Upper Tribunal
(Immigration and Asylum Chamber)

Terrelonge (para 399(b)) [2015] UKUT 00653 (IAC)

THE IMMIGRATION ACTS

Heard at Field House **On 19 October 2015**	**Decision Promulgated** .....

Before

Upper Tribunal Judge Gill

Between

Keron George Mcleod Terrelonge (Anonymity Order Not Made)	Appellant

And

The Secretary of State for the Home Department	Respondent

Representation:

For the Appellant: Mr S Jaisri, of Counsel, instructed by Victory@Law Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

(i) The requirements in para 399(b) are conjunctive. Accordingly, the correct approach is to consider para 399(b)(i) before the requirements in para 399(b)(ii) and (iii). If para 399(b)(i) is not satisfied, there is no need to consider the issues of undue hardship in para 399(b)(ii) and (iii). The offender would then have to rely upon showing other factors that show

very compelling circumstances over and beyond those described in paras 399 and 399A.

(ii) Para 399(b)(i) will only be satisfied if the relationship relied upon was entered into at a time when: (a) the offender had settled status which he had not obtained by deception or other means that imperils his settled status; and (b) he did not fall within the definitions of "foreign criminal" in s.32 of the UK Borders Act 2007 or s.117D of the Nationality, Immigration and Asylum Act 2002; and (c) he had not been notified of his liability to deportation.

(iii) The automatic deportation provisions in s.32 of the 2007 Act apply to persons convicted in the period between the passing of the Act (30 October 2007) and its implementation (1 August 2008).

DECISION AND REASONS

Introduction

1. The appellant, a national of Jamaica, has appealed with permission granted by the Upper Tribunal on 15 May 2015 against the decision of a panel of the First-tier Tribunal (Immigration and Asylum Chamber) ("FtT") (Judge of the First-tier Tribunal B A Morris and Mrs. R Bray JP) (hereafter the "second panel" or the "panel" to distinguish it from the "first panel", see [20] below). The decision of the second panel was promulgated on 24 October 2014, following a hearing on 14 October 2014, by which the panel dismissed his appeal under the Immigration Rules (hereafter the "IRs" in plural and "Rule" in the singular) and on human rights grounds (Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")) against a decision of the respondent of 21 May 2013 to refuse to revoke a deportation order made on 27 July 2011 on the basis that the respondent deemed his deportation to be conducive to the public good pursuant to s.3(5)(a) of the Immigration Act 1971. Reasons for the refusal are given in a letter that is also dated 21 May 2013 (the "RFRL").

2. Deportation proceedings (the chronology of which is described below) were commenced following the appellant's conviction on 21 November 2001 at Inner London Crown Court of an offence of causing grievous bodily harm with intent to do grievous bodily harm in respect of which he was sentenced to a 3-year custodial sentence. The appellant appealed against his sentence. On 30 April 2002, the appeal court increased his sentence to 3 years 9 months.

3. There is no evidence that the appellant has since committed any criminal offences.

4. The appellant has a rare condition of the spinal cord known as HTLV-I associated Myelopathy (HAM). This is a condition associated with long term

inflammation of the spinal cord. The long term diagnosis is to become wheelchair dependent. There is a summary of the appellant's condition at [47] of the second panel's decision, quoted at [30] below.

5. Before the second panel, the appellant's Article 8 claim was based on his relationship with a Ms Walker said to have started in 2002 (according to the appellant's evidence before the second panel) or 2004 (according to her evidence before the second panel). Before the second panel, it was not argued that the appellant's case fell within para 399(a) or 399A of the IRs (second panel's decision, at [53]). It was argued that his Article 8 claim fell to be considered under para 399(b).

Immigration history and background facts

6. The appellant arrived in the UK on 26 January 1997 as a visitor for six months. He obtained further leave to remain as a student which was subsequently extended to 18 January 1999.

7. On 19 March 1999, the appellant married a British citizen, Ms E Daniel. He then applied for leave to remain as a spouse which was granted until 18 January 2001. Upon a further application he was granted indefinite leave to remain ("ILTR") on 11 October 2001 on the basis of his subsisting marriage.

8. On 21 November 2001 the appellant was convicted of the offence described at [2] above. As stated above, the appeal court increased his sentence to three years nine months.

9. In the light of his criminal conviction, the appellant was notified on 4 December 2002 of his liability to deportation on conducive grounds. A decision was made to pursue his deportation to Jamaica and a decision notice and reasons for deportation letter were issued on 20 November 2003 and served on him together with an ICD.0343 reporting restriction letter requiring him to report at Becket House within 24 hours of his release on completion of his sentence on 21 November 2003 and every Thursday. The appellant was, in fact, released from prison in January 2003.

10. The appellant lodged an appeal dated 5 December 2003 against the reasons given by the respondent in the letter dated 20 November 2003 to deport the appellant. The appeal was heard by Adjudicator F R C Such on 18 June 2004. In a determination promulgated on 8 July 2004, the appeal was dismissed.

11. The appellant's wife did not attend the hearing on 18 June 2004 notwithstanding that an earlier hearing on 18 June 2004 had been adjourned because it was said that her daughter had chickenpox. A direction was issued that a letter from the GP be produced to support the explanation given for her absence from the hearing on 18 June 2004. No such GP's letter was submitted to Adjudicator Such.

12. The appellant's application for permission to appeal against the determination of Adjudicator Such was refused by Mr N H Goldstein, Vice

President of the Immigration Appeal Tribunal, on 14 September 2004. An application for Statutory Review was dismissed on 14 October 2004 and the appellant became appeal rights exhausted on the same day.

13. The respondent alleged that the appellant failed to comply with the requirements to report at Becket House and he also failed to advise the Home Office of his change of address.

14. On 23 May 2006, the appellant made an application for naturalisation as a British Citizen which was refused on 11 October 2006 on the basis of character.

15. On 19 October 2010, the appellant made a further application for naturalisation as a British citizen which was refused on 26 November 2010 due to his criminal conviction.

16. The appellant was subsequently brought to the attention of Criminal Casework through the representations of his son (Keron Anthony Terrelonge, date of birth: 7 August 1987). Keron Anthony Terrelonge had arrived in the UK on 27 July 1998 and was deported on 1 July 2012.

17. A Deportation Order was signed against the appellant on 27 July 2011 and was served on him when he reported at Becket House on 4 August 2011.

18. The appellant's then solicitor, Messrs Chartwell & Sadlers, made representations on 21 October 2011 and 9 November 2011. Such representations were treated as an application to revoke the Deportation Order.

