



IAC-AH-CO-V1

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

Appeal Number: DA/01695/2014

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 30<sup>th</sup> November 2015**

**Decision & Reasons Promulgated  
On 7<sup>th</sup> January 2016**

**Before**

**UPPER TRIBUNAL JUDGE HEMINGWAY**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR SHADDAI SHALOM SMITH  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr S Whitwell (Home Office Presenting Officer)

For the Respondent: Mr E Anyene (Counsel)

**DECISION AND DIRECTIONS**

1. The Secretary of State has appealed, with permission, against a decision of a Judge of the First-tier Tribunal (Immigration and Asylum Chamber) (hereinafter the “judge” unless otherwise stated) promulgated on 21<sup>st</sup> January 2015, following a hearing on 6<sup>th</sup> January 2015, by which he allowed the appeal of Mr Shaddai Shalom Smith (hereinafter the “claimant”) against a decision of the Secretary of State of 20<sup>th</sup> August 2014 to make a deportation order by virtue of Section 3(5)(a) of the Immigration Act 1971. The decision followed the claimant’s conviction at Wood Green Crown Court

on 22<sup>nd</sup> December 2010 for an offence of robbery in respect of which he was sentenced to a period of three years' custody in a young offenders' institute.

2. The claimant was also convicted, at Havering Magistrates' Court, on 8<sup>th</sup> August 2008, on two counts of attempting/making false representations in order to make a gain for himself or another. He was sentenced to a community order in respect of that. In June 2009 he was cautioned in respect of an offence of criminal damage to a car window.

### **Immigration History and Background Facts**

3. The claimant is a national of Barbados. He was born on 7<sup>th</sup> March 1990. It has been variously suggested, in the documentation before me, that he first arrived in the UK in 2001 as a visitor (see paragraph 10 of the judge's determination) or that he first arrived on 26<sup>th</sup> July 2002 as the dependent child of a work permit holder (see paragraph 7 of the Respondent's "notice of decision"). In any event nothing turns on the precise date of his arrival and it is clear that he had come to the UK to join his mother who had herself arrived in the UK as a work permit holder having divorced his father.
4. On 2<sup>nd</sup> October 2004 the claimant received a grant of leave to remain as a dependent child until 31<sup>st</sup> October 2007. There followed a further grant, on the same basis, until 7<sup>th</sup> December 2012.
5. The claimant formed a relationship with one Miss President (according to her oral evidence the relationship had started in 2007) a dental nurse and British citizen. On 4<sup>th</sup> June 2011, she gave birth to the couple's daughter who is, of course, also a British citizen.
6. The claimant served what he was required to serve of his custodial sentence and was released on 20<sup>th</sup> January 2012. He rejoined his mother's household. He has a younger brother, Nathan, who also lives in that household. He did not go to live with Miss President and had not been living with her prior to his incarceration. She lives with the couple's child. There is evidence that he has maintained contact with the child.
7. On 6<sup>th</sup> November 2012 the claimant applied for indefinite leave to remain in the UK on the basis of "long residence". However, that application was rejected because the correct fee had not been paid. Shortly after, on 20<sup>th</sup> December 2012, he made a further application for indefinite leave to remain which was again rejected, this time on 23<sup>rd</sup> January 2013, as the correct fee had not been paid. On 22<sup>nd</sup> February 2013 a similar application was made but rejected for, essentially, similar reasons. On 14<sup>th</sup> October 2013 he made another application for indefinite leave to remain outside the Immigration Rules. That application has been considered along with the matters relating to his deportation. Indeed, on 17<sup>th</sup> June 2014 he was informed of his liability to deportation and the decision to make a deportation order followed on 20<sup>th</sup> August 2014. He appealed and has, throughout the appeal process, sought to rely upon

Article 8 of the European Convention on Human Rights (ECHR) in resisting deportation and in seeking leave.

### Relevant Legal Provisions

8. The relevant legal provisions are Section 117B to D of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") and paragraphs 398, 399 and 399A of the Immigration Rules.
9. Section 117A to D of the 2002 Act, which came into effect on 28<sup>th</sup> July 2004, provides as follows:

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

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

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) ...
- (3) ...
- (4) Little weight should be given to –
  - (a) a private life, or
  - (b) a relationship formed with a qualifying partner, that is established 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,
- (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) ...
- (7) The considerations in sub-Sections (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) is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see Section 33(2)A 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,
  - (c) who -
    - (i) has been sentenced to a period of imprisonment of at least twelve months, or
    - (ii) has been convicted of an offence that has caused serious harm, or
    - (iii) is a persistent offender."

10. It is also necessary to set out the contents of paragraph 398, 399 and 399A of the Immigration Rules. Since both the decision under appeal and the subsequent hearing before the judge took place after 28<sup>th</sup> July 2014 it is beyond dispute that the Rules in the form that they were from that date are the ones which apply. The relevant parts, in the context of this claimant's circumstances, read as follows;

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

- (a) ...
- (b) 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 four years but at least twelve months; or
- (c) ..., the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398(b) or (c) applies if -

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
  - (i) the child is a British citizen; or
  - (ii) ...; and in either case;
    - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
    - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

- (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK, and
  - (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and then immigration status was not precarious; and
  - (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
  - (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

- (a) the person has been lawfully resident in the UK for most of his life; and
- (b) he is socially and culturally integrated in the UK;
- (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.”

### **The Decision of the Judge**

11. Both parties were represented before the judge. He heard oral evidence from the claimant, from Miss President and from the claimant’s mother. In his determination he reviewed some case law which he considered to be relevant and summarised the cases which had been advanced by the competing parties. He then explained his decision to allow the claimant’s appeal in this way;

“30. The background history of this Appellant is that he arrived in the United Kingdom aged 12 years as the dependent child of his mother, a work permit holder. On 26<sup>th</sup> November 2007 the Appellant was ultimately granted leave to remain as a dependent child of his mother until 7<sup>th</sup> November 2012.

31. The criminal history of the Appellant is not contested by the Appellant. On 8<sup>th</sup> August 2008 the Appellant was sentenced to a community order for 40 hours and £70 costs for two counts of attempting or making false representations to make gain.

In June 2009 the Appellant was cautioned for an offence of criminal damage. This was not a criminal conviction but a caution accepted by the Appellant.

The index offence for which the Appellant received a three year custodial sentence on 22<sup>nd</sup> December 2010 was for an offence of robbery. Clearly this was a serious offence as reflected by the sentence imposed.

I have taken into account the sentencing remarks of His Honour Judge Browne QC. I also note that there were a number co-defendants, some of whom pleaded to guilty to the charge and others like the Appellant who maintained not guilty

pleas. The judge in his sentencing remarks explained to all the defendants, including the Appellant, why such robberies were “so serious”.

‘This is group activity, which takes recognisance, planning and then targeting the van that must be identified’.

‘The vulnerable point is the custodian outside in the street carrying the cash’.

‘The fear of violence, the fear of intimidation, must be ever present in that guardian’s duty every day. It is cowardly what you have done’.

‘This is not minor pickings, this is rich pickings, thousands of pounds in cash gone forever, putting up the price of food, the price of petrol, for the honest citizen, it is as simple as that’.

The judge acknowledged that this was a less sophisticated commercial robbery and that it was not professionally planned and that no weapons were used. The judge remarked that the Appellant was 20 years of age and a driver for just the one day. The defendants were looking for a likely target van to rob and it was determined to rob the BP garage of over £14,000. The Appellant’s vehicle was the ‘switch vehicle’. The judge could not give the Appellant credit for a guilty plea since he was convicted by the jury, but it was acknowledged that he was a man of good character with excellent references and a university student at Greenwich University and that the Appellant at that time had a pregnant girlfriend, which I assume to be Miss President. Notwithstanding such mitigating factors, the Appellant was nevertheless sentenced to three years’ detention in a young offenders’ institute.

32. I should pay regard to paragraph 399 and 399A and applicability.

The Appellant claims to have family life in the United Kingdom with his daughter, Mya. Mya is presently just over 3½ years of age. The requirements of the exception to deportation on the basis of family life with a child are set out at paragraph 399(a) of the Rules. I am satisfied that this Appellant has a genuine and subsisting parental relationship with his 3½ year old daughter and that the child is a British citizen. The Contact Order from Romford County Court which was made in October 2013 would seem to imply that the County Court at least acknowledges that this Appellant has a genuine relationship with his daughter, since in the absence of any such relationship one could question the merits of the court making such a contact order with a young child. The evidence, not only of this Appellant at this hearing, but also that of the Appellant’s mother, Norma Marshall, and the Appellant’s partner, Miss President, are wholly consistent with regard to this Appellant’s care, love and affection for his daughter, Mya. The contact is regular and whilst the Appellant does not live in the same house as his daughter I am satisfied that the nature and regularity of contact between the Appellant and his daughter is genuine, subsisting and meaningful and that there is a strong bond between this Appellant and his daughter. I also accept that due to the limited financial status of this Appellant, he personally is unable to provide maintenance payments for his daughter, but with the financial assistance of his mother he regularly provides Miss President with maintenance payments for his daughter.

I also am satisfied that Miss President welcomes the contact between father and daughter and expresses the view that this Appellant should be involved in his

daughter's life, notwithstanding his past criminal behaviour. She is supportive in developing and further in contact between father and daughter. Therefore, taking into account all the evidence before me, I am satisfied that the Appellant has established a family life in the United Kingdom with his child.

33. In determining whether there was a family life with the Appellant's partner, I have considered paragraph 399(b) of the Rules. I am satisfied that Miss President is a British citizen. I am not however satisfied that there is credible and reliable evidence that the Appellant has a genuine and subsisting relationship with Miss President, other than to the extent that Miss President, as the mother of the Appellant's daughter, is supportive of the County Court contact order between her daughter and the Appellant. The Appellant has never cohabited with his claimed partner, either before prison or subsequently. The relationship between the Appellant and his claimed partner was formed in 2007 when this Appellant only held limited leave to remain in the United Kingdom. He should be aware that by committing criminal offences he would be liable for removal or deportation, as well as being aware of the problems that such conduct would have on his relationship. Nevertheless, the Appellant engaged in criminal behaviour between 2008 and 2010. It is my understanding that Miss President would have no intentions of leaving the United Kingdom to join the Appellant in Barbados. She has no family in Barbados and all her family and network of friends are in the United Kingdom. I also note that in the past she has relied on her own parents in the United Kingdom to occasionally look after her daughter while she has been working and whilst the Appellant did not do so. It may well be that the Appellant was not contacted by Miss President at that time due to ongoing problems and the break up of the relationship for a period of approximately one year. Whilst noting the wishes of Miss President, I am nevertheless satisfied that there are no restrictions upon her in visiting the Appellant in Barbados, or relocating to Barbados if that was her wish at some time in the future. In any event, I am satisfied that the relationship between the Appellant and his partner could be maintained by any such occasional visits or by modern methods of communication, including e-mail, Skype or even by telephone. Deporting the Appellant to Barbados is not unduly harsh upon his partner and taking into account the criminal conduct in this context it is in the public interest for such a deportation to occur. I am not satisfied that the Appellant has established a family life in the United Kingdom with his partner, Miss President.
34. I shall pay regard to the criteria set out at paragraph 399A of the Rules. This exception applies where all three limbs of the specific exception have been established in order for the public interest in deportation to be outweighed.

The Appellant has not been lawfully resident in the United Kingdom for most of his life since he had limited leave to remain until 7<sup>th</sup> December 2012 when his leave expired. The Appellant would only appear to have held lawful residence in the United Kingdom for ten years and four months. He currently has no legitimate leave to remain in the United Kingdom.

He is clearly not financially independent as he is currently unemployed and relies on accommodation, as well as some financial assistance from his mother with whom he lives. The Appellant has failed to establish that he would not be a burden on the British tax payer. The Appellant's criminal conduct clearly shows that whilst residing in the United Kingdom he was apart from the society



wherein he would have had to integrate himself with. The Appellant spent the first twelve years of his life in Barbados. It is unclear as to whether this Appellant has any relatives in Barbados. The Appellant believes that he has and the mother of the Appellant disputes this is the case. In any event the existence of ties has been considered in a number of cases, the most important of which is **Ogundimu (Article 8 - new rules) Nigeria [2013] UKUT 00060 (IAC)**. In paragraphs 123 and 124 the Tribunal stated the following -

‘The natural and ordinary meaning of the word ‘ties’ imports we think a concept involving something more than merely remote and abstract links to the country of proposed deportation. It would appear that ties covered a wide variety of social, cultural and familiar matters’.

It is not just a question of language and I am satisfied that this Appellant having spent the first twelve years of his life in Barbados acquired considered cultural and social ties with that country. Furthermore, not only does the mother of the Appellant continue to visit Barbados almost annually, but this Appellant has on three separate occasions returned to Barbados with his mother between 2004 and 2006.

35. Since this Appellant cannot satisfy the requirements under paragraph 399 or 399A of the Rules, I need to consider whether there are circumstances which are sufficiently compelling to outweigh the public interest in deportation. In reaching my findings, I am well aware of the principles outlined in the case of **SS Nigeria [2013] EWCA Civ 550**, which held that the more pressing the public interest, the more serious is the need for deportation. This required the application of the two stage approach identified in **MF (Nigeria)** and the principles in **Nagre [2013] EWHC 720 (Admin)** where it would only be in exceptional circumstances that a person’s right to family and/or private life would outweigh the public interest in deportation. In all the circumstances, I am satisfied that there are exceptional circumstances, or indeed very compelling circumstances, which outweigh the public interest in deportation in this case.

36. It is significant that the Appellant arrived in the United Kingdom when he was just 12 years of age. He has spent the whole of his teenage life, his youth and adult life in the United Kingdom. He completed his education in the United Kingdom and went to university in the United Kingdom. Whilst I understand and appreciate that the decision in the case of **Masih (deportation - public interest - basic principles) Pakistan [2012] UKUT 00046 (IAC)** preceded Section 19 of the Immigration Act 2014, as well as a number of more recent decisions regarding Article 8 and deportation, I am satisfied that the decision of the Tribunal in the case of **Masih** is of importance. The Tribunal held that when considering the relevant facts on private and family life under Article 8, a person who had lawfully spent ‘all or the major part of his or her childhood and youth in this country, very serious reasons are required to justify expulsion’.

I am also aware in the Court of Appeal decision in **Gurung v SSHD [2012] EWCA Civ 62** that the ‘absence of a risk reoffending, though plainly important, is not the ultimate aim of the deportation regime’.

In the absence of an OASys or probation report, I am unable to assess the risk of reoffending by this Appellant. I cannot presume a risk or not. All I can say is that since the commission of this offence and the Appellant’s custodial sentence,

there have been no criminal convictions whatsoever committed by this Appellant.

37. Whilst not undermining the serious nature of the index offence, the sentencing judge remarked that it was not a sophisticated robbery and that no weapons were used and that it was not professionally planned. The Appellant was of good character and the Appellant acted as a driver on that day. When the Appellant committed the offence he was sentenced to a young offender institute as opposed to a prison due to being under 21 years of age.
38. There is no credible and reliable evidence before me that this Appellant represents a continued threat to the wellbeing and protection of the public as stated by the Respondent in the refusal letter.
39. I must also take into account the Contact Order made by Romford County Court on 4<sup>th</sup> October 2013. The Court Order that the mother of the child make that child available for contact with the Appellant as the father as could be agreed between the mother and father. Deportation of this Appellant would clearly break any contact between the Appellant and his young daughter, apart from any occasional visits to Barbados by the mother and daughter. In performing the Article 8 balance regard should be had to the welfare of a child of the family (Singh v ECO New Delhi [2004] EWCA Civ 10 75). The best interests of a child should not be under valued and there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Article 8 assessment. A child should not be blamed for the conduct of a parent (Zoumbas v SSHD [2013] UKSC 74).

