judge erred in finding that s.117C(5) of the 2002 Act was satisfied. In reaching his finding that it would be unduly harsh for Ms SF (the appellant's partner) and their daughter, S, to remain in the United Kingdom without the appellant, the judge took into account that it would not be in the best interests of S to be without her father and that Ms SF needed the emotional support of the appellant. The grounds contend that these considerations were not sufficient to establish undue harshness. The judge had failed to balance the best interests of S against the wider public interest. The grounds make reference to AR (Pakistan) v SSHD [2010] EWCA Civ 816 at [18] and Lee v SSHD [2011] EWCA Civ 348 at [27] to the effect that it would be contrary to principle if a child's interests must always take precedence over the wider public interest where the two are in conflict and that deportation can be proportionate even if it brings about the permanent separation of families.
6. The respondent's grounds did not raise the issue that the judge had applied the wrong version of the IRs. Ms Allen, who appeared before the judge on the appellant's behalf, did not raise any objection to this issue which I raised at the commencement of the hearing.
7. Mr Tufan said that it was not clear whether the judge had before him the respondent's guidance in a document entitled: "*Immigration directorate instructions Chapter 13: criminality guidance in Article 8 ECHR cases*" version 5.0 dated 28 July 2014 (hereafter the "Guidance"). In fact, I noted from the judge's Record of Proceedings that the submissions of Ms Allen before the judge referred to the "IDIs" (page 12 at letter E) and, in particular, the 20-

year continuous residence requirement and the “no ties” stipulation. It follows therefore that Ms Allen in her submissions before the judge relied on the 2012 IRs.

8. However, it is also clear from the judge’s Record of Proceedings that the respondent’s representative (Mr Archie) clearly had the provisions of para 399 of the 2014 IRs in mind. This is because the Record of Proceedings shows that he referred in his submissions to para 399 in the following terms (and I quote) (page 12, letter B):

“.. 399 reflects 117C”

9. Given that para 399 of the 2012 IRs cannot possibly be said to reflect s.117C, Mr. Archie must have been referring to the 2014 IRs.
10. The judge did not apparently realise that the representatives were addressing him on different versions of paras 398, 399 and 399A. This would account for the fact that he considered the version of the IRs under the 2012 IRs not realising that he was focusing on the incorrect provisions.
11. Ms Allen accepted that the judge had applied the wrong version of the IRs. He should have applied the version as amended by HC 352 with effect from 28 July 2014 (which I shall hereafter refer as to the “2014 IRs”). He applied instead the version of the IRs that was in force immediately before 28 July 2014 (which I shall hereafter refer to as the “2012 IRs”).
12. The relevant provisions of the 2012 IRs and the 2014 IRs are set out in Annex A hereto in a form which makes it easy to see the differences between them. It will be obvious that paras 398, 399 and 399A of the 2014 IRs are more difficult for an individual to satisfy than paras 398, 399 and 399A of the 2012 IRs.
13. The judge therefore misdirected himself by incorrectly applying the less stringent requirements under paras 399(a), 399(b) and 399A of the 2012 IRs when he considered the appellant’s Article 8 claim based on his relationships with Ms SF and S as well as his Article 8 claim based on his length of residence and ties, as explained at [24] to [32] below.
14. By applying the 2012 IRs, the judge found that there were disparities between the provisions of the IRs and s.117A-D. He said he resolved these disparities in favour of s.117 as it was primary legislation. In fact, no such disparities existed between the relevant provisions in the 2014 IRs and s.117.
15. The judge also considered s.117C(4). At [27-28] of the determination, he found that:
  - i) the appellant had been lawfully resident in the United Kingdom for most of his life;
  - ii) he was socially and culturally integrated in the United Kingdom; and
  - iii) there would be very significant obstacles to his integration into Ghana;and that he therefore satisfied s.117C(4) and fell within Exception 1 under s.117C(3).
16. Since the appellant only needs to succeed under one applicable exception and given that Exception 1 under s.117C(3) is mirrored in the version of para 399A of the 2014 IRs, the parties addressed me on the question whether the errors explained in outline at [13] above and in more detail at [24] to [32] below were material.
17. In oral submissions, Mr Tufan raised an issue to which Ms Allen objected because it was not raised in the respondent’s grounds. Mr Tufan took issue with the fact that the judge had stated at [18] of the determination that the only factual issue concerned the date of the appellant’s entry into the United Kingdom. He also submitted that the judge had not given any reasons at all for his findings in the appellant’s favour. He had accepted all of the

evidence before him, including the evidence that the appellant has no ties in Ghana, without giving any reasons.

18. Mr Tufan also raised the following issues, to which Ms Allen did not raise any objection:

- i) Mr Tufan took issue with the fact that the judge had stated at [20] of the determination that the respondent's representative before the judge, Mr Archie, had suggested that there was no DNA evidence that the appellant was the father of S but had said that he preferred to take the appellant's case at its highest. Mr Tufan informed me that Mr Archie's notes of the hearing showed that he had pointed out that there was no DNA evidence and that, even if the appellant's claim that he was the father of S was taken at its highest, his Article 8 claim based on this relationship could not succeed. Mr Tufan submitted that this did not accord with para 20 of the determination.
- ii) Mr Tufan submitted that the judge had failed to apply the Guidance. He referred me, in particular, to para 2.3.8 which states that, for the purposes of s.117B(4), a person's immigration status is precarious if he is in the United Kingdom with limited leave but without settled or permanent status or if he has obtained leave fraudulently or if he has been notified that he is liable to deportation or administrative removal. He submitted that this was a relevant consideration because the appellant's relationship with Ms SF began after the appellant had been served with papers notifying him of his liability to automatic deportation. He also referred me to the non-exhaustive list of factors set out at para 3.3.2 to be considered in assessing whether a foreign criminal has a genuine and subsisting parental relationship with a child. He drew my attention to the fact that the list included the following factors which he submitted the judge had failed to consider:

- “• where the foreign criminal lives in relation to the child;
- whether any evidence has been provided in support of the claimed parental relationship, e.g. views of the child, other family members, social workers or other relevant professionals;
- the extent to which the foreign criminal makes an active contribution to the child's life – this may include financial, emotional and other forms of support to ensure the child's wellbeing.”

### **Summary of the evidence before the judge of the appellant's circumstances**

19. The basis of the appellant's Article 8 claim before the judge may be summarised as follows:
20. Following his release on immigration bail on 21 May 2012, the appellant met Ms SF in August 2013. In about December 2013, she became pregnant by the appellant, and gave birth to S in about mid-August 2014. Ms SF and the appellant do not see each other every day; the appellant sees her and the child every other day. Ms SF has her own council accommodation. The evidence before the judge was that the couple hoped to settle together in their own home and live together permanently as husband and wife.
21. The evidence before the judge was that the appellant had grown up in the United Kingdom and studied in the United Kingdom. He had also worked in the United Kingdom. His mother and various siblings were British nationals. He had two brothers (R and G) and one half-brother (St) in the United Kingdom. The appellant's father left the family when the appellant was a child. He has not been seen or heard of since the appellant was a baby. The appellant had a sister, Sh, in Ghana who married in July 2014 and subsequently settled with her husband in the United States of America. The appellant therefore has no family members left in Ghana. The appellant has no ties to Ghana.

22. The appellant has left the United Kingdom twice since his arrival – once to travel to France on holiday in June 1998 and once to travel to Ghana with his mother for three weeks in 2002. His mother travelled to Ghana in July 2014 to attend his sister’s wedding and in September 2014 to attend the funeral of her maternal aunt by whom she had been raised and whom she referred to as mother. His brother, R, has travelled to Ghana three times since his arrival, his last journey being to attend the wedding of his sister, Sh. His brother, G, has never returned to Ghana. His half-brother (St) visited Ghana once when he was ten years old.

### Assessment

23. The judge found that the appellant satisfied the following provisions of the 2012 IRs for the reasons explained below. However, he misdirected himself in the ways I shall now describe for the reasons given below. It is plain that these errors were material to his findings that the appellant satisfied the relevant requirements on the basis of his relationships with S and Ms SF. Accordingly, I do not need to rely upon the argument summarised at my [18.i] above and the non-exhaustive list of factors in para 3.3.2 of the Guidance to which Mr. Tufan drew my attention.

