Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/19699/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 March 2013 and 19 June 2013	**On 19 July 2013**

Before

UPPER TRIBUNAL JUDGE LATTER

Between

MUSTAPHA AKNOUCHE

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms P Solanke, instructed by Farani Taylor, Solicitors
For the Respondent: Mr P Nath, Home Office Presenting Officer (14 March 2013)
Mr J McGirr, Home Office Presenting Officer (19 June 2013)

DETERMINATION AND REASONS

1. This is an appeal by the appellant against a determination of the First-tier Tribunal issued on 5 December 2012 dismissing his appeal against the respondent's decision made on 29 June 2007 to deport him on the grounds that the respondent deemed it to be conducive to the public good.

Background

2. The appellant is a citizen of Algeria, born on 19 May 1970. He first came to the UK on 25 April 1989 and was granted leave to enter as a visitor for six months, his leave later being extended until 19 April 1990. He was granted further leave to remain as

the spouse of a person present and settled in the UK on 27 October 1993 and indefinite leave to remain as a spouse on 7 February 1995.

3. On 27 April 2004 he was convicted at Southwark Crown Court of conspiracy to defraud and on 2 April 2004 sentenced to three years' imprisonment. On 31 March 2005 the appellant was served with a notice of liability for deportation. He replied setting out reasons why he should not be deported. He was released from prison on 20 May 2005. On 15 February 2007 the respondent decided to make a deportation order but checks on the appellant's last known permanent address were not successful and a visit by an enforcement officer did not yield any results. The appellant was listed as an absconder and the decision was served on file on 29 June 2007. A deportation order was signed on 28 August 2007. The appellant came to light on 22 August 2012 when he was arrested at his place of work. The deportation order was served on 31 August 2012.

4. His appeal was heard by the First-tier Tribunal on 23 November 2012. The Tribunal heard evidence from the appellant, his daughter Laila, one of his step-daughters Jessica, his former wife and a business partner. The Tribunal sitting as a panel was satisfied that the appellant was liable to deportation as the respondent deemed deportation to be conducive to the public good. It went on to consider whether removing him from the UK would be in breach of his article 8 rights. It accepted that he had a daughter and two step-daughters living in the UK. His daughter, Laila, was 18 years old. She had given evidence about her health saying that she suffered from rectal bleeding and felt sick all the time. She did not know much about Algeria but knew that her grandmother, the appellant's brother and cousins lived there. The panel noted Laila's lack of knowledge about her father's life and describing it as inconsistent with her claim that they were very close to each other (29). It found that she was exaggerating her relationship with him as she had exaggerated her medical condition in order to assist him in this appeal. It found that the appellant and Laila had normal ties as expected between an adult child and a parent.

5. The panel also accepted that the appellant had two step-daughters living in the UK but they were adults and no longer lived at home. It found that the decision to deport the appellant would not interfere with his, his step-daughters' or their children's right to their family life.

6. The panel heard evidence from the appellant's business partner who claimed that he had entered into a business relationship with the appellant. It did not find it credible that he would not have enquired in more detail about his criminal history before establishing a business relationship and commented on the lack of any documentary evidence to support the claim about the proposed business. It did not accept that the appellant was his business partner and found that his evidence was to assist the appellant in the appeal and no reliance was placed on it.

7. However, the panel accepted that the appellant had established a private life in the UK which would be interfered with by deportation. It went on to consider the

question of proportionality referring to the threshold giving rise to the duty to deport under s32 of the UK Borders Act 2007, a sentence of imprisonment of at least twelve months. It referred to the amended immigration rules as setting out how the government considered the balance should be struck when assessing proportionality in a case involving a foreign criminal.

8. The appellant had been in the UK since 25 April 1989, a large part of the time being spent illegally. It found that the appellant had been in the country without leave for almost 10 of his 17 years' residence. It considered the judge's sentencing remarks in [39] and summarised its findings as follows:

> "[40] This seriousness of the offence was reflected in the three years' sentence meted out to the appellant.
>
> [41] We find a very strong public interest in deportation outweighs the appellant's private and family life in the United Kingdom. We find that there are no exceptional circumstances in the appellant's appeal. We find that whatever private life the appellant has created in the United Kingdom for the most part has been created when the appellant knew that he had no right to live here. We find that the appellant could not have had a reasonable expectation that he could live and build a private life in this country when he knew that a deportation order had been served against him and when he had no leave to remain. The appellant knew about the deportation order because of an undated letter addressed to the respondent which gives reasons why he should not be deported.
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> [42] We find that the appellant has family contacts and cultural ties to Algeria. His mother, brother and cousins live there. His daughter continues her contact with her grandmother in Algeria. The appellant has visited Algeria and knows plantation owners in Algeria who grow dates which are exported to the United Kingdom. The appellant still speaks Arabic. He can therefore continue his business of exporting dates from Algeria. We find that the appellant can continue with his life in that country.
>
> [43] We have followed the step-by-step approach in Razgar and find that the appellant's removal would be proportionate to the legitimate aim of effective immigration control, and, given that the appellant has been convicted of the crime, proportionate to the legitimate aim of the prevention of disorder or crime."

Grounds and Submissions

9. The grounds refer to the amended immigration rules and argue the panel failed to give them proper consideration when assessing whether deportation was conducive to the public good. This was a case which would succeed, so it is argued, under the amended rules and in particular para 399A(a). It is then argued that the panel materially erred in its assessment of article 8 by failing to consider whether the appellant was at any risk of re-offending, failing to refer to the relevant guidelines set out both in European and domestic jurisprudence when assessing whether deportation was necessary and proportionate. There had been no proper

consideration of the time which had elapsed since the appellant's offence, 23 years, the panel mistakenly referring in [37] to 17 years. It had failed properly to evaluate the relationship between the appellant and his daughter and step-daughters, to make any finding on the evidence of the appellant's former wife or generally to consider the relevant factors in respect of family life.

10. Finally, it is argued that the determination contained a number of mistakes of fact. The appellant had not been released to an unknown address from prison but to an address in London, N1. He had been subject to electronic tagging at this address between May and December 2005 but the respondent had not made contact with him and he then moved to another address. The appellant had not been without leave for ten years as the panel stated. As the deportation decision and deportation order had not been served on him, he could not be regarded as someone without leave.

11. Permission to appeal was granted by the First-tier Tribunal for the following reasons:

> "1. The appellant seeks permission in time to appeal against the decision of the First-tier Tribunal panel … promulgated on 5 December 2012 whereby it dismissed the appellant's appeal against the Secretary of State's decision to make a deportation order under s32(5) of the UK Borders Act 2007, the new Immigration Rules dated 9 July 2012 and under article 8 ECHR.
>
> 2. In the other ground it is submitted that the Tribunal has arguably erred in law by (a) misdirecting themselves on parts of the appellant's evidence on which the Tribunal based their findings. For example at para 37 of the determination it is recorded that the appellant has been in the UK since 25 April 1989. The Tribunal find that the appellant has been in the UK for 23 years and (b) by failing to give any findings on material matters, for example it is recorded at para 5 of the determination that the appellant's ex-wife, Mrs Marion Faulkner, gave written and oral evidence. A record of her oral evidence is recorded at para 10 of the determination. However there are no findings in relation to her evidence or the impact of the appellant's removal on her life (Beoku-Betts v SSHD [2008] UKHL 39)."

12. Ms Solanki adopted the grounds. She submitted that although a deportation order operated to invalidate any leave to remain, the order would only take effect when it was served. The appellant had given his address to the Probation Service and had been tagged. He was under no further duty to keep the respondent informed of where he was living. It was wrong to characterise him in these circumstances as an absconder. These factors should have been taken into account when assessing proportionality. The Tribunal had given significant weight to the fact that much of the time the appellant's leave to be in the UK had been unlawful when that was not in fact the case. It had failed to make any findings on the evidence given by the appellant's former wife or to deal adequately with the evidence given by Laila and his step-daughter, Jessica. She argued that para 399A was applicable as the appellant had been resident for twenty years at the date of service of the decision and that should have been taken into account.

13. Mr Nath submitted that there had been proper service as the decision was served at the appellant's last known address. In any event, in the circumstances of this appeal whether the appellant's leave was lawful or unlawful had little relevance to the outcome of the appeal. The evidence of the witnesses had been adequately summarised and its findings of fact made were properly open to the panel. The Tribunal had been entitled to take the view that this was a serious offence as was clear from the judge's sentencing remarks. The fact there may be a low risk of re-offending was not the end of the matter. The seriousness of the offence had to be considered together with the issues of deterrence.

The Error of Law

14. The issue for me at this stage of the hearing is whether the Tribunal erred in law such that its decision should be set aside. When granting permission to appeal the First-tier Tribunal judge said that the deportation decision was made under the UK Borders Act 2007 but this is not correct, it was made under the provisions of the Immigration Act 1971 s5. The panel recorded this in [1] of its determination and [15] but in [18] cited from MK (Deportation – foreign criminal – public interest) Gambia [2010] UKUT 281 saying that it must take that case into account but that case dealt with automatic deportation orders under the 2007 Act. At the hearing submissions were made to the effect that the appellant could bring himself within the provisions of para 399A, the ground relying on para 399A(a) and arguing that it was not considered, seemingly on the basis that the Tribunal were working on the assumption that the appellant had only been resident in the UK for 17 years as opposed to over 20 years. I am satisfied that the Tribunal erred in law by failing to consider the length of the appellant's residence in the UK not only when considering the amended immigration rules but also more generally when assessing article 8.

15. The Tribunal referred to the evidence from the appellant's former wife in its summary of the evidence but did not make any findings on that evidence or take it into account when assessing proportionality. That evidence was at least capable of affecting the assessment of proportionality.

16. I am also satisfied that a number of relevant matters were not properly taken into account as set out in Uner [2006] 45 EHRR 421 and Maslov [2007] 47 EHRR 496 including the time which has elapsed since the appellant's offence, length of residence in the UK and the evidence of the nature and extent of the continuing private and family life between the appellant, his daughter, step-daughters and his former wife.

17. For these reasons I am satisfied that the panel erred in law and that these errors are capable of affecting the outcome of the appeal. In these circumstances the decision should be set aside. The appeal was listed for further directions on 2 May 2013 and the appeal was re-listed for the decision to be re-made on 19 June 2013.

Further Evidence

18. Following a direction made on 2 May 2013, the respondent, in response to a request from the appellant to serve any evidence that she had in her possession of contact with the probation service after the appellant was released from detention and any evidence as to whether the respondent had asked the appellant to stay in contact with UKBA following his release from detention, confirmed in a letter dated 13 June 2013 that enquiries had not disclosed any such evidence. Mr McGirr sought to rely on a number of further documents including a request for information about the appellant's immigration status when considering whether he might be eligible for removal and a copy of the record on the respondent's computer system about the appellant's whereabouts following his release from prison. The appellant sought to adduce further evidence of a partnership deed between the appellant and Mr R Brilis and submitted a skeleton argument and extracts from the UKBA website setting out the rules relating to deportation. I gave permission for this evidence to be admitted.

19. Ms Solanke objected to the admission of the computer record but in the light of the issues arising from the delay in serving the immigration decision on the appellant I took the view that it was in the interests of justice for this document to be admitted but gave Ms Solanke an opportunity of taking instructions from the appellant before hearing further evidence. The record reads as follows:

> "Subject was released from HMP Standford Hill – release address:
>
> 418 The Strand Piccadilly London WC2
>
> Probation office 1-5 Dorsett Close, London NW1 5AN
>
> Case was referred to MIG, they confirm that subject's last known address was 32 Swathling Close, N18 2QG (according to DWP)
>
> A visit was made to the address on 9 May 2006 by Beckett House Arrest Team as part of OP Scully. Subject resides at address but was not present at time of visit.
>
> Call from subject's brother-in-law who declined to leave name or number.
> He said subject had called him saying that he (the subject) had been at work when we visited. His flatmate called him about our visit and he then fled to Leeds. Caller agreed to try and get the subject to come into Beckett Reporting Centre after I explained that we needed to see him about his status following his conviction; the caller had imagined that it was connected. He claimed that the subject's conviction for credit card fraud was his only involvement in criminal activity.
>
> Caller said he would call back if he succeeded.
>
> N Gornall

Beckett Arrest Team

On 27/2/04 at Southwark Crown Court the subject was concocted for the offence of conspiracy to defraud and sentenced to three years' imprisonment.

On 25.09.06 file allocated to Miss A Baugh."

20. The relevant documentary evidence is set out in the appellant's bundle indexed and paginated A1-88 and the respondent's bundle R unpaginated but including the record already set out in [19]. There is also a partnership deed between the appellant and Mr R Brilis. I heard oral evidence from the appellant, his former wife, Marion Faulkner, his daughter Laila Aknouche, his stepdaughter Natalie Faulkner and his business partner Mr R Brilis.

(i) The Evidence of the Appellant

21. The appellant adopted his witness statement at A17-22. This confirms that he entered the UK as a visitor in 1989 with six months' leave to enter which was extended until April 1990. In 1995 he was granted indefinite leave to remain on the grounds of his marriage to Mrs Faulkner, a British national. They have a daughter Laila and his wife had twin daughters from a previous relationship. They lived as a family unit for the next ten years. On 27 February 2004 he was convicted of conspiracy to defraud having been on bail for two years and sentenced to three years in prison on 2 April 2004. He served twelve months in HMP Stamford Hill taking a business and IT course. On 20 May 2005 he was released and was given no conditions by the respondent nor asked to keep in contact. Since then he has committed no further offences. This had been a difficult period for himself and his family resulting in a separation from his wife followed by divorce in May 2006. However, amicable relations have been maintained for the sake of the children. The appellant says that he is not a dishonest person but hard working. He has attempted to rebuild his life and the one thing that made him carry on and be optimistic was the fact that he had children waiting for him when he came out of prison.

22. He was very shocked when he was arrested and detained on 23 August 2012 and served with the decision dated 15 February 2007 to make a deportation order. He remained on good terms with his former wife and was bailed to her address which was very convenient as he helped care for their daughter, Laila. She suffers from a number of health complications and has been going through a very distressing physical health problem. He plays a vital role in her life supporting her emotionally and financially. His former wife could not care for her as she is trying to cope with her own health problems. He has two stepchildren, Natalie and Jessica Faulkner who are twins. He has regular contact with them as a father. Natalie now has two children, a daughter aged 5 and a son aged 4. He regularly looks after them and they spend a lot of time together. He is employed as a director of a company called Global Foods, paying tax, national insurance and corporation tax. He has also paid

child maintenance for his daughter and stepdaughters. The business is likely to expand and they will have to recruit new staff members. He says this is a very exciting time for the company and it is vital that he remains in the UK.

23. In his oral evidence he said that he used to live at 32 Swaythling Close after he came out of prison from May 2005 until the end of 2005. He was tagged and there was a record of coming in and going out and he had to report to Enfield probation office. He had never reported to the probation office at 1-5 Dorsett Close. His wife had five brothers but he did not think she had seen them since her mother's funeral some twenty years ago. His children had never seen them so far as he was aware. He had been working in Canning Town in a hotel. He had never been to Leeds. He had never been asked to report to the Home Office after his release from prison and had never been to Beckett House Reporting Centre. He had moved to an address in Private Road, Enfield at the end of 2005 and lived there for one and a half to two years. He then moved back to Potters Bar to his wife as they had been suffering some harassment and there were a number of problems. He had moved them to another address in Southgate.

24. He recalled that towards the end of his time in prison he had had a letter from the immigration authorities and had been asked to send a copy of his passport and details of whether he was in this country legally or illegally. He had sent them his wife's passport and Laila's passport but he heard nothing back. He was referred to the document at E1 of the appeal papers but said that he had not seen this before. This document sets out representations apparently made on his behalf in response to receiving a notice of intention to consider issuing deportation proceