



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 00415 (IAC)

**THE IMMIGRATION ACTS**

**Heard at Royal Courts of Justice  
On 20 April 2015**

**Decision & Reasons Promulgated**

.....

**Before**

**UPPER TRIBUNAL JUDGE STOREY  
UPPER TRIBUNAL JUDGE DAWSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR YAN BOSSADE  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondent: Mr K Mak, Solicitor, instructed by MKM Solicitors

*1. For courts and tribunals, the coming into force of Part 5A of the Nationality, Immigration and Asylum Act 2002 (ss.117A-D) has not altered the need for a two-stage approach to Article 8 claims.*

*2. Ordinarily a court or tribunal will, as a first stage, consider an appellant's Article 8 claim by reference to the Immigration Rules that set out substantive conditions, without any direct reference to Part 5A considerations. Such considerations have no direct application to rules of this kind. Part*

5A considerations only have direct application at the second stage of the Article 8 analysis. This method of approach does not amount to according priority to the Rules over primary legislation but rather of recognising their different functions.

3. In the context of foreign criminal cases (because the provisions found in Part 13 of the Rules are a complete code encompassing both stages of the Article 8 assessment), this means that Part 5A considerations have no direct role at the first stage when a court or tribunal is deciding whether an applicant meets the substantive conditions of paragraphs 399 or 399A of the Immigration Rules. They only have direct application at the second-stage, viz. assessment under the rules that involve a proportionality assessment: viz. paragraph 398 and (in revocation cases) paragraph 390A. In cases other than those concerning deportation of foreign criminals, where the Rules are not a complete code, it may still be necessary to conduct this second stage outside the Rules: see Secretary of State for the Home Department v AJ (Angola) [2014] EWCA Civ 1636 at [39].

4. Whilst Part 5A considerations may have indirect application to the Immigration Rules, including those setting out substantive conditions such as paragraphs 399 and 399A, this is limited to their role as statements of principles that can be used where appropriate to inform the meaning of key terms set out in such paragraphs.

5. New paragraph 399A of the Immigration Rules remains similar to the old in considering the foreign criminal deportee's situation both in the UK and in the country of return. However, so far as concerns focus on a person's situation in the UK, time in the UK is no longer relevant as such except in the context of lawful residence (399A(a)) and paragraph 399A(b) introduces new criteria that relate to social and cultural integration in the UK. So far as concerns focus on the situation in the country of return, paragraph 399A no longer looks at 'ties' per se but at the more inclusive notion of integration and obstacles thereto. By requiring focus on integration both in relation to a person's circumstances in the UK as well as in the country of return, the new Rules achieve a much more holistic assessment of an appellant's circumstances. Thereby they bring themselves closer to Strasbourg jurisprudence on Article 8 in expulsion cases which has always seen consideration of both dimensions as requiring a wide-ranging assessment: see e.g. Jeunesse v Netherlands (GC) App.No. 12738/10, 31 October 2014, paragraphs 106-109.

## **DECISION AND REASONS**

1. The respondent (hereinafter "the claimant") is a national of the Democratic Republic of Congo (DRC) aged 29. On 23 July 2013 the appellant (hereinafter "the SSHD") decided to make a deportation order against him on the ground that he was a foreign criminal sentenced to a period of imprisonment of at least twelve months.

2. In a determination of 24 June 2014, a First-tier Tribunal (FtT) panel comprising Judge Abebrese and N.L.M. Richardson allowed the claimant's appeal under Articles 3 and 8 of the ECHR and paragraph 276ADE of the Immigration Rules. On 28 January 2015 we set aside the decision of the First-tier Tribunal for error of law (the principal errors found were inadequate treatment of Article 3; failure to recognise that the claimant was shut out from paragraph 276ADE of the Immigration Rules by suitability requirements; and failure to assess objectively the issue of ties in the country to which he would be deported). In our decision we observed that whilst ideally the further hearing would not take place

before the Upper Tribunal had issued new country guidance on the Democratic Republic of Congo, we might find it necessary, if that were delayed, to proceed with the case nonetheless. We made this observation in light of the fact that the Upper Tribunal had taken steps to convene a new country guidance case to address the issue of whether there was a risk on return to criminal deportees, which Phillips J had had to engage with P (DRC) R (on the application of) v Secretary of State for the Home Department [2013] EWHC 3879 (Admin).

3. At the hearing before us we explained to the parties that rather than adjourn to await the pending country guidance case, which was then imminent, we would hear their submissions and then give them a specified period in which to make written submissions dealing with the implications for our decision of the new country guidance once reported. Following the reporting of that decision, BM and Others (returnees - criminal and non-criminal) Democratic Republic of Congo (CG) [2015] UKUT 293 (IAC), on 2 June 2015, we duly received submissions. It is convenient to say at this stage that in light of the BM decision we are entirely satisfied that the claimant would not face risk on return to the DRC by virtue of the fact that he is a foreign national offender (FNO). He has never asserted that he falls into any of the risk categories identified in BM or other country guidance cases on the DRC. Mr Mak's further written submission that we should find that the claimant would face a real risk of being detained for more than a day because he had been away from the DRC so long was unsupported by any evidence and can be rejected as purely speculative. Our conclusion is that his case cannot succeed on asylum-related grounds; it hinges entirely on Article 8 ECHR.