### As to the Article 8 claim based on the appellant’s relationship with the child, S:

24. The judge found ([31] of the determination) that para 399(a) of the 2012 IRs was satisfied because S was a British citizen and it would not be reasonable to expect her to leave the United Kingdom. He also said that the requirement in para 399(a)(b) of the 2012 IRs (not para 398(a)(i)(b) as stated by the judge) – that “*there was no other family member who is able to care of the child in the UK*” - was not repeated in s.117D. He therefore effectively disapplied para 399(a)(b).
25. I cannot see why the judge referred to s.117D at this juncture in his determination. I can only surmise that he was considering the definition of a “*qualifying child*” under s.117D together with the provision in S.117B(6). This is the only provision in ss.117A-D which refers to the requirement of it not being reasonable to expect a child to leave the UK, which was one of the requirements in paragraph 399(a) that the judge was considering. This is the only way of making sense of his observation at [31] that the provision in rule 399(a)(i)(b) – that ““*there was no other family member who is able to care of the child in the UK*” - is not repeated in s.117D. If am right, that the judge had in mind a combination of s.117B(6) and the definition of qualifying child in s.117D, he plainly erred in relation to both. This is because the opening words of s.117B(6) make it clear that it does not apply to a person liable to deportation and because s.117D is only an interpretation section and therefore it does not provide a stand-alone basis of qualification for an exception to automatic deportation.
26. In any event, even leaving this point aside, it is plain that the judge erred in finding that the appellant satisfied para 399(a) simply on the basis of his finding that it would be not reasonable to expect S to leave the United Kingdom. The version of para 399(a) under the 2014 IRs replaced this test of reasonableness with a requirement that was not only more stringent (i.e. whether “unduly harsh”) but two-fold because it required consideration of this issue from two angles. The new version of para 399(a) requires it to be shown that:
- “(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”.
27. The judge did consider whether deportation would be unduly harsh on S (as well as Ms SF) at [30] of his determination, which reads:
- “30. I address the issue whether the effect on these two persons of the appellant's deportation would be unduly harsh. Although the child is in the care of a person who is a committed mother, her mother is herself a young person of 19 years, who enjoys a subsisting and

genuine relationship with the appellant, and who enjoys his ongoing financial and other support in the care of their child. She seeks to raise her child in co-operation with the appellant and looks to a settled married life with him. In addressing this issue, I attach weight to the public interest in deportation expressed by the Act, and to the increased public interest in this case, because of the nature and seriousness of the offence. As against that, I bear in mind the favourable finding already made for the appellant in connection with the public interest considerations under section 117B. I attach weight also to the circumstance, which I hold to be proven, that the appellant is a reformed person who poses no ongoing threat of further offending or of other harm to the public. I recognise, finally, the circumstance that the appellant, having been sentenced to less than four years imprisonment, does not fall foul of the provision 117C(6) which enacts that in cases of sentences exceeding four years, the public interest requires deportation unless there are very compelling circumstances over and above those enacted in the exceptions. In all of the circumstances, I consider that the deportation of the appellant would deprive [Ms SF] of the necessary support and companionship of the appellant and would leave her to raise their child on her own, without his contribution and support. It would leave the child without a committed father. The deportation would in [*sic*] circumstances have an effect that is undesirable and unduly harsh on mother and child and not in the best interests of the child.”

28. It is plain from [30] of the determination that the judge failed to consider whether it would be unduly harsh for S to live in Ghana with the appellant. In itself, this error is material to his findings that para 399(a) was satisfied. It is also plain, as contended in the grounds, that the judge effectively treated the best interests of the child as determinative. This last point is in itself an error that was material to the judge’s finding that para 399(a) was satisfied. I therefore do not need to rely upon the argument summarised at my [18.i] and whether the judge should have considered the non-exhaustive list of factors set out at para 3.3.2 of the Guidance.

As to the Article 8 claim based on the appellant’s relationship with Ms SF:

29. The judge found ([31] of the determination) that appellant did not satisfy para 399(b) because he had only accrued 13 years’ residence with valid leave. However, he relied upon his finding that the appellant satisfied s.117C(5), which provides:

“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.”