19. The respondent then made attempts to obtain information about the appellant's relationship with his wife, daughter and stepson, as detailed at [24]-[27] of the RFRL. Eventually, the appellant's representatives said in a letter dated 20 February 2013 that the appellant was no longer in a relationship with his wife and had not been with her since about 2004. By letter dated 11 April 2013, the respondent then requested information about his relationship with his daughter and stepson.

20. The skeleton argument before the second panel said that the appellant and his wife were divorced in 2008 (second panel's decision at [48]). The respondent did not receive a reply to her request by letter of 11 April 2013 for details of the appellant's involvement with his daughter born on 5 March 2000 and his step-son born on 12 March 1995.

21. The decision to refuse to revoke the Deportation Order was then made on 21 May 2013.

22. The appellant's appeal against this decision was heard on 10 March 2014 before a panel of the First-tier Tribunal (Judge K W Brown and Mr G F Sandall) (hereafter the "first panel"). The appeal was allowed under the IRs and Article 8 of the ECHR.

23. On 22 May 2014, Upper Tribunal Judge Kekić granted permission to appeal to the Upper Tribunal against the decision of the first panel. The appeal

was heard on 21 July 2014 before Upper Tribunal Judge Rintoul who concluded that the first panel had materially erred in law and set aside its decision with none of its findings preserved. Judge Rintoul remitted the case to the FtT for fresh decision.

24. Thus the appeal came before the second panel on 14 October 2014.

Relevant legal provisions

25. The relevant legal provisions are ss.117B-D of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") and paras 398 and 399 of the IRs.

26. Ss.117A-D of the 2002 Act, which came into effect on 28 July 2014, provide 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 subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> **117B** *Article 8: public interest considerations applicable in all cases*
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) …
>
> (3) …
>
> (4) Little weight should be given to—
>
> (a) a private life, or
> (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
>
> (5) …
>
> (6) …
>
> **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 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 …

"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.

27. Paras 398 and 399(b) of the IRs provide:

A.398. These rules apply where:

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

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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

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

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

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

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

Revocation of deportation order

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
(i) the grounds on which the order was made;
(ii) any representations made in support of revocation;
(iii) the interests of the community, including the maintenance of an effective immigration control;
(iv) the interests of the applicant, including any compassionate circumstances.

390A. 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.

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

(a) …

or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, **or** settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

The decision of the second panel

28. The panel heard oral evidence from the appellant and Ms Walker, summarising their evidence at [33]-[41].

29. Although its decision was set aside with none of its findings preserved, the first panel's record of the evidence it received stands. To the extent relevant to the issues that were argued before me, this may be summarised as follows:

i) The appellant was divorced from his wife who lives with his daughter ([5]).

ii) The appellant was in a relationship with someone who had an 11-year-old daughter. He said that the partner was not at the hearing because he had not told the partner about his case or the appeal ([18]). He said he was not living with his partner and that she was unaware of his predicament ([33]).

iii) In cross-examination, Ms Walker said, inter alia, that when the appellant's appeal was heard in April 2014, he did not want her to become involved as she was the carer for her son ([37]). She was then referred to her witness statement where, at [3] and [5], she said that in 2004 the appellant mentioned to her that, after he left prison, the Home Office wanted to deport him, that nothing further was heard and that she assumed everything was okay [37].

iii) His aunt, Mrs. Norma Dubison, who gave evidence before the first panel, said she did not know if he was in a relationship in the UK ([20]).

iv) Pastor Jennifer Moore, ordained by the Pentecostal Church, gave written and oral evidence. She said she had known the appellant for about 3 years; that he was a valuable member of the congregation

who participates in most church activities; that the church tries to give him support for his daily living because of his medical condition; and that he helped immensely with the church youth programme and has helped young church members to change their ways. She was unable to provide information as to his current relationship.

30. The second panel gave its reasons for its findings at [44]-[66]. Its findings may be summarised as follows:

    i) It rejected the appellant's evidence that he was not served with the deportation order in 2011 and that the first he came to know about the deportation order was when he attended the Tribunal in 2013 or 2014 ([50]).

    ii) It found that the appellant was aware that he was subject to reporting conditions after his release from prison in 2003 ([51]).

    iii) It accepted Ms Walker's evidence that their relationship started in 2004 and that it ended in 2011 when there was a dispute about the appellant's son (Keron Anthony Terrelonge) coming to live with them. It accepted that the appellant moved to live with Ms Walker in 2012 when she became aware of his physical condition. However, the panel did not accept that they had a genuine and subsisting relationship, stating that it had "*taken note*" of the fact that the appellant did not mention the relationship with Ms Walker at his hearing in March 2014 but said he had a new relationship with someone who had an 11-year-old daughter (whereas Ms Walker then had an 11-year old son).

    iv) It found that the appellant had not shown that treatment or medication for his condition would not be available to him in Jamaica ([56]).

    v) There was no evidence that he had committed any offences since being released from prison in 2003 ([49]). Although there was no evidence put before it that he was addressing his offending behaviour, it said that it found that there was no evidence that he was a risk to the public ([57].

    vi) The appellant had not shown that it would be unduly harsh for Ms Walker to live in Jamaica if she chose to do so or that it would be unduly harsh for her to remain in the UK without him [58]).

    vii) Any delay in bringing deportation proceedings did not amount to an exceptional circumstance ([59]).

    viii) The appellant had minimal contact with his daughter. Such contact as he had was by phone.

31. I will now quote [44]-[66] of the second panel's decision:

    Conclusions

44. We have considered all the evidence in this case whether or not we specifically refer to it. We have not considered evidence in isolation but by reason of the format of this determination matters are considered in separate paragraphs.

45. We have considered Section 117C of the Nationality, Immigration and Asylum Act 2002 and paragraphs 390, 390A, 396, 397, 398, 399 and 399A of the Immigration Rules. We have borne in mind the decision in McLarty (Deportation – proportionality balance) [2014] UKUT 00315 (IAC).

46. We do not have any sentencing remarks in relation to the Appellant's conviction in 2001 although we note that it was an offence involving serious violence and that the original three year sentence was increased by the Court of Appeal to three years nine months.