4. The claimant who was born in 1986 came to the UK when aged 4. He was granted indefinite leave to remain (ILR) in 1998. He began committing offences from 2002, with a history of convictions in 2002, 2004, 2005, 2006, 2008, 2009, 2010 and 2011, culminating in a conviction at Croydon Crown Court for robbery and related offences for which he received a sentence of 42 months' imprisonment. On 2 August 2006 the claimant was issued with a "warning letter" about his criminal behaviour (whilst imprisoned in HMP Glen Parva).

5. At the hearing before the FtT the claimant gave evidence as did his mother. The claimant stated that he had two brothers born in the UK. They had different fathers. The claimant had a difficult relationship with his stepfather. He entered a life of crime which spiralled and eventually he was sentenced to a term of imprisonment. In his statement of May 2014 he said his most recent spell in prison and the deportation decision had made him realise he had to change. He now accepted full responsibility for his crimes and his behaviour. He had learnt and developed the right skills to equip himself better for life outside. He had no memory of life in the DRC and had always considered himself British. He had never met his own father. He had never been outside the UK. He did not speak Lingala or French. In the DRC he would have no friends, family, home or knowledge of the language or culture. He was not aware he had uncles in the DRC.

6. The FtT also heard from the claimant's mother. She explained that when he was a teenager he refused to listen to instructions or be disciplined. She believed it was possible for her son to have changed.

7. Before the FtT there was also an OASys Report indicating that there was still an element of risk in respect of the claimant and that his licence was due to expire in October 2015. The claimant had had a number of opportunities to stop re-offending which he had not taken advantage of.

8. Shortly after we set aside the FtT decision, the parties were sent directions putting both on notice that it was their responsibility to file any documentary evidence upon which reliance was placed. No further evidence was produced in response to that direction nor was there any application for the claimant or any other witness to give oral evidence. In such circumstances we indicated to the parties that the hearing before us would be confined to submissions.

## **Submissions**

9. At the outset both parties said that we should decide the claimant's appeal, not under the version of the Immigration Rules in force at the date of decision but as at the date before us. That meant looking at the Rules as they had been amended on 28 July 2014. Both parties also reminded us of the need to apply Part 5A of the 2002 Act, inserted by s.19 of the Immigration Act 2014. Before going further, it is convenient to set out in full paragraphs 398 and 399A of the Rules (as amended on 28 July 2014) and Part 5A of the Act:

Paragraphs 398 and 399A provide:

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

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

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

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

...

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.”

Headed “Article 8 of the ECHR: Public Interest Considerations”, Part 5A provides:

**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."

10. Mr Jarvis for the SSHD contended that because the claimant had been sentenced to less than 4 years (3 years, 9 months) he fell under paragraph 399A(a)-(c). As regards paragraph 399A(a), Mr Jarvis accepted the claimant met this condition as he had been lawfully resident in the UK for most of his life: he was granted ILR on 24 September 1998, which meant he had over 16½ years' lawful residence.

11. As regards paragraph 399A(b), however, Mr Jarvis argued that notwithstanding he had received all his schooling in the UK and had a mother and two half-brothers who were British citizens, he was not socially and culturally integrated in the UK. He had spent significant periods of his residence in prison and excluded from society. Even when not in prison his pattern of offending showed his lifestyle was anti-social. He had also failed to show he was financially independent to any significant degree whilst he was not in prison. His offending, namely repeated robbery, showed an obvious disregard for the safety and wellbeing of fellow citizens.

12. In any event, even leaving paragraph 399A(b) aside, according to Mr Jarvis the claimant could still not meet the conditions set out in paragraph 399A(c), which required him to show that there would be very significant obstacles to his integration into the country to which it is proposed he is deported. It would be open to the claimant to rebuild his private life in the DRC and integrate into that country's society. It was not accepted he was not conversant in French, bearing in mind his upbringing with a mother from the DRC. He could use whatever skills he had accrued in the UK to help him get by in the DRC. He had not produced any evidence of mental or physical disability. The wording of paragraph 399A no longer referred anywhere to "ties" as such, but clearly the matter of family connections was just as relevant under the new wording. The claimant had not shown he could not look to support from family in the DRC whether that be financial, emotional etc. Long residence was not enough.

13. Mr Jarvis said that the claimant could not benefit from paragraph 398 as he could not meet the very high threshold of “very compelling circumstances over and above those described in paragraphs 399 and 399A”.

14. Turning to Part 5A of the 2002 Act, Mr Jarvis said that the Upper Tribunal was obliged to take account of its provisions, including when making the proportionality assessment under paragraph 398. Section 117C(3) applied to the claimant and as such significant weight should be given to the public interest in deporting him. The claimant was a serious recidivist criminal with an appalling criminal history and as such the public interest in deportation was particularly strong in terms of the historical impact of his offences; the risk of re-offending in the future; and the importance of general deterrence. The claimant’s extensive involvement with the criminal justice system has also caused a substantial cost to the public purse.

15. Mr Mak began his submission by taking issue with the Upper Tribunal’s statement in its error of law decision that the claimant had four uncles in the DRC. That was not the case and not what the claimant had said in his witness statement in May 2014. He had two uncles in Congo, Brazzaville and two whom he had lost touch with – hence none in the DRC. The claimant’s evidence about this was not challenged by the respondent before the FtT.