Paying due regard to Section 55, I am satisfied that it is in the best interests of the Appellant's child that he should remain in the United Kingdom and remain in regular physical contact with her, notwithstanding that at the present time the child lives with her mother and not this Appellant.

40. I am aware from the decision in McLarty that Parliament views the object of deporting those with a criminal record as a very strong policy. However, the weight to be attached to that concept will include a variable component which reflects the criminality in issue. Whilst Parliament has tilted the scales strongly in favour of deportation, I am satisfied on the evidence before me that there are exceptional circumstances, or indeed compelling reasons why the Appellant should not be deported.
41. This Appellant is defined as a foreign criminal by reference to Section 117D of the Nationality, Immigration and Asylum Act 2000. Section 117C is additional considerations in cases involving foreign criminals. In the case of a foreign criminal who has not been sentenced to a period of imprisonment of four years or more, the public interest requires deportation unless Exception 1 or Exception 2 applies. Exception 1 cannot apply since this Appellant has not been lawfully resident in the United Kingdom for most of his life, even if he had socially and culturally integrated in the United Kingdom, and even if there were very significant obstacles to his integration into Barbados.

For reasons which I have previous stated, I am however satisfied that there are compelling reasons which are exceptional whereby the right to private and private life outweighs the public interest in deporting this Appellant. The requirement to pay regard to the definition of public interest may not be in

absolute terms. Article 8 is in absolute terms in that if an Appellant's private and family life is potentially engaged, it is unlawful to remove him if the decision to do so would be disproportionate. I am satisfied that the decision of the Respondent would be disproportionate in that it infringes the Appellant's right to respect for both his private and family life in the United Kingdom."

12. The judge then went on to indicate that he was dismissing the appeal under the Immigration Rules but allowing it "on Human Rights Grounds".

### The Grounds

13. The grounds of appeal to the Upper Tribunal are not always easy to follow but appear to contain contentions that the judge erred in failing to properly consider whether the claimant had a genuine and subsisting parental relationship with the child, in failing to make any findings as to whether it would be unduly harsh for the child to go to live in Barbados or to remain in the UK without the claimant, in failing to explain why the factors he found to weigh in favour of the claimant outweighed the public interest in his deportation, in failing to identify what "exceptional circumstances" there were, in failing to adequately consider the possibility of Miss President relocating to Barbados, and in failing to have regard to guidance contained in the **Secretary of State for the Home Department v AJ (Angola) [2014] EWCA Civ 1636**. Permission to appeal, however, was granted simply in these terms.

- “3. The judge spoke of the need to identify exceptional or very compelling circumstances outweighing the public interest (paragraph 35) noting the requirements of Sections 117C and D of the Nationality, Immigration and Asylum Act 2002 and made a finding that family life outweigh the public interest.
4. The judge on a fair reading of the Decision did not however give reasons for reaching that conclusion.
5. A failure to give necessary reasons constitutes an error of law.”