47. The Appellant has been diagnosed with a rare condition of the spinal cord known as HTLV-1 associated Myelopathy (HAM). The documents before us show that this is a condition associated with long term inflammation of the spinal cord. The letter from Professor Taylor dated 19 September 2013 at page 3 of the Appellant's bundle states that the natural history of HAM is of gradual worsening of walking, bladder, bowel function and of chronic pain. The long term prognosis is to become wheelchair dependent. Patients' independence therefore becomes dependent on the degree of care that they can receive in the community. Treatment for the condition is not widely available and, indeed, the only treatments that Professor Taylor has evidence for previously have essentially been short term measures and symptomatic treatment. The Appellant presented in August 2007 early in the disease with symptoms of six months' duration. He consented to participate in a research trial to test whether a new approach to treating the condition would be safe and effective. The treatment was for twelve months and the study lasted a total of eighteen months. The experimental treatment appeared to stabilise the Appellant's condition. The most up-to-date medical documents are at pages 14 and 16 of the Appellant's bundle. On 16 April 2014 Dr Kagdi was requesting that the Appellant be seen for skin lesions over his back. The document also records that his HAM has been managed largely with symptomatic treatment including muscle relaxant. However he did receive 48 weeks of Ciclosporin therapy from September 2007 to September 2008 as part of a clinical study. The document at page 16 of the Appellant's bundle is also by Dr Kagdi and is dated 20 May 2014. This records that the Appellant's skin rash is much better but leg stiffness is still persistent. His CSF showed mildly raised protein and CSF HTLV-1 PVL of 45 percent. Following discussion with Professor Taylor they initiated the Appellant on Disease Modifying Medication for his Myelopathy. He was started on Methotrexate 7.5 mg weekly with Folic Acid supplements. The document concludes with the comment that they would review the Appellant again in three weeks but there is no further medical evidence available to us.

48. When the Appellant was granted ILR on 11 October 2001 it was on the basis of his subsisting marriage to Ms Daniel. He has not been in a relationship with her since 2004 and we are informed, in the Skeleton Argument, that they were divorced in 2008.

49. We find that there is no evidence before us to show that the Appellant has committed any further offences since his release from prison in 2003.

50. We reject the Appellant's evidence that he was not served with the Deportation Order in 2011 and we reject his evidence that he first came to know about the Deportation Order when he attended the Tribunal in 2013 or 2014. At the hearing the Appellant confirmed the contents of his witness statement which he had signed prior to the hearing on 14 October 2014 but which was undated. He, consequently, dated it on 14/10/14 but he had signed it before the date of the hearing. At paragraph 3 of that witness statement he states as follows:

> "In 2001, I received a conviction for GBH and a custodial sentence. The Home Office wrote in 2003 saying that they wanted to deport me. I appealed against the decision and although I lost my appeal, I understood from my solicitors at the time that they would make further representations on my behalf to the Home Office. Since 2004 I have heard nothing further from the Home Office until July 2011 when they suddenly served me with a deportation order. This order I believe was served or issued because of my son's situation as he was facing deportation himself at the time."

In addition to the Appellant's acceptance in that paragraph that he was served with the Deportation order in 2011 we have also seen the letter from his solicitors, Chartwell & Sadlers, dated 21 September 2012 which is in the Respondent's bundle. This letter contains the following sentence:

> "We maintain that our client is not a danger to the public and therefore his deportation cannot be said to be conducive."

We find that such sentence clearly indicates that a Deportation Order had been served. In the light of these matters we further find that the Appellant's oral evidence that he was not aware of the Deportation Order until he appeared at court in 2013 or 2014 undermined his credibility.

51. We find, on the balance of probabilities, that the Appellant was aware that he was subject to reporting conditions after his release from prison in 2003. The determination by Adjudicator Such states, at paragraph 4, that on completion of his sentence the Appellant was allowed to live at his current address subject to reporting conditions. We also note the entry on the Respondent's case notes that on 4 August 2011 the Appellant phoned the Respondent and claimed that his representative had written in 2003 in respect of his absence from reporting restrictions. This telephone call followed an earlier conversation between the Respondent and the Probation Officer for the Appellant's son in which the Probation Officer queried the nature of the Appellant's reporting restriction. The Probation Officer was advised that the Appellant was subject to restrictions imposed in January 2003 when he was released from prison to report at Becket House which he had never complied with. The Appellant does not dispute that he phoned the Respondent on 4 August 2011 but he disputes that he had ever received an earlier letter. We reject his evidence in that regard. We

find, on the balance of probabilities, that the Appellant was informing the Respondent of a letter written by his representatives in 2003 which was explaining his absence from the reporting requirements and that he was aware of such reporting requirements. We find that the Appellant has been aware since November 2002 that he was liable for deportation and that he has known since November 2003 that the Respondent deemed his deportation to be conducive to the public good. We take note that in paragraph 5 of her witness statement Ms Walker states that when they started going out in 2004 the Appellant told her that the Home Office wanted to deport him.

52. The Appellant was sentenced to three years nine months and, consequently, paragraph 398(b) is applicable and paragraphs 399 and 399A would fall to be considered.

53. It is not argued that the Appellant's case falls to be considered under paragraph 399(a) or 399A. It is argued that it falls to be considered under paragraph 399(b). This is relevant in that when considering the best interests of the Appellant's daughter it is not argued that his deportation would have an effect upon her and it is not argued that the Appellant has a genuine and subsisting relationship with Ms Walker's son. It is clearly in the best interests of the Appellant's daughter that she continue to live with her mother.

54. The relationship upon which the Appellant relies is his relationship with Ms Walker. The date when the relationship started is given as 2002 by the Appellant and 2004 by Ms Walker. We accept the date given by Ms Walker as the Appellant was in prison in 2002. We note that she has been aware from the commencement of the relationship that the Home Office wanted to deport the Appellant. We accept the evidence given by Ms Walker that their relationship ended in 2011 when there was a dispute about the Appellant's son coming to live with them and that the Appellant moved to live with her in 2012 when she became aware of his physical condition. We take note of the fact that the Appellant did not mention a relationship with Ms Walker at the hearing in March 2014 but said he had a new relationship with someone who had an 11 year old daughter. That description does not describe Ms Walker. We find that the Appellant has not shown, on the balance of probabilities that he is in a genuine and subsisting relationship with Ms Walker. We further find this matter relevant to the issue of family life

55. We reject the submission made by Mr Slatter in paragraph 4 of his Skeleton Argument that the Appellant has lived in the United Kingdom with valid leave for at least fifteen years immediately preceding the date of the immigration decision. We have already found that the Appellant was served with the Deportation Order in 2011 which nullifies the basis upon which the fifteen year period was calculated.

56. We have set out above the details of the Appellant's medical condition. That was considered by the Respondent in the letter dated 21 May 2013. The Respondent considered a letter from Dr Graham Taylor, dated 4 September 2012, which listed the medication prescribed to the Appellant. The Respondent's letter states that all medications listed in the letter dated 4 September 2012 are available in Jamaica. We find that the Appellant has not shown, on the balance of probabilities, that treatment or medication would not be available to him in Jamaica.

57. Although we have had no evidence put before us as to the Appellant addressing his offending behaviour we find that there is no evidence before us to show that he is a risk to the public.