16. As regards the relevant Immigration Rules, Mr Mak said he did not seek to argue that the claimant could show “very compelling circumstances” under paragraph 398, but he did not need to as he met paragraph 399A. Mr Mak noted that in that regard the SSHD agreed the claimant met paragraph 399A(a), so there was only dispute over the two other conditions set out in paragraph 399A(b)-(c). He asked us to find that the claimant clearly did meet paragraph 399A(b) by virtue of the fact that the UK was effectively the only country in which he had ever lived, all his schooling had been here, he only spoke English, his mother and half-brothers were British and he had shared his upbringing with them. The fact that he had been lawfully resident in the UK over half his life also fed into the paragraph 399A(b) assessment. It was dangerous and wrong to read paragraph 399A(b) as requiring (social and cultural) integrative behaviour free of criminality because the provision was predicated on someone being a foreign criminal with less than four years’ sentence. In respect of paragraph 399A(c), the claimant could show that there would be very significant obstacles to his integration in the DRC. He had only lived there as a baby. He had no ties in the DRC. He did not speak Lingala. If the claimant could not satisfy paragraph 399A(b) or (c), then who could? The provision was not intended to allow only a small minority to satisfy its requirements.

17. Mr Jarvis enunciated as a general proposition that the new version of the Rules dealing with foreign criminals was not intended to effect any drastic changes but rather to ensure there was closer alignment with higher court decisions. That was true, he said, both of the Rules in general and paragraphs 399, 399A and 398 in particular. The main focus of this appeal was paragraph 399A. Mr Mak did not seek to advance any general argument regarding the new Rules but was in agreement with Mr Jarvis that, together with Part 5A, paragraph 399A was at the heart of the claimant’s appeal.



## Analysis

### The applicable Rules

18. We deal first with the applicable Rules (we shall address more fully later why we start with them rather than with Part 5A considerations). The parties invited us to apply those in force now, rather than those in force when the SSHD made her decision. They did not cite authority but in light of the conclusion set out by Aikens LJ in YM (Uganda)[2014] EWCA Civ 1292 at [37] and AJ (Angola) [2014] EWCA Civ 1636 at [7] they are clearly right about that. Because we are re-making the decision (having set aside that of the First-tier Tribunal) we must apply the Rules in force at the date of hearing before us.

19. This approach carries with it the difficulty that the Upper Tribunal is determining an appeal under a different version of the Rules than the SSHD was when she made her decision, but that is one the legislative framework caters for (s.85(4) of the 2002 Act) and of course the SSHD (in reply to Tribunal directions and through her representative, Mr Jarvis) was able to inform us what view she takes.

### The new Rules

20. Whether (as Mr Jarvis contended) the new Rules are largely a codification of existing case law or not, we of course have to approach the meaning of their provisions in the light of the guidance given by the Supreme Court in Mahad (and Others) v Entry Clearance Officer [2009] UKSC 16.

21. Paragraph 399A, like paragraph 399, only applies to less serious foreign criminal cases falling within paragraph 398(b) or (c). Put another way, a foreign criminal who has been convicted of an offence for which he has been imprisoned for at least 4 years – i.e. a foreign criminal falling within paragraph 398(a) – is excluded from consideration under paragraphs 399A and 399A and can only seek to rely on the residual provision in paragraph 398 which requires him to show that there are “very compelling circumstances over and above those described in paragraphs 399 and 399A”.

### Paragraph 399A

22. The previous version of paragraph 399A<sup>1</sup> did not refer to integration but rather to criteria relating to (i) the period of time a person has lived in the UK continuously, discounting any period of imprisonment); (ii) age (if 25 or over, it was necessary to show a

---

<sup>1</sup> This stated:” 399A. This paragraph applies where paragraph 398(b) or (c) applies if –  
(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.

20 year period; if under 25, it was necessary to show he had spent at least half his life living continuously in the UK); and (iii) the nature of his ties in the country to which he would go if required to leave the UK (“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”). These criteria were set out in two subparagraphs, one imposing a requirement of 20 years’ continuous residence; the other, applicable only to those under 25, imposing a ‘half of his life in the UK’ criterion coupled with a ‘no ties’ test. Except for requirements of time, the focus was entirely on the situation in the applicant’s country of return.

23. The new paragraph 399A of the Immigration Rules remains similar to the old in considering the foreign criminal deportee’s situation both in the UK and in the country of return. However, so far as concerns the focus on a person’s situation in the UK, time in the UK is no longer relevant as such except in the context of lawful residence (paragraph 399A(a)) and paragraph 399A(b) introduces new criteria that relate to social and cultural integration in the UK. As before, the rule is cast in the present tense: “he is socially and culturally integrated in the UK”. So far as concerns focus on the situation in the country of return, it no longer looks at ‘ties’ per se but at integration and obstacles thereto. By requiring focus on integration both in relation to a person’s circumstances in the UK as well as in the country of return, the new Rules require a much more holistic assessment of an applicant’s circumstances. Thereby they bring themselves closer to Strasbourg jurisprudence on Article 8 in expulsion cases which has always seen consideration of both dimensions as requiring a wide-ranging assessment: see e.g. Jeunesse v Netherlands (GC) App.No. 12738/10, 31 October 2014, paragraphs 106-109. Sections 117A(2)(b) and 3(b) of the 2002 Act also utilise the concept of “integration into society”.