14. At the hearing, Mr Whitwell provided me with a copy of the judgment in **AJ (Angola)**, cited above together with a copy of the judgment in **McLarty (Deportation - proportionality balance) [2014] UKUT 00315 (IAC)**. He said, whilst accepting that the grounds appeared to betray something of a scattergun approach, that he would rely upon all of them though he contended that the crux was whether or not adequate reasons had been given for the conclusion that there were exceptional circumstances such as to outweigh the public interest in the claimant's deportation. He contended that the judge had accepted, at paragraph 35 of the determination, that none of the requirements of paragraph 399 or 399A had been met. So, in order to properly explain why the claimant's appeal should succeed the judge had to identify something else which was exceptional. He had failed to recognise "the new weighting of exceptionality" under the current statutory regime. He had erred in relying upon what was said in **Masih** bearing in mind what had been said about that decision in **McLarty**. He had not properly explained why the claimant was not a risk to the public. He had not properly taken account of the fact that the Immigration Rules, with respect to deportation, are a complete code.

15. Mr Anyene reminded me that the claimant had arrived in the UK at a very young age. The judge had been clear at paragraph 35 of the determination in stating that, in his view, there were sufficiently compelling circumstances to outweigh the public interest in deportation. Thus, he had applied the correct test.
16. It does seem to me that there is a lack of clarity in the determination which has resulted in the First-tier Tribunal's reasoning being inadequate to the extent that an error in law is established.
17. In this context, as was stressed in **McLarty** but also in a number of other judgments, **AJ (Angola)** being one, it is apparent that Parliament does view the object of deporting foreign criminals as a very strong policy which is constant in all cases. What will amount to compelling reasons or exceptional circumstances is fact dependent but must necessarily be seen in the context of the articulated will of Parliament in favour of deportation. As Mr Whitwell submits, primary legislation and the content of the Immigration Rules does tilt the scales strongly in favour of deportation.
18. It is right to point out that the judge did, at paragraph 35 of the determination, state that he did have to consider "whether there are circumstances which are sufficiently compelling to outweigh the public interest in deportation". However, whilst going on to identify considerations weighing in the claimant's favour such as the contact with the child and the claimant having arrived in the UK at a very young age, he did not explain why those factors, even when taken together, were capable of amounting to very compelling circumstances over and above those described in paragraphs 399 and 399A. Nor in his consideration of the paragraph 398 test did he indicate he had taken into account countervailing points such as the offending and the deterrence aspect of deportation. His assessment, therefore, did not demonstrate a proper appreciation of the extent to which the scales have now been tipped in favour of deportation and the required force of the arguments which might cause the balance to swing in favour of a person seeking to challenge deportation.
19. The judge specifically indicated he was dismissing the appeal under the Immigration Rules, albeit, that he was allowing it under Article 8 of the ECHR. The Rules, though, in the context of deportation, are a complete code as was indicated by the Court of Appeal in **MF (Nigeria) [2013] EWCA Civ 1192**. Such an error will not always be a material one but it did mean, in this case, that the judge was not looking at the question of the claimant's Article 8 rights "through the lens of the new Rules themselves" (see **AJ (Angola)**), but, rather, was or may have been taking a more freestanding approach.
20. The judge failed to carry out a proper or complete evaluation of the possible applicability of paragraph 399(a) of the Rules. In this context, he did clearly accept that the claimant had a genuine and subsisting parental relationship with his child and clearly did accept that the child was a British citizen. However, he did not then go on to consider the possible applicability of 399(a)(ii)(a) and (b). Mr Anyene, rather ambitiously it seems to me, urged me to conclude that the judge had, in fact, decided

that all the requirements of 399(a) had been met and that, in consequence, the opening words of paragraph 35 of his determination contained a typing error. I do not think that is right because if he had been deciding that those requirements were met then he would not have found it necessary to go on to conduct any further assessment of the Article 8 arguments. The error is of some importance, though, because the extent to which a claimant fails to satisfy the requirements of 399 or the requirements of 399A, can be of relevance when considering the question of “very compelling circumstances” for the purposes of 398. It also meant, from the claimant’s perspective, that there had been an incomplete assessment such that he could not be certain why it had been concluded that he did not satisfy 399(a).