58. We find that the Appellant has not shown, on the balance of probabilities, that it would be unduly harsh for Ms Walker to live in Jamaica if she chose to do so nor has he shown, on the balance of probabilities, that it would be unduly harsh for her to remain in the United Kingdom without the Appellant. We make this finding when considering both paragraph 117C(5) of the Nationality, Immigration and Asylum Act 2002 and paragraph 399(b) of the Immigration Rules.

59. We have considered the factor of delay in this case. There is no explanation from the Respondent as to why the Appellant's two applications for Naturalisation did not alert them to his presence However, as we have already found above, the Appellant has been aware for many years of the respondent's view that his deportation would be conducive to the public good. We have considered the case of EB (Kosovo) [2008] UKHL 41 which is set out at paragraph 9 of the Skeleton Argument. As set out above, the current relationship between the Appellant and Ms Walker commenced in 2012 which is after the Deportation Order was served on the Appellant. We have also set out above the fact that the Appellant's relationship with his wife ended in 2004 and we find that any delay on the part of the Respondent could not have affected that relationship. It is also to be noted that the Appellant did not mention his relationship with Ms Walker at the hearing in March 2014. We do not find that any delay in this case on the part of the Respondent amounts to an exceptional circumstance.

60. By reason of all the matters set out above we find that the Appellant has not shown, on the balance of probabilities, that pursuant to paragraph 390A of the Immigration Rules there are exceptional circumstances which outweigh the public interest in maintaining the Deportation Order.

61. We have considered the step-by-step process set out in Razgar [2004] UKHL 27. We accept that the Appellant would have a private life by virtue of the number of years he has lived in the United Kingdom. We do not find that he has a family life with Ms Walker but, if we are wrong in this, we go on to consider it below. We find that he has minimal contact with his daughter and that such contact is by telephone. His daughter's mother does not want them to be in contact and we find that it is in the child's best interest that she remain in the care of her mother. His private life also involves his involvement with the church.

62. Removal of the Appellant from the United Kingdom would interfere with any family and private life and have consequences of such gravity as potentially to engage the operation of Article 8. We remind ourselves that Lord Justice Sedley said in the case of VW (Uganda) [2009] EWCA Civ 5 that the phrase poses no especially high threshold in terms of Article 8. It was not argued that such interference would not be in accordance with the law and would have a legitimate aim. That, therefore, leaves the question of proportionality.

63. We bear in mind the decision in the case of Beoku-Betts [2008] UKHL 39.

64. We remind ourselves of the public interest in favour of deporting foreign criminals. We also remind ourselves that when considering the balancing exercise, Parliament has tilted the scales strongly in favour of deportation.

65. The Appellant has been present in the United Kingdom since January 1997 but was sentenced to a term of imprisonment in November 2001, a period of four years ten months after his arrival. He was released from custody in January 2003 by which time he had been notified of his liability to deportation on conducive grounds. We repeat here all the matters and findings set out above in relation to this factor. The Appellant has a medical condition which is being treated by the NHS. We set out here all the matters and findings made above in relation to that medical condition. There is no evidence that the Appellant has committed any further offences since his release from prison but we remind ourselves of the decision in Nasim & Others (Article 8) [2014] UKUT 00025 (IAC) that a person's human rights are not enhanced by not committing criminal offences or not relying on public funds. We repeat our finding in relation to no risk to the public. We repeat here our finding that the Appellant has minimal contact with his daughter and that such contact is, in any event, by telephone. We note the evidence of Pastor Jennifer Moore that the Appellant's involvement with the church has been for approximately three years. Such involvement would, therefore, have commenced at about the same time that we have found the Deportation Order was served upon the Appellant and his involvement with that church would have continued when he was fully aware that he was subject to a Deportation Order. We take account of his relationship with Ms Walker and we repeat here all the matters and findings set out above in respect of that relationship. We have considered the issue of delay by the Respondent but we repeat here the matters and findings made above in relation to that issue. His relationship with Ms Walker commenced when she and the Appellant were aware of his liability to deportation and their current relationship commenced after the Deportation Order had been served on the Appellant. This Appellant is a 47 year old male who has spent the majority of his life outside the United Kingdom and on his own evidence has made two visits back to Jamaica in 2000 and in 2001.

66. Taking into account all the matters set out above and the evidence as a whole, as we do, we find that there are no factors either singly or cumulatively which amount to compelling or exceptional reasons to outweigh the public interest in removal. The appeal in relation to paragraph 390A and Article 8 is dismissed.

The grounds

32. There are three grounds. Ground 1 advances two arguments as follows:

    i) The panel's finding that the appellant had not shown that he enjoyed family life with Ms Walker was inconsistent with the fact that it also considered whether it would be unduly harsh for Ms Walker to live in Jamaica and that it considered the guidance in Beoku-Betts.

    ii) The panel gave inadequate reasons for finding that the appellant did not enjoy family life with Ms Walker and failed to properly engage with her evidence as well as the evidence of Pastor Moore who said that she knew of the relationship.

33. Ground 2 is that the panel failed to consider or engage with the evidence that the appellant is receiving support with coping with his illness from members of his church and his aunt and niece. The panel failed to address the significance of the care and community support that the appellant is receiving. The appellant has no community ties in Jamaica and no family.

34. Ground 3 is that the panel failed to identify the public interest factors given that appellant has not committed an offence in the 13-year period since his conviction on 21 November 2001.

Submissions

35. In opening, Mr Jaisri submitted that, as the respondent's representative had not challenged the evidence that the relationship between the appellant and Ms Walker was genuine and subsisting, the second panel should have proceeded on the basis that it was genuine and subsisting.

36. This issue had not been raised in the grounds. I refused Mr Jaisri permission to argue it. My reasons are given at [45]-[48] below.

37. In relation to ground 1, Mr Jaisri said that he is instructed that the appellant's evidence at the hearing in March 2014 was that he was in a relationship with someone who had an 11-year old son and that this was a reference to Ms Walker. Mr Jaisri was instructed to say that the appellant had not said at the hearing in March 2014 that his partner had an 11-year daughter.

38. I pointed out that it had not been raised before Judge Rintoul that the first panel had incorrectly recorded the evidence of the appellant, nor had it been raised at any stage before the second panel.

39. Mr Jaisri submitted that the second panel had not given any reasons for rejecting the evidence that the appellant and Ms Walker had a genuine and subsisting relationship. They had merely said: "*We take note of the fact that the appellant did not mention a relationship with Ms Walker at the hearing in March 2014 but said he had a new relationship with someone who had an 11 year old daughter*". Mr Jaisri submitted that this

was not a reason. The panel merely noted this evidence. Having noted the fact, the panel did not explain the significance of this fact.