30. The judge decided that, as the appellant satisfied s.117C(5), his deportation was not in the public interest whether or not paras 399(a) and (b) were satisfied. This was because he considered that, where there is a conflict between the IRs and ss.117A-D, the latter should be preferred because it is primary legislation.
31. However, there was no conflict between the IRs and s.117C because the version of para 399 (b) under the 2014 IRs sets out (in effect) how the phrase “unduly harsh” under s.117C(5) falls to be assessed. As in the case of para 399(a) of the 2014 IRs, para 399(b) of the 2014 IRs provides for a two-fold test. However, in the case of a partner, the test was more stringent still. Para 399(b) of the 2014 IRs 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 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.”

32. The provisions of EX.2 are set out in Annex B hereto. It is plain from [30] of the determination that the judge failed to consider whether it would be unduly harsh for Ms SF to live in Ghana because of compelling circumstances over and above those described in para EX.2 of Appendix FM. In itself, this error is material to his findings that para 399(b) was satisfied. It is also plain that he failed to take into account the fact that the relationship began after the appellant had been notified of his liability to deportation and his status was therefore precarious. Even if the Guidance was not before him, this issue fell to be considered on general principles. Finally, and as contended in the grounds, it is evident that the judge treated Ms SF's needs and desires as determinative. This last point is in itself an error that was material to the judge's finding that para 399(b) was satisfied.

As to the Article 8 claim based on the appellant's residence in the UK and ties:

33. The judge found (at [32] of the determination) that the appellant satisfied para 399A because he had lived in the United Kingdom continuously for at least 20 years and "*he had no ties (including social, cultural or family)*" with Ghana. He found that the appellant did not have any connection to life in Ghana as constitute ties to that country as defined in Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC).

34. However, the "*no ties*" stipulation was deleted in the 2014 IRs and replaced with the following:

"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."

35. The requirements of the version of para 399A under the 2014 IRs are effectively the same as those set out in s.117C(4) which the judge did consider, at [27-28] of the determination which read:

"27. On my finding, the appellant has been in the United Kingdom for almost the entirety of his life. He has been lawfully resident with indefinite leave to remain for about 17 years, although for some of this period he was serving [sic] sentence of imprisonment. He is fully socially and culturally integrated into the United Kingdom. He has engaged in criminal activity in an underclass of drug dealers but has re-established himself in law-abiding circumstances in the 18 months since his liberation.

28. There would, in my judgment, be very significant obstacles to his integration into the country to which he would be deported. Although a Ghanaian by origin, he has not been in Ghana, save for a three week holiday with his mother as a ten year old, since he was a babe in arms. He does not speak any indigenous language of Ghana. He has no acquaintance with, or even knowledge of, any member of his extended family in Ghana. His maternal grandmother may be alive, but that woman did not even bring up his own mother, who was raised by an "aunt". His paternal grandfather is deceased. He has no siblings in Ghana. He may have more distant relatives in Ghana but even his eldest brother, who has travelled to Ghana on about three or four occasions in the last two decades, is unable to identify any such relatives and knew only their sister in Ghana. That sister is now in the United States of America. The appellant would be without means of support or accommodation in what is effectively a foreign country to him. In all of the circumstances, I hold that Exception 1 therefore does apply".

36. Ms Allen submitted that the judge had considered all of the factors and given adequate reasons for finding that there would be very significant obstacles to the appellant's integration into Ghana. I put to Ms Allen whether the judge's failure to consider whether it would be unduly harsh for Ms SF and S to live in Ghana with the appellant was relevant to an assessment of the requirement for there to be very significant obstacles to the appellant's

integration into Ghana. In response, Ms Allen questioned how a 19-year old girl with a baby could help the appellant integrate into Ghana.