24. In our judgement, the gravamen of the new paragraph 399A(b) is integration in the UK. Integration must be shown to exist in two respects: social and cultural. Neither one nor the other is sufficient. The term integration imports a qualitative test: in order to assess whether a person “is” socially and culturally integrated in the UK, one is not simply looking at how long a person has spent in the UK or even at whether that period comprises lawful residence: but the fact that an applicant has spent some or all of his time in the UK unlawfully may be of relevance in deciding whether he has integrated in these two ways. Another difference between the old and the new Rules is that whereas the previous rule required any period of imprisonment to be discounted, the new rule is silent on the matter. As a result we consider that it must remain open to the decision-maker to consider time spent in prison negatively, because it does not bespeak integrative behaviour; but the rule no longer mandates that.

25. Mr Mak submitted that it is implicit in the paragraph 399A context – a rule dealing with foreign criminals – that merely being a foreign criminal cannot preclude a person from showing the necessary integration. With that we can easily agree. Mr Mak further submitted that the rule cannot have been intended to assist only a few such persons. With that we wholly disagree. The new Rules make even clearer than the pre-28 July 2014 rules that deportation of foreign criminals is always in the public interest and can only be outweighed in very limited circumstances. In general terms imposition of a custodial sentence is an indication that the person concerned has not respected the values of the host

society (cf in the context of EU law on deportation of foreign criminals, Case C-400/12 Secretary of State v MG ECJI:EU:C2014:9 at [31]). Further, whilst in prison a person cannot be a useful member of society at large; during that time such a person cannot as a general rule show integration into society. Thus, although the new rule does not as such preclude time in prison from being considered as to whether social and cultural integration is shown, its terms leave very little scope for such argument.

#### Interrelationship between ss. 117A-D considerations and the Immigration Rules.

26. Both parties were adamant that in deciding the claimant's case it was necessary for the Tribunal to apply Part 5A of the Act in tandem with the relevant provisions of the Rules. However, beyond Mr Jarvis's submission that to apply Part 5A was especially important in the context of the paragraph 398 analysis, neither representatives offered any view as to how the Tribunal should structure its decision-making so as to address both sets of provisions.

27. The coming into force of Part 5A of the 2002 Act has complicated life for courts and tribunals. It has meant that in this area of law there are now two overlapping sets of domestic provisions dealing with Article 8. Both reflect attempts to codify aspects of Article 8 jurisprudence (with the Immigration Rules this process was only expressly begun in July 2012, when the government decided to incorporate into the Rules a number of provisions dealing with Article 8). Just as when the government introduced the new Immigration Rules in June 2012 it produced an "ECHR memo" explaining their purport, so too when it introduced the Immigration Bill in 2013 it published an "ECHR Memorandum". Both sets of provisions reflect the will of Parliament although the Rules do not carry the same degree of democratic endorsement as does primary legislation: see MM & Ors, R (On the Application Of) v Secretary of State for the Home Department (Rev 1) [2014] EWCA Civ 985 at [92]; R (on the application of Onkar Singh Nagre) v SSHD [2013] EWHC 720 (Admin) at [25]. In addition, their respective contents heavily overlap. For example, both s.117B(6) and paragraph 399(a)(ii) deal with a person who has a genuine and subsisting relationship with a child under the age of 18 years and is in the UK and the child is a British citizen or the child has lived continuously for at least 7 years; whereas s.117A(6)(b) refers to the circumstances where "it would not be reasonable to expect the child to leave the United Kingdom", paragraph 399A(b) requires it to be shown that it would be "unduly harsh" for the child to live in the country to which the person is to be deported and it would be "unduly harsh" for the child to remain in the UK without the person who is to be deported. Both s.117C(5) and paragraph 399(a) (ii) (a) and (b) employ the criterion of "unduly harsh". We have already noted that both s.117C(4) and paragraph 399A(b) employ the concept of integration.

28. That there should be broad overlap in content is hardly surprising; indeed something would be amiss otherwise, since both deal with immigration control and both require relevant decision-makers to act in compliance with a person's human rights (paragraph 2 of the Rules; s. 117A(1) of the 2002 Act). Both also reflect the desire on the part of the government to regulate more fully the importance of the public interest in the maintenance of effective immigration control and in the Committee stage of the Bill the

then Minister of Immigration described the purpose of Part 5A as being that of “setting out the weight that judges should place on the public interest in relation to certain factors”, such a step being seen as necessary because judges had observed that the Immigration Rules lacked the full democratic legitimacy of primary legislation (see Q194).

29. However, whilst this backdrop clarifies why it was felt necessary to complement the Rules with primary legislation in the form of Part 5A, it does not assist us in clarifying their interrelationship. The interplay between these two regimes, one of primary legislation, the other of a subsidiary status, is one of the important issues arising out of the recent legislative reforms.

30. In seeking to analyse how they co-exist, we should first of all clarify that the coming into force of Part 5A of the Nationality, Immigration and Asylum Act 2002 (ss.117A-D) has not altered the need for a two-stage approach to Article 8 claims. It is inexorably clear from higher court guidance, both that preceding the coming into force of Part 5A (see e.g. MF (Nigeria)) and that given subsequently (see e.g. SSHD v SS (Congo) & Ors [2015] EWCA Civ 387), that assessment of Article 8 claims requires a two-stage analysis.