40. Even if this amounted to a reason, Mr Jaisri submitted that it was incumbent upon the panel to put the point to the appellant. Its failure to do so was unfair. There was an obvious inconsistency in the evidence, the significance of which may have been lost to the appellant's representative. The second panel was therefore obliged to put the point to the appellant if it intended to attach weight to the inconsistency.

41. In relation to ground 2, Mr Jaisri accepted that, if I decided ground 1 against the appellant, ground 2 could not succeed on its own, given the guidance in the Court of Appeal's judgment in GS (India) and others v Secretary of State for the Home Department [2015] EWCA Civ 40 and, that, in any event, medical treatment for the appellant's condition is available in Jamaica.

42. However, Mr Jaisri submitted that, if the second panel erred as contended in ground 1, the appellant's Article 8 claim is capable of succeeding pursuant to the guidance in GS (India) when his family life is considered in conjunction with the assistance that the appellant receives from members of his church and also from his aunt and niece.

43. Mr Jaisri submitted that the error of law contended in ground 3 was a process error. The second panel had failed to set out the public interest factors in favour of deportation. It also failed to consider the positive factor in his favour, that he had not committed any offence in the 13-year period since November 2001.

44. I heard Mr Avery briefly in response, following by Mr Jaisri's brief submissions in reply. I then reserved my decision.

Assessment

45. I shall first give my reasons for refusing to permit Mr Jaisri to argue that, as the respondent's representative had not challenged before the second panel the evidence of the appellant and Ms Walker that they had a genuine and subsisting relationship, the panel ought to have proceeded on the basis that they did have a genuine and subsisting relationship.

46. In the first place, the submission ignores the fact that the burden of proof is upon the appellant to establish the facts of his case. Furthermore, even if the respondent's representative does not challenge in terms the evidence given (which is not the case in the instant case, as explained below), this does not mean that the point is conceded.

47. The argument that Mr Jaisri sought to raise had not been raised in the grounds and therefore Mr Avery did not have prior notice of it. Having had the opportunity to consider the material before me in greater detail, I am fortified in my decision not to allow Mr Jaisri to argue this point. The hearing that took place before the second panel on 14 October 2014 does not stand in isolation. I have set out the chronology in this case in some detail. It will be apparent from [19] above and [24]-[27] of the RFRL that

the appellant and his representatives did not reply to the respondent's requests for information about his relationship with his wife, daughter and stepson on a timely basis. It was only after a second request for information had been made that a reply was sent, stating that the appellant was no longer in a relationship with his wife and had not been with her since 2004. No reply was received in response to a further request for information about his relationship with his daughter and stepson.

48. In my judgment, it was clear from [23]-[27] of the RFRL, that, in setting out the chronology of this correspondence, the respondent put the appellant strictly to proof on any claim that he might have to form the basis of an Article 8 family life claim.

49. In any event, it is plain from the second panel's decision, that the appellant's credibility was challenged at the hearing before the second panel in relation to his evidence that he had not been served with the deportation order in 2011 and that he was not aware that he was subject to reporting conditions after his release from prison in 2003. It is therefore plain that the respondent took issue with his credibility in material respects. It would (and should) have been obvious to him and his representative that he was not entitled to assume that any material aspect of his evidence was accepted. In addition, and importantly, the explanation that Ms Walker gave for not giving evidence to the first panel was specifically challenged in cross-examination, as the second panel's summary of the evidence at [37] of its decision demonstrates.

50. I therefore do not accept the submission that the respondent's representative had not challenged the evidence of the appellant and Ms Walker that their relationship was a genuine and subsisting one.

51. I turn to the fact that, in relation to ground 1, Mr Jaisri informed me that his instructions were that the appellant had not said at the hearing before the first panel that he was a relationship with someone who had an 11-year-old daughter, that he had in fact said his partner had an 11-year-old son and that he was referring to Ms Walker.

52. The fact is that there is no evidence to that effect before me. Counsel's instructions are not evidence. In any event, this should have been raised at the hearing before Judge Rintoul who had before him the issue as to the future conduct of the case. It should have been made clear to him that the appellant took issue with the first panel's record of his evidence. This was not done.

53. Furthermore, and importantly, it was open to the appellant to have given evidence to this effect to the second panel. He did not do so. I do not accept that fairness required the second panel to put to the appellant the fact that his evidence before the first panel was that he had said that he was in a relationship with someone who had an 11-year-old daughter.

54. What fairness requires will vary from case to case. In Secretary of State for the Home Department v Maheshwaran [2002] EWCA Civ 173, the Court of Appeal said (at [3]-[6]):

3. Those who make a claim for asylum must show that they are refugees. The burden of proof is on them. Whether or not a claimant is to be believed is frequently very important. He will assert very many facts in relation to events far away most of which no one before the adjudicator is in a position to corroborate or refute. Material is often adduced at the last minute without warning. From time to time the claimant or the Home Secretary are neither there nor represented and yet the adjudicator carries on with his task. He frequently has several cases listed in front of him on the same day. For one reason or another not every hearing will be effective. Adjudicators can not be expected to be alive to every possible nuance of a case before the oral hearing, if there is one, starts. Adjudicators in general will reserve their determinations for later delivery. They will ponder what has been said and what has not been said, both before the hearing and at the hearing. They will look carefully at the documents which have been produced. Points will sometimes assume a greater importance than they appeared to have before the hearing began or in its earlier stages. Adjudicators will in general rightly be cautious about intervening lest it be said that they have leaped into the forensic arena and lest an appearance of bias is given.

4. Undoubtedly a failure to put to a party to litigation a point which is decided against him can be grossly unfair and lead to injustice. He must have a proper opportunity to deal with the point. Adjudicators must bear this in mind. Where a point is expressly conceded by one party it will usually be unfair to decide the case against the other party on the basis that the concession was wrongly made, unless the tribunal indicates that it is minded to take that course. Cases can occur when fairness will require the reopening of an appeal because some point of significance – perhaps arising out of a post hearing decision of the higher courts – requires it. However, such cases will be rare.

5. Where much depends on the credibility of a party and when that party makes several inconsistent statements which are before the decision maker, that party manifestly has a forensic problem. Some will choose to confront the inconsistencies straight on and make evidential or forensic submissions on them. Others will hope that 'least said, soonest mended' and consider that forensic concentration on the point will only make matters worse and that it would be better to try and switch the tribunal's attention to some other aspect of the case. Undoubtedly it is open to the tribunal expressly to put a particular inconsistency to a witness because it considers that the witness may not be alerted to the point or because it fears that it may have perceived something as inconsistent with an earlier answer which in truth is not inconsistent. Fairness may in some circumstances require this to be done but this will not be the usual case. Usually the tribunal, particularly if the party is represented, will remain silent and see how the case unfolds.