37. In my judgement, the judge overlooked considering the following factors which, taken cumulatively, are material to his finding that there would be very significant obstacles to the appellant's integration into Ghana:
- i) As contended in the respondent's grounds, the judge fail to take into account the fact that the appellant speaks English and that English is the official language in Ghana.
  - ii) As contended in the respondent's grounds, the judge failed to take into account that the appellant's family members could assist him, both emotionally and financially to reintegrate into Ghana. He also failed to consider the possibility of the appellant's family members accompanying him, either on a temporary or permanent basis, to help with his integration. This was of particular relevance in the instant case, given that various family members had made visits to Ghana since they first arrived in the United Kingdom and given that his sister lived in Ghana, at least until recently. Even if it is correct that she has left Ghana, that does not mean that she is unable to assist him with his integration.
38. For these reasons, I concluded that the judge had erred in his determination on a point of law such that his determination fell to be set aside.
39. The next question is the extent to which the determination should be set aside. This informs the extent of the re-making of the decision. I stress that, in considering this issue, I have been careful to bear in mind that the appellant should not lightly be deprived of findings in his favour.
40. I am satisfied that, although the issues raised by Mr Tufan which I have summarised at [17] above were not raised in the respondent's written grounds, fairness to both parties requires that the exceptional course of setting aside the entire determination be taken, for reasons I will now give.
41. The mere fact that an objection is not raised in the grounds of application for permission does not, of itself, mean that the party wishing to rely upon it should be precluded from doing so. This is so whether it is the appellant or the respondent who wishes to rely upon a new matter. Ms Allen did not say that she had been caught by surprise and needed time to take instructions. She did not request further time to consider her position.
42. At the hearing, I retrieved the judge's typed transcript of the proceedings and read to the parties relevant extracts from it. I informed the parties that I would consider the transcript carefully and Ms Allen's submission that the judge's credibility assessment and findings of primary fact should be allowed to stand.
43. Having considered the judge's transcript, it is evident that:
- i) The judge had erred in stating that the only factual issue concerned the date of the appellant's entry into the United Kingdom. There were other factual issues, as described at ii) and iv) of this paragraph, in addition to the fact that the respondent did not accept paternity of S.
  - ii) Mr Archie had cross-examined the appellant about his evidence that his sister in Ghana (Sh) had left Ghana and gone to live in the United States of America (page 2, at letter G). Mr. Archie had also cross-examined the appellant about his visit to Ghana in 2002. The appellant was asked:

"With whom did you stay in Ghana"



to which he replied:

“I can’t remember – I was pretty young”

As the trip took place in 2002, the appellant was 15 years old at the time of the trip (not ten years old as the judge said at [28] of the determination). However, the appellant’s mother said in cross-examination (page 8, at letter F-G) that the appellant stayed with her at the home of her daughter, i.e. Sh. This was therefore a potentially important discrepancy between the oral evidence of the appellant and his mother, which the judge failed to engage with.

- iii) It is also plain that Mr Archie probed in cross-examination of the appellant and Ms SF whether they were each aware that the appellant faced the possibility of deportation when they began their relationship (page 3, letters E-F, in relation to the appellant and page 6, letter E in relation to Ms SF). Even leaving aside the respondent’s Guidance in which it is said (at para 2.3.8) that an individual’s immigration status is precarious if he has been notified that he is liable to deportation, this fell to be considered on general principles as I have said above. A relationship formed when an individual is under the threat of deportation carries less weight. Although this issue was specifically raised by Mr. Archie’s cross-examination, the judge failed to engage with it.
- iv) In cross-examination, the appellant’s mother said, variously, that she had one brother and two sisters still in Ghana (page 8, letter A) and also that she had only one sister in Ghana (page 9, letter A). This was an obvious discrepancy which the judge failed to resolve. Furthermore, it was clear from her evidence that she had at least one sibling in Ghana. This was relevant, given that the evidence before the judge was that the appellant’s sister (Sh) had lived with one of his mother’s immediate relatives.
- v) Importantly, at [28] of the determination, where the judge considered whether there were very significant obstacles to the appellant’s integration into Ghana, the judge failed to mention the sibling(s) of the appellant’s mother. The closest he came was that he said: *“He [the appellant] has no acquaintance with, or even knowledge of, any member of extended family in Ghana”*.

- 44. These omissions, taken together with the fact that the judge’s determination gives the reader no inkling at all of the respondent’s case nor is there any mention of the evidence summarised at i)-iv) of the preceding paragraph, evidence which was elicited in cross-examination and which took up a significant part of the oral evidence before the judge, have driven me to the conclusion that the respondent’s case has not been considered at all by the judge.
- 45. In the exercise of my discretion, I have decided to permit the respondent to rely upon the challenge to the judge’s findings of fact on the ground that he gave no reasons for accepting the evidence before him. I am satisfied that the judge failed [to] resolve or consider the factual issues summarised above and failed to give reasons for his positive findings in the appellant’s favour. For the reasons given, I am satisfied that the judge erred in law such that his determination falls to be set aside. I set it aside in its entirety. None of his findings shall stand.
- 46. However, the transcript of the judge’s Record of Proceedings shall be before the FtT as the record of the evidence that was given before him. I shall therefore arrange for the transcript to be sent to the parties.
- 47. Ms Allen asked me to remit the case to the same judge. I have decided that this would be inappropriate and unfair to the respondent, not least because the judge has already taken a view of the evidence. I have therefore decided that the decision is to be re-made by a judge other than Judge M J Gillespie.

**Anonymity**

48. The judge made an anonymity order. I cannot see any good reason for a blanket anonymity order, given that the identity of the claimant's alleged partner and their alleged child can be anonymised to protect the child. However, as this was not raised at the hearing me, I have decided to leave the anonymity order in place to give the parties an opportunity to address the issue.
49. If the parties wish to make representations as to whether the anonymity order should be varied so that the prohibition on direct or indirect identification relates only to the claimant's alleged partner and their alleged child, they must be ready to address the FtT on that issue at the resumed hearing.

**Decision**

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that it falls to be set aside in its entirety. This case is remitted to the First-tier Tribunal for the decision on the appellant's appeal to be re-made by a Judge of the First-tier Tribunal other than Judge M J Gillespie.

Signed

Date: 10 February 2015

Upper Tribunal Judge Gill

**ANNEX A**

**Paras 362, 397, 398, 399 and 399A of the Immigration Rules, as amended by HC 352 with effect from 28 July 2014**  
**showing the amendments made by HC 352 in bold (the “2014 IRs”) and the text it replaced as crossed text and in square brackets (the “2012 IRs”).**

A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at **28 July 2014** are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.’

...

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. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

**A.398. 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) a foreign criminal applies for a deportation order made against him to be revoked.**

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

- (a) the deportation of the person from the UK is conducive to the public good **and in the public interest** because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least four years;
- (b) the deportation of the person from the UK is conducive to the public good **and in the public interest** because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
- (c) the deportation of the person from the UK is conducive to the public good **and in the public interest** because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

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

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 seven 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** [~~it would not be reasonable to expect the child to leave the UK~~]; and
  - (b) **it would be unduly harsh for the child to remain in the UK without the person who is to be deported** [~~there is no other family member who is able to care for the child in the UK~~];

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 [~~or in the UK with refugee leave or humanitarian protection~~], 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.**

~~[(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and  
(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK]~~

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.**
- ~~[(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK;  
or  
(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.]~~

**ANNEX B****Appendix FM, Exceptions EX.1 and EX.2****Section EX: Exceptions to certain eligibility requirements for leave to remain as a partner or parent**

EX.1. This paragraph applies if

- (a)
  - (i) the applicant has a genuine and subsisting parental relationship with a child who-
    - (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
    - (bb) is in the UK;
    - (cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and
  - (ii) it would not be reasonable to expect the child to leave the UK; or
- (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

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.

**ANNEX C****Section 19 of the Immigration Act 2014, which with effect from 28 July 2014, introduced a new Part 5A to the Nationality, Immigration and Asylum Act 2002 containing new sections 117A-D****“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) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
  - (a) are less of a burden on taxpayers, and
  - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
  - (a) are not a burden on taxpayers, and
  - (b) are better able to integrate into society.
- (4) Little weight should be given to—
  - (a) a private life, or
  - (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person’s immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person’s removal where—
  - (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
  - (b) it would not be reasonable to expect the child to leave the United Kingdom.

**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) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

- (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.

- (3) For the purposes of subsection (2)(b), a person subject to an order under—

- (a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
- (b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or (c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

- (4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

- (a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
- (b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;
- (c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and
- (d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

- (5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it.”