31. The existing case law makes very clear that in foreign national deportation cases, the two-stage approach must be conducted entirely within the Rules because they are a “complete code” for these purposes (MF (Nigeria) [2013] EWCA Civ 1192 at [16]); the same is not necessarily true for other types of cases where there may be gaps. In Secretary of State for the Home Department v AJ (Angola) [2014] EWCA Civ 1636, Sales LJ stated at [39]:

“The fact that the new rules [on foreign criminals] are intended to operate as a comprehensive code is significant, because it means that an official or a tribunal should seek to take account of any Convention rights of an appellant through the lens of the new rules themselves, rather than looking to apply Convention rights for themselves in a free-standing way outside the new rules. This feature of the new rules makes the decision-making framework in relation to foreign criminals different from that in relation to other parts of the Immigration Rules, where the Secretary of State retains a general discretion outside the Rules in exercise of which, in some circumstances, decisions may need to be made in order to accommodate certain claims for leave to remain on the basis of Convention rights, as explained in *Huang and R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin).”

32. In SS (Congo) Sales LJ at [45] put matters this way:

“The latter stage of the [two-stage analysis] analysis will be covered by the text of the Rules themselves, as in relation to the Rules covering deportation of foreign criminals reviewed in *MF (Nigeria)*. Those Rules laid down substantive conditions which, if satisfied, would lead to the grant of LTR, but also stated that LTR might be granted in “exceptional circumstances” if the substantive conditions were not satisfied in a particular case. Where the Rules take this form, it can be said that they form a “complete code”, in the sense that both stages of the analysis are covered by the text of the Rules. But this does not take one very far, since under the “exceptional circumstances” rubric one still has to allow for consideration of any matters bearing on the application of Article 8 for the purposes of the second stage of the analysis:

see *AJ (Angola [ ]*, above, at [46] and [55]. This is the basic point made by this court at paragraph. [44]-[46] of its judgment in *MF (Nigeria)*.”

33. We have seen cases in which tribunal judges have regarded Part 5A considerations as provisions that have to be directly applied and without qualification when deciding cases under the Immigration Rules. We respectfully suggest that such an approach cannot be correct for a number of reasons.

34. In the first place, the application of Part 5A considerations presupposes that the decision-maker has reached the stage in an Article 8 assessment of assessing proportionality. Part 5A considerations are not a complete code of the general law on Article 8. Sections 117A-D do not for example deal with the meaning of family life or private life or with the issue of interference with the right to respect for private and family life or whether the decision is in accordance with the law. Put in *Razgar, R (on the Application of) v. Secretary of State for the Home Department* [2004] UKHL 27 terms, ss.117A-D are concerned only with Question 5: as stated in *Dube (ss.117A-117D)* [2015] UKUT 90 (IAC) at [25]: “in effect ss.117A-117D are essentially a further elaboration of *Razgar*’s Question 5 which is essentially about proportionality and justification (Lord Bingham’s Question 5 asks, assuming that in reply to previous questions it has been established that there had been an interference with the right to respect for private and family life, “ [i]f so, is such interference proportionate to the legitimate public end sought to be achieved?”). In addition, the Part 5A considerations are not and do not purport to be a complete code for the conduct of the proportionality assessment enjoined by *Razgar* Question 5. They do not purport to be an exhaustive set of the considerations that must be taken into account when assessing proportionality: section 117A(2) provides that the court or tribunal “must (in particular) have regard to . . . considerations” that are then enumerated: see *Dube, AM (S.117B)* [2015] UKUT 260 (IAC).

35. Second, ss.117A-D do not provide that such considerations are to be applied to the Immigration Rules or in what way. They state that they apply where a court or tribunal is required to determine a decision made under the Immigration Acts, but they do not specify whether they are to be applied to assessment of Article 8 claims either under the Rules or outside the Rules. Correspondingly, the Immigration Rules contain no express provision making or requiring reference to Part 5A notwithstanding that this was brought into force on the same date as the new version of the Immigration Rules with which we are concerned (28 July 2014).

36. Third, the approach that Part 5A considerations should be applied directly and in wholesale fashion to the Rules misunderstands that a key characteristic of the Rules is that for the most part they set out criteria which are or may be determinative of a person’s immigration status. It was this characteristic which was seen by the Supreme Court in *R(Alvi) v Secretary of State for the Home Department* [2012] UKSC 33 [2012] 1 WLR 2208 to constitute their *raison d’etre*. As was put by Lord Dyson at [94]:

“...any requirement which, if not satisfied by the migrant, will lead to an application for leave to enter or remain being refused is a rule within the meaning of section 3(2) [of the Immigration Act 1971]. That is what Parliament was interested in when it enacted section

3(2). It wanted to have a say in the rules which set out the basis on which these applications were to be determined”.

and at [97]: “The key requirement is that the immigration rules should include all those provisions which set out criteria which are or may be determinative of an application for leave to enter or remain”.

37. How this characteristic of the Rules is woven into the rules on foreign criminals headed “Deportation and Article 8” needs some elaboration because of the unusual wording found in paragraphs 398 and 390A. The Rules on foreign criminals include provisions that specify substantive conditions that have to be met and if they are met result in a decision that a person is or is not “successful” in their Article 8 claim and in turn on a decision whether to grant of limited leave etc. (paragraph 399B). In this way, meeting these conditions has a determinative effect on a person’s status. This is the primary function of paragraphs 399 and 399A: see MF (Nigeria) at [35]. Being a set of conditions they are qualitatively different to “considerations”. Paragraph 398 (like paragraph 390A) has to be treated as *sui generis* because it is settled law that its criterion for those who cannot succeed under paragraphs 399 or 399A – “very compelling circumstances over and above those described in paragraph 399 and 399A” – necessitates a full-blown second-stage Article 8(2) proportionality assessment.

38. There is thus a qualitative difference between the Rules in general and Part 5A. By contrast (and subject to a possible argument regarding s.117B(6) and s.117C(4)-(6) in some appropriate future case or cases), the considerations set out in ss.117A-D are not determinative of whether or not a person qualifies on Article 8 grounds; they do not set out necessary and sufficient conditions. Rather they are obligatory (non-exhaustive) considerations to be applied in addressing the “public interest question”. This crucial difference remains notwithstanding that most of the provisions of Part 5A are either identical or broadly mirror those to be found in the Rules: see above paragraph 27.

39. We have noted above that certain provisions of Part 5A, in particular s.117B(6) and s.117C(4)-(6), might be argued to operate as a self-contained set of legal requirements providing a complete answer to the “public interest question” and we have noted that decision on such issues is best left to a future cases or cases. All that we would observe here is that even if one or both sets of provisions were found to be determinative of the “public interest question” in a particular case, it remains that Part 5A is silent about what this means for the success or failure of an Article 8 claim or about a person’s consequential immigration status.

40. Fourth, the wholesale and unstructured application of Part 5A considerations to the Rules would undermine the settled law regarding the two-stage approach, by effectively requiring the first stage to be expanded to incorporate or take into account considerations that are integral to the second stage. To apply Part 5A considerations directly and indiscriminately to decision-making under the Rules would subvert the legal certainty of the Rules. Despite the Rules making no reference to Part 5A considerations as being any kind of “condition” or requirement, courts and tribunals would in effect be treating them as additional conditions or as sub-rules within the Rules. It would also pose an impossible

task logically since it would require courts and tribunals to simultaneously decide (i) whether the substantive conditions of the Rules are met; and (ii) whether the Part 5A considerations operate as a further set of specific substantive requirements potentially requiring a different conclusion under the Rules. The Rules stipulate that an Article 8 claim succeeds if it meets the substantive conditions set out in paragraphs 398, 399 or 399A.

41. It might be argued that the above analysis is defeated by the fact that the Rules represent a striking of the Article 8 balance (between individual interests and the interests of the wider community)<sup>2</sup> and have been formulated to reflect where the public interest lies. We have no difficulty with that argument insofar as it expresses that the new Rules were meant to incorporate more fully principles of Article 8 jurisprudence. But this argument cannot mean that in general the new Rules provide criteria for how the decision-maker is to strike the balance in the context of a free-standing proportionality assessment. Leaving aside the unusual provisions to be found in paragraphs 398 (requiring it to be shown that there are “other factors where there are very compelling circumstances over and above those described in paragraphs 399 and s99A”) and 390A<sup>3</sup> (requiring there to be “...exceptional circumstances” such that “the public interest ...will be outweighed by other factors”), the new Rules generally reflect a balance that has already been struck. They are designed without more to deliver a decision which is compliant with Article 8. This is the core of the binding Court of Appeal decisions which have addressed this fundamental issues, in particular MM & Ors at [92].

42. It might separately be argued that the above analysis is undermined by the fact that even when seeking to apply the substantive requirements of the Rules (other than the “very compelling circumstances” and provisions set out in paragraphs 398 and 390A respectively) a court or tribunal in any individual case has clearly to conduct a balancing exercise, e.g. in deciding whether a person has shown social or cultural integration into society or has shown that the effect of their deportation on a child would be unduly harsh. Furthermore, it might be argued that such a balancing exercise is co-extensive with the proportionality assessment to be conducted in deciding the public interest question under Part 5A. We find any such argument unconvincing. Of course assessment under *both* the substantive requirements of paragraphs 399 and 399A and under the proportionality assessment to be made when deciding the public interest question requires an exercise of judgement which may involve looking at factors for and against. But under paragraphs 399 and 399A the balancing exercise is strictly limited to evaluation of the relevant condition or conditions – e.g. whether there is social or cultural integration, whether the impact of deportation is unduly harsh. That is quite different from the wide-ranging multi-factored stage two proportionality assessment required when deciding the public interest question in order to decide whether a decision is justified under Article 8(2).

---

<sup>2</sup> That is not to say that the Rules are themselves required to guarantee compliance with Article 8: see MM & Ors at [134].

<sup>3</sup> Paragraph 390A provides that: “Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.”

43. The above analysis does not mean that Part 5A has no relevance to the legal regime formed by the Rules. Even though imposing obligations on courts and tribunals only, Part 5A contains a clear expression of statements of principle seen to govern identified elements of Article 8 in the context of the Immigration Acts. In this way Part 5A could be said to underpin the Rules or to be overarching. In this context Part 5A can clearly have *indirect* application to the Rules, including to rules setting out substantive conditions such as paragraphs 399 and 339A, for example by possibly informing the meaning of key terms set out in such paragraphs, as we have explored at [23] above (see also [54] below).

44. It has been important to the foregoing analysis to emphasise the degree of overlap in subject-matter between Part 5A and certain provisions of the Rules. However, in light of what we have just said about Part 5A containing overarching statements of principle, it is pertinent to note that some provisions of Part 5A find no precise equivalent in the Rules. For example, the Rules do not contain a provision stating in terms, as does s.117(4)(a), that little weight is to be given to a private life that is established by a person at a time when the person is in the UK unlawfully. That only goes to reinforce that the two legal regimes, although complementary, are different in kind, because the private life provisions of the Immigration Rules represent the Secretary of State's weighting, without more, as to what conditions have to be met in order for leave to remain to be granted on private life grounds.

#### Should Part 5A considerations be applied first?

45. There is a body of opinion that as a result of the coming into force of Part 5A courts and tribunals must begin their assessment of all Article 8 cases by reference to Part 5A. In this regard it is emphasised that being now enshrined in primary legislation, Part 5A considerations must have priority over the Immigration Rules which are not even subsidiary legislation in the strict sense. We think it will already be apparent why we must respectfully disagree with this view. The reasons we have set out at [26]-[43] above for concluding that Part 5A considerations are only to be directly applied to the Rules in carefully limited ways also stand to explain why in our judgement it would be wrong ordinarily to apply Part 5A considerations at the first stage of the analysis. We would emphasise that in light of our earlier analysis it is not a question of according priority to the Rules over primary legislation but rather of recognising their different functions. Consistent with the two-stage approach, the first stage requires that courts and tribunals first of all determine whether a person meets the substantive requirements of the Rules. It is only at the second stage that Part 5A considerations have direct application and even if that second stage takes place within the Rules (as it must in relation to foreign criminals), it remains that they are not applied first.

46. Accordingly, it would be wrong as a general proposition to address Part 5A considerations first.

#### Part 5A and the two-stage approach to Article 8 analysis summarised



47. In light of the above analysis it is now possible to summarise how Part 5A impacts on the two-stage process.

48. Part 5A does not and is not intended to displace the ongoing need for a two-stage approach to Article 8 analysis. The only question is to what extent it modifies it. In our view it cannot, and is not intended to, impact directly or in wholesale fashion on the first-stage.

49. In the context of considering an applicant under the Rules there is ordinarily no role for direct application in wholesale fashion of Part 5A considerations. Those considerations only directly arise where there is a “public interest question” which is defined at s.117A(3) to mean a proportionality assessment: or more precisely, “the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2)”. We use the adverb “directly” to differentiate the situation where the Part 5A provisions may be seen to have indirect application, by shedding possible light on the meaning of terms in the Rules – as we have considered above in relation to the meaning of “social and cultural integration” within paragraph 399(b)).

50. For Part 5A considerations to have a direct role, therefore, it can only be in the context of a proportionality assessment in accordance with Article 8(2).

51. Whilst it is now established that in some respects the Rules do not incorporate a two-stage approach, it is settled law that those dealing with foreign criminals do. What that entails for the role of Part 5A considerations in a foreign criminal deportation case is that they only have direct application in the context of the unusual provisions contained in paragraph 398 and paragraph A390 which require the decision-maker to conduct a proportionality assessment in terms of whether there exist “other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A” or (in the revocation context) “only...in exceptional circumstances...[where there are] other factors” outweighing the public interest. Assessment of such circumstances (by reference to unspecified “other factors” inevitably requires a wide-ranging, multi-factored assessment.

52. It is true that success under the “very compelling circumstances”/exceptional circumstances” criteria set out in paragraph 398 and 390A ( both which have to be applied to unspecified “other factors”) also results in success in an Article 8 claim and in this way is also determinative of a person’s immigration status. But by virtue of the reading given phrases of this kind by the Court of Appeal in MF (Nigeria) they must be understood as having a *sui generis* character, since although they can be said to constitute a substantive criterion, their specific nature is such that they have no fixed boundaries: a decision on whether these criteria are met requires a full-bodied proportionality assessment in accordance with Article 8(2).

## Application of the new rule to the claimant's circumstances

### Paragraph 399A(a)

53. The claimant falls for consideration under paragraph 399A because he had been convicted of an offence for which he was sentenced to a period of imprisonment of less than 4 years (see paragraph 398(b)). It is not in dispute in this case that the claimant meets the requirements of paragraph 399A(a) by virtue of the fact that he had resided in the UK lawfully from 24 September 1998 (when he was granted ILR) to the date of the SSHD decision in July 2013. What is meant by lawful residence may require interpretation in other cases, but the fact of such residence is uncontroversial in this case.

### Paragraph 399A(b)

54. In the claimant's case, the question of whether he meets the requirements of paragraph 399A(b) requires us to weigh up all considerations relevant to social and cultural integration into the UK. In the claimant's favour, he has been in the UK since 1991 he was 4 and was granted ILR in 1998, which means he has been the UK lawfully for most of his life. His mother, sister and half-brother were naturalised as British citizens in 2003. He did not start offending until he was around 16. He has been to school in the UK. His mother tongue is English: that such a factor should count in the claimant's favour is lent force by the fact that s.117B(3)(b) of the 2002 Act identifies that persons able to speak English "are better able to integrate into society". The finding of fact made by the FtT was that he had shown an acceptance of his conduct and that he had engaged in programmes that will assist him in deviating from criminal conduct in the future.

55. On the other hand, his history of offending (repeated robbery) betokens a serious discontinuity in his integration in the UK especially because it shows blatant disregard for fellow citizens. His history of offending includes a conviction for robbery for which he received a sentence of 42 months imprisonment. The significant period of time he has spent in prison in consequence of his offending has excluded him from outside society for that period. We also agree with Mr Jarvis that even when not in prison the claimant's lifestyle over the period when he was committing offences was manifestly anti-social. This lifestyle and his period in prison have contributed to his not able to show he is financially independent. We have to decide whether he is socially and culturally integrated in the UK in the present. He is now 29. Whilst his recent acceptance of the reprehensible nature of his criminal conduct is an important factor, we consider the negative factors we have just mentioned indicate that his history of criminal offending broke the continuity of his social and cultural integration in the UK and he has not regained it. This means that currently he has not shown he is socially and culturally integrated.

### Paragraph 399A(c)

56. Even had we considered the claimant to meet the requirements of paragraph 399A(b), we would still have concluded he fails under paragraph 399A because he fails to meet paragraph 399A(c) and (as explained earlier) to succeed under paragraph 399A, the

requirements of both (b) and (c) (as well as (a)) must be met and we are not persuaded that there would be very significant obstacles to his integration into the country to which it is proposed he is deported. We accept there would be significant obstacles: in particular he would be required to overcome the fact that he does not speak Lingala; that he has no experience of living in such a country as an adult or indeed even as a young person (only as an infant). Whilst we do not accept that the respondent has ever resiled from her position set out in her refusal decision that the claimant has uncles in the DRC, for the purposes of this appeal we are also prepared to decide his case on the basis of his own claim as set out in his witness statement that he has no uncles there.

57. But the paragraph 399A(c) test is more stringent: it is not met simply by showing that a person has no close family ties in the country to which it is proposed he is deported; it requires “very significant obstacles to...integration” to be shown. In our judgement the obstacles the claimant faces do not meet this demanding standard. In relation to his command of language spoken in the DRC, it was his own mother’s evidence that he had been brought up in a household where French was spoken. The DRC is a Francophone country. In any event, it was not suggested on his behalf that there would be any reasons related to physical or mental inability preventing him from learning the local language or dialect. As regards his lack of knowledge of the culture, whilst it was his evidence that he identified with British culture, it was not suggested he had specifically rejected or no longer understood his cultural origins. Furthermore, as regards lack of family ties, he is now a young adult and the skills he has acquired through attending classes in prison will assist him in being able to earn a living without the need to be a dependant. Further, we agree with Mr Jarvis that it is reasonable to infer that his mother and/or other relatives here will seek to help him financially, at least until he has had time to find his own feet. We agree with Mr Jarvis that it has not been shown that he would be prevented by reason of any physical or mental ability from developing social and cultural ties in the DRC. He is young, able-bodied and of an adaptable age.

58. For the above reasons we conclude that the claimant does not meet the requirements of paragraph 399A in full – in particular he does not fulfil the requirements of either paragraph 399A(b) or (c).

59. Given our conclusion that he fails to meet the requirements of paragraphs 399 or 399A, the claimant can only succeed under the Rules if able to show, pursuant to paragraph 398 (stage 2 of the Article 8 assessment), that “the public interest in deportation [is] outweighed by other factors where there are very compelling circumstances over and above those described in 399 and 399A”.

60. Mr Mak did not entirely abandon the argument that the claimant could succeed under this provision set out in paragraph 398 but he was realistic enough to accept that it imposed a very high threshold and that, in the circumstances of the claimant’s case, if he could not bring himself within 399A, he was very unlikely to be able to demonstrate very compelling circumstances. Furthermore and in any event, we are entirely satisfied that the claimant’s circumstances come nowhere near meeting this threshold.

### The claimant's case in relation to Part 5A considerations

61. In reaching our conclusion that the claimant cannot demonstrate very compelling circumstances as set out in paragraph 398 we have conducted the proportionality assessment that this requires by applying Part 5A considerations directly. As regards s.117B considerations, whilst s.117B(2) can be said to entitle him to say his ability to speak English is a characteristic that is in the public interest and makes him “better able to integrate into society”, in respect of s.117B(3) he has not been able to show that he has established financial independence free of criminal behaviour. He is not a parent. As regards s.117C(1) and (2), his offences include robbery and related offences for which he received a sentence of 42 months and being more serious than many others, the public interest in his deportation must be greater than if that were not the case. He does not have a qualifying partner or child so as to fall within s.117(5) (Exception 2). In relation to s.117C(4)(Exception 1), we find that for the same reasons that he fails to meet the requirements of paragraphs 399A(b) and (c) he does not meet the requirements of s.117C (b) and (c). We note in this regard that the requirements of s.117C(4) (b) and (c) are identical to those set out in paragraph 399A(b) and (c). Indeed in relation to foreign criminals if the Rules were more harsh than s.117C, they would no longer be a complete code.

62. For the above reasons we find the claimant cannot succeed under the Immigration Rules. He cannot succeed under the first-stage of the analysis of his Article 8 circumstances as embodied in paragraph 399A nor under the second-stage analysis of his Article 8 circumstances conducted under paragraph 398 of the Immigration Rules.

### **Notice of Decision**

63. The appeal is dismissed.  
No anonymity direction is made.

Signed

Date

Upper Tribunal Judge Storey