6. The requirements of fairness are very much conditioned by the facts of each case. This has been stressed in innumerable decisions – see the many citations to this effect in *Rees v Crane* [1994] 2 A.C.173. We have no doubt that the claimant's submission is framed in terms which are far too wide and in words which are not to be rigidly applied to every situation. Whether a particular course is consistent with fairness is essentially an intuitive Judgment which is to be made in the light of

> all the circumstances of a particular case – see *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 A.C. 531 *per* Lord Mustill at p.560D….

55. When one considers the background in this case, it is evident that the appellant was slow to admit to the respondent in reply to her enquiries that his relationship with his wife had ended as long ago as 2004. He did not reply to the respondent's request for information about his relationship with his daughter and stepson. It was not until the appeal before the first panel that he said that he had minimal contact with his daughter and that such contact was by telephone. This is undoubtedly the behaviour of someone who does not wish to draw attention to weaknesses in his case.

56. Furthermore, as Mr Jaisri himself appeared to accept, the discrepancy was an obvious one although, at the same time, he also submitted that the significance of the discrepancy might have been lost on the appellant's representative. I do not accept that the significance of the discrepancy might have been lost to the appellant and/or a reasonably competent representative. His Article 8 claim before the second panel was based on his relationship with Ms Walker and his medical condition. Accordingly, it is elementary that the evidence that was before the first panel about the relationship would continue to feature in the appeal before the second panel.

57. I do not accept Mr Jaisri's submission that the second panel had not given reasons for rejecting the appellant's and Ms Walker's evidence of the genuineness of their relationship. In submitting that the second panel had merely noted the evidence at the hearing before the first panel and that this did not amount to a reason, Mr Jaisri seeks to place an overly technical interpretation on the sentence:

> We take note of the fact that the appellant did not mention a relationship with Ms Walker at the hearing in March 2014 but said he had a new relationship with someone who had an 11 year old daughter.

58. In my judgement, it is plain that the second panel *was* relying upon the evidence at the previous hearing *as a reason* for its rejection of the evidence of the appellant and Ms Walker.

59. I do not accept that the second panel gave inadequate reasons for rejecting the evidence of the appellant and Ms Walker about their alleged relationship. The fact that the appellant had not mentioned his alleged relationship with Ms Walker at the hearing in March 2014 and that he said he had a relationship with someone with an 11-year old daughter was adequate in my view.

60. In any event, there were other reasons in the evidence before the second panel that supported their rejection of the evidence of the alleged relationship, as follows:

    i) Ms Walker's explanation for her absence from the hearing in March 2014 is not one that stands up to any scrutiny, given that, as [3] and [5] of her witness statement showed, she was aware that there was

deportation action against him in 2004 and that, as nothing further was heard, she assumed everything was "*okay*".

ii) Ms Walker's explanation at the hearing before the second panel conflicts with the explanation the appellant gave at the hearing before the first panel, that he had not told his partner about his case.

iii) The evidence of the appellant's aunt, Ms Dubison, at the hearing before the first panel was that she did not know if he was in a relationship in the UK.

iv) At the hearing before the first panel, Pastor Moore said she was unable to give information as to his current relationship notwithstanding that she gave evidence about his activities in her church, saying, amongst other things, that he participated in most church activities.

v) The appellant said at the hearing before the first panel that he was not living with his partner, whereas Ms Walker said at the hearing before the second panel that he moved in to live with her in 2012.

61. Indeed, if the second panel had rejected the entirety of the evidence of Ms Walker and the appellant, this would have been open to it. As it is, its decision to accept *some* aspects of the evidence of Ms Walker was generous.

62. For all of these reasons, I do not accept that the second panel materially erred in law by giving inadequate reasons for its finding that the appellant had not shown that he was in a genuine and subsisting relationship with Ms Walker.

63. There is no substance in the remainder of ground 1, i.e. that the second panel failed to properly engage with the evidence of Ms Walker and Pastor Moore. Judges are not obliged to deal with every aspect of the evidence that is before them. However, if the second panel had given further reasons for rejecting the evidence of Ms Walker, no doubt this would have included the matters to which I have drawn attention at [60] above. Likewise, the evidence that Pastor Moore gave at the hearing before the second panel did not stand alone. The panel had before it all of the matters to which I have drawn attention above. Importantly, Pastor Moore was unable to provide information about his alleged relationship at the hearing before the first panel. This notwithstanding the fact that it is alleged by the appellant and Ms Walker that they were already in a relationship then and Pastor Moore's evidence at the hearing before the first panel that the appellant took part in most church activities, in which case it is reasonable to think that she would have been able to provide some information about his alleged relationship at the hearing before the first panel.

64. I do not accept that there is any inconsistency in the second panel's findings. When its decision is read as a whole and whilst I accept that the second panel may have expressed itself better, it is nevertheless clear that it considered the issue of undue hardship and Beoku-Betts on an

alternative basis, that is, if they were wrong to reject the evidence of the appellant and Ms Walker that they had a genuine and subsisting relationship.

65. I have therefore concluded that ground 1 is not established.

66. Nevertheless, I conclude that any error in the second panel's rejection of the evidence that the appellant and Ms Walker did not have a genuine and subsisting relationship is not material. My reasons are given at [67]-[82].

67. The next question concerns the meaning of "*precarious*" in para 399(b)(i). In AM (S 117B) Malawi [2015] UKUT 0260 (IAC) (a decision of Mr CMG Ockelton, Vice President, and Deputy Upper Tribunal Judge Holmes), the Upper Tribunal considered the meaning of "*precarious*" in s.117B(5) of the 2002 Act. Although the Upper Tribunal in AM (Malawi) considered s.117B(5) and not para 399(b)(i), it is nevertheless helpful to note what the Upper Tribunal said about the meaning of "*precarious*" in s.117B, head note (5) of which reads:

> (5) In some circumstances it may also be that even a person with indefinite leave to remain, or a person who has obtained citizenship, enjoys a status that is "precarious" either because that status is revocable by the Secretary of State as a result of their deception, or because of their criminal conduct. In such circumstances the person will be well aware that he has imperilled his status and cannot viably claim thereafter that his status is other than precarious.