21. A matter of potential relevance to the question of whether there were the necessary compelling circumstances was the likelihood of the claimant reoffending. The judge noted the absence of an “OASys” report and said that, as a consequence, he was unable to assess the risk of reoffending. (Paragraph 36 of the determination). He then went on to point out as part of his explanation as to why he was allowing the appeal, that there was “no credible and reliable evidence before me” that the claimant represented “a continued threat to the wellbeing and protection of the public”. It seems to me, though, that despite the absence of an OASys report, which was of course unhelpful, it was, nevertheless, incumbent upon the judge to take a view as to the risk of reoffending for himself based upon all of the evidence he did have.

22. It is clear from paragraph 36 of his determination that the judge attached considerable importance to what was said by the Upper Tribunal in **Masih (deportation - public interest - basic principles) Pakistan [2012] UKUT 00046 (IAC)**. He said that he was satisfied that that decision was “of importance” and stated of it;

“The Tribunal held that when considering the relevant facts on private and family life under Article 8, a person who had lawfully spent ‘again all the major part of his or her childhood and youth in this country, very serious reasons are required to justify expulsion’.”

23. As Mr Whitwell points out, **Masih** and its continuing relevance was considered by the Upper Tribunal in **McLarty**. At paragraph 21 the Upper Tribunal said this;

“Finally, in relation to cases we should refer to the decision of the UT in **Masih v SSHD (Blake J and UT Judge Freeman) [2012] UKUT 00046 (IAC)**. In this case the UT laid down, at paragraph 11 a series of principles which it was intended would be applied in future deportation cases involving criminality. On their face they accurately reflect the law as it stood at the time. But they predate **SS Nigeria** (ibid) and **MF (Nigeria)** (ibid). In particular they do not emphasise the fact that Parliament has spoken (in favour of deportation) and this is a consideration that the Court of Appeal in **SS (Nigeria)** (ibid) has made clear must be given great weight. It seems to us therefore that to be consistent with recent case law emphasising this point **Masih** should no longer be treated as guidance, on this point.”

24. Thus, in light of that, the judge's reliance upon **Masih**, and it appeared to be substantial reliance, was misplaced. Further, and in any event, it was not right to say that the claimant had lawfully spent all or the major part of his or her childhood and youth in the UK, given that he did not arrive until he was aged 11 or 12 years and has not had valid leave since December 2012.
25. It is right to say, therefore, that there are a number of problems with the judge's reasoning though the main difficulty is the lack of explanation as to why the favourable circumstances identified in the determination satisfied, against the background of the importance now to be accorded to the public interest in deportation, the requirements of paragraph 398.
26. I do appreciate that the judge clearly set about his task with diligence but I do conclude that his determination contains errors of law of a material nature. I do, therefore, set the decision aside.
27. Given that the claimant succeeded in the appeal before the First-tier Tribunal and that there is a child involved in this appeal and bearing in mind the Court of Appeal's judgment in **JD (Congo) and Others [2012] EWCA Civ 327** and taking into account the views of the representatives, I have concluded that it is appropriate to remit this case to the First-tier Tribunal with the directions which follow below.
28. Finally, no anonymity order was made by the First-tier Tribunal and none was sought before me. Accordingly, no such order is made.

### **Decision**

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside the decision. The case is remitted to the First-tier Tribunal in accordance with the directions set out below and on the basis that it be heard by another judge of the First-tier Tribunal.

I make no anonymity order.

Signed

Date

Upper Tribunal Judge Hemingway

**Directions for the Rehearing Before the First-tier Tribunal**

1. The case is remitted to the First-tier Tribunal to be heard by a judge other than Judge K Moore.
2. The new hearing shall take place at a hearing centre convenient for the claimant and the time estimate for the new hearing shall be three hours. There are no interpreter requirements.
3. If either party is to rely upon further documentary evidence not already filed then that evidence should be produced in the form of a paginated and indexed bundle and sent to the First-tier Tribunal and the other party so that it is received at least 5 working days prior to the date of hearing.

**TO THE RESPONDENT**  
**FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed

Date

Upper Tribunal Judge Hemingway