68. Paragraph 4.4(b) of Chapter 13 of the Immigration Directorate Instructions (IDIs) (version 5.0 dated 28 July 2014) states:

> 4.4(b) Was the relationship formed at a time when the foreign criminal was in the UK lawfully and his immigration status was not precarious?
>
> 4.4.4 This rule is partially underpinned by section 117B(4) of the 2002 Act which provides that little weight should be given to a relationship formed with a qualifying partner that is established by a person at a time when the person is in the UK unlawfully. For the purposes of paragraph 399(b), a foreign criminal was in the UK unlawfully if he required leave to enter or remain but did not have it.
>
> 4.4.5 The Immigration Rules also require that a relationship not be formed at a time when the foreign criminal has precarious immigration status because a claim to respect for family life formed when there was no guarantee that family life could continue indefinitely in the UK, or when there was no guarantee that if the person was convicted of an offence while he had limited leave he would qualify for further leave, will be less capable of outweighing the public interest. For the purposes of this guidance, a person's immigration status is precarious if he is in the UK with limited leave to enter or remain, or he has settled status which was obtained fraudulently, or he has committed a criminal offence which he should have been aware would make him liable to removal or deportation.

4.4.6 If a relationship was formed when a foreign criminal had limited leave to enter or remain or was exempt from control for a limited period, then his immigration status was precarious. This is because he will, or should, have been aware that:

- he will not be able to qualify for indefinite leave to remain, e.g. because he is in the UK with limited leave that does not provide a route to settlement; or
- he may not qualify for indefinite leave to remain if there is a change in his circumstances, e.g. if he commits a criminal offence; or
- a temporary exemption from immigration control does not provide a legitimate expectation that he will be able to remain permanently in the UK.

4.4.7 In order to meet this limb of the exception, the onus is on the foreign criminal to provide evidence that the relationship with his partner was formed when he was in the UK with indefinite leave to enter or remain and before the criminality which he should have been aware would make him liable to removal or deportation.

4.4.8 If a foreign criminal formed a relationship with a partner at a time when he had indefinite leave to enter or remain which was obtained by means of deception, then that will provide a basis for saying that his immigration status does not benefit him under this provision because he should have been aware that he was not entitled to that status and the need to maintain effective immigration controls outweighs his immigration status.

69. The leading authorities on the interpretation of IRs include Mahad (Ethiopia) v Entry Clearance Officer [2010] 1 WLR 48, [2009] UKSC 16 and Odelola v Secretary of State for the Home Department [2009] 1 WLR 1230. Para 25 of Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088 (IAC) sets out the relevant passages from Mahad and Odelola, as follows (the emphasis is mine):

> 25. The law is settled as to the proper approach to the construction of the Rules. As observed by Lord Brown in *Ahmed Mahad v ECO* [2009] UKSC 16 at paragraph [10]:
>
> > "There is really no dispute about the proper approach to the construction of the Rules. As Lord Hoffman said in *Odelola v Secretary of State for the Home Department* [2009] 1 WLR 1230, 1233 (paragraph 4):
> >
> > > 'Further, like any other question of construction, this [whether a Rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the Rule, construed against the relevant background. That involves a consideration of the Immigration Rules as a whole and the function which they serve in the administration of immigration policy.'
> >
> > That is entirely consistent with what Buxton LJ (collecting together a number of dicta from past cases concerning the

status of the Rules) had said in *Odelola* in the Court of Appeal [2009] 1WLR 126 and indeed, with what Laws LJ said (before the House of Lords decision in *Odelola*) in the present case. Essentially it comes to this. The Rules are not to be construed with all the strictness applicable to the construction of a statute or statutory instrument but, instead sensibly according to the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State's administrative policy. The respondent's Counsel readily accepted that what she meant in her written case by the proposition 'the question of interpretation is … what the Secretary of State intended his policy to be' was that the court's task is to discover from the words used in the Rules what the Secretary of State must be taken to have intended. After all, under s.3(2) of the Immigration Act 1971, the Secretary of State has to lay the Rules before Parliament, which then has the opportunity to disapprove them. True, as I observed in *Odelola* (paragraph 33): '**The question is what the Secretary of State intended. The Rules are her Rules'. But that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State's intention to be discovered from the Immigration Directorates' Instructions (IDIs) issued intermittently to guide immigration officers in their application of the rules. IDIs are given pursuant to paragraph 1(3) of Schedule 2 to the 1971 Act which provides that:**

> **'In the exercise of their functions under this Act immigration officers shall act in accordance with such instructions (*not inconsistent with the immigration rules)* as may be given them by the Secretary of State …' (emphasis added)."**

70. Mahad and Odelola were considered by the Upper Tribunal in Sultana and Others (rules: waiver /further enquiry; discretion) [2014] UKUT 00540 (IAC) (the President and Upper Tribunal Judge Dawson) where, at [30], the Upper Tribunal said:

> 30. Thus IDIs, in common with comparable instruments of Secretary of State's guidance or policy, are subservient in nature, the handmaidens of the Immigration Rules. Instruments of this kind, notwithstanding their legal status, can, nonetheless, feature in a Tribunal's review of whether a decision was in accordance with the law. This follows from a correct understanding of their status. In public law terms, policies, or guides, of this kind have the status of a material consideration in cases where they are engaged. Accordingly, a decision maker's failure to have regard to this kind of instrument may operate to vitiate the decision under challenge. Similarly, where a decision maker purports to have regard to the guidance but misconstrues or misapplies it. This kind of instrument can also, in principle, engender a substantive legitimate expectation to which the law will give effect. Our final observation concerning IDIs is that provided their terms are consistent with the provisions of the Immigration Rules to which they relate, they may,

potentially, fulfil a further role, namely that of illuminating the rationale and policy underpinning the relevant Rules. This is illustrated in the statement in paragraph 3.4.2 of the IDI appended hereto that:

> "*Decision makers are also able to grant an application despite minor evidential problems .....*"

71. Sultana and others concerned the discretion on decision makers of waiver and/or further enquiry in cases where evidence submitted in support of an application under the Points Based System falls short. The Rule that was considered in Sultana and Others did not involve a rule the interpretation of which must take place in the context of primary legislation.

72. In my view, any proper interpretation of para 399(b)(i) must take account of relevant primary legislation. There are two pieces of primary legislation that are relevant. The first is s.32 of the UK Borders Act 2007 (the "2007 Act") and the second is s.117D of the 2002 Act.

73. The relevant provisions of s.117D are set out at [26] above. The relevant provisions of s.32 of the 2007 Act are:

> **32 Automatic deportation**
>
> (1) In this section *"foreign criminal"* means a person–
> (a) who is not a British citizen,
> (b) who is convicted in the United Kingdom of an offence, and
> (c) to whom Condition 1 or 2 applies.
>
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
>
> (3) Condition 2 is that–
>
> (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and
>
> (b) the person is sentenced to a period of imprisonment.
>
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.
>
> (5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).

74. It follows that a person's settled status is imperilled from the moment he satisfies the definition of "*foreign criminal*" in the automatic deportation provisions.

75. As a minimum, therefore, one can draw the conclusion that para 399(b)(i) will only be satisfied if the relationship relied upon was entered into at a time when: (a) the offender had settled status which he had not obtained by deception or other means that imperils his settled status; and (b) he did

not fall within the definitions of "*foreign criminal*" in s.32 of the 2007 Act or s.117D of the 2002 Act; and (c) he had not been notified of his liability to deportation.

76. The 2007 Act received Royal Assent on 30 October 2007. Section 32 came into force on 1 August 2008. In AT and another v Secretary of State for the Home Department [2010] EWCA Civ 567, the Court of Appeal held that s.32 applied to persons convicted in the period between the passing of the Act and its implementation. It follows that the occurrence of an event from 30 October 2007 onwards that triggers the automatic deportation provisions in s.32 of the UK Borders Act 2007 will *always* imperil a person's settled status, with effect from the date of the event.

77. The definition of "*foreign criminal*" in s.117D is different from the definition of "*foreign criminal*" in s.32 of the 2007 Act. The definition in s.117D applies to someone who has been convicted of a period of imprisonment of at least 12 months and also someone who has been convicted of an offence that has caused "*serious harm*" or is a *"persistent offender"*. The commission of an offence that has caused serious harm may result in the Secretary of State issuing a certificate under s.72(4)(a) of the 2002 Act, thus bringing the person within the automatic deportation provisions of s.32 of the 2007 Act in addition to s.117D. However, the definition of s.117D also applies to someone who is a persistent offender. Thus, in this respect, s.117D is wider.

78. It follows that, pursuant to s.117D, criminal conduct of an individual can imperil his/her settled status even if the automatic deportation provisions in s.32 of the 2007 Act are not triggered.

79. Para 4.4.5 appears to imply (although the first sentence is difficult to follow) that the fact that an individual's immigration status is precarious when the relationship was entered into is something that "*will be less capable of outweighing the public interest*" as opposed to it being a bar to success under para 399(b)(i) whereas under para 399(b)(i) it is an absolute bar. Plainly, this part of the IDIs is inconsistent with the clear words of para 399(b)(i) which must apply pursuant to Mahad and Odelola, in particular, the words in bold in the quote at [69] above.

80. Para 4.4(b) of the IDIs appears to envisage the possibility of an individual with settled status imperilling that status so as to render it precarious for the purposes of para 399(b)(i) in circumstances beyond those that make the person fall within the definitions of "*foreign criminal*" in s.32 of the 2007 Act and perhaps even s.117D of the 2002 Act. This may be suggested, for example, by the words: "*if the person was convicted of an offence*" and the words: "*or he has committed a criminal offence which he should have been aware would make him liable to removal or deportation*" in para 4.4.5.

81. The question whether convictions for criminal offences falling short of those that would make a person fall within the definitions of "*foreign criminal*" in s.32 of the 2007 Act and s.117D of the 2002 Act imperils their settled status does not arise in this case. This will require further

consideration in another case. Similarly, the question whether the commission prior to s.32 of the 2007 Act being passed of an offence that would have brought the individual within the definition of "*foreign criminal*" in that section but for the fact that s.32 was not in existence then, imperils his/her settled status is not a material issue in this case.

82. The requirements in para 399(b) are conjunctive. Accordingly, the correct approach is to consider para 399(b)(i) before the requirements in para 399(b)(ii) and (iii). If this requirement is not satisfied, there is no need to consider the issues of undue hardship in para 399(b)(ii) and (iii). The offender would then have to rely upon showing *other* factors that show very compelling circumstances over and beyond those described in paras 399 and 399A.

83. In the instant case, the appellant was convicted on 21 November 2001 of an offence for which he received a sentence of three years 9 months. This was before s.32 of the 2007 Act being passed and s.117D of the 2002 Act coming into force. However, he was notified of his liability to deportation on 4 December 2002. His status became precarious from this point. The second panel found that the appellant and Ms Walker first started their relationship in 2004 but it ended in 2011 and that he later moved in to live with Ms Walker in 2012. Accordingly, on any legitimate view, their relationship was formed at a time when his immigration status was precarious.

84. It follows that the appellant could not satisfy para 399(b)(i) of the IRs. Accordingly, in order to succeed in his appeal before the second panel, he would have had to show that the public interest in his deportation was outweighed by "*other factors"* which amounted to "*very compelling circumstances over and above those described in paras 399 and 399A*". No such "*other factors*" were put before the second panel. The assistance that he receives from members of his church and his aunt and niece was not sufficient in itself, as Mr Jaisri accepted.

85. Mr Jaisri accepted that, if I decide ground 1 against the appellant, ground 2 cannot succeed. Accordingly, it is not necessary for me to deal with ground 2.

86. As for ground 3, there is an assumption that the fact that an individual has not committed any further criminal offences somehow reduces the public interest in deportation. As Judge Rintoul said in his decision, the fact that the appellant has not committed further offences is not something that can properly attract weight in his favour. Not committing crimes is something that is expected of all members of society.

87. The second panel referred to s.117C of the NIAA 2002 and the decision of the Upper Tribunal in McLarty. At [64], it said that it had reminded itself of the public interest in favour of deportation and that Parliament had tilted the scales strongly in favour of deportation. I accept that it would have been preferable if the panel had elaborated on the public interest considerations. However, I make two points, as follows.

88. In the first place, the fact is that the appellant was convicted of a serious crime of violence, an offence of grievous bodily harm with intent to do grievous bodily harm for which, on appeal, his sentence was increased to 3 years 9 months. The nature of the offence and sentence together immediately raise the public interest of prevention of crime through the deterrence of others, the expression of society's revulsion at such crimes and the maintenance of public confidence in the system. This is not a case where the crime committed was of a less serious order so that there is some room for saying that not all of the public interest considerations that may come into play apply. This is undoubtedly a case in which all of the public interest considerations I have described apply in addition to the obvious one of immigration control.

89. Secondly, and in any event, the panel noted that Parliament had tilted the scales strongly in favour of deportation. In others words, there was a presumption in favour of deportation. Given the panel's findings, in particular, that the appellant had not demonstrated that he and Ms Walker had a genuine and subsisting relationship, there was nothing presented by him in his case even at a basic level to outweigh the public interest. Accordingly, any failure by the second panel to set out in terms the public interest considerations in this case is not material.

90. Ground 3 is therefore not established.

91. For all of the above reasons, I have concluded that the second panel did not materially err in law.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed Date: 30 October 2015
Upper Tribunal Judge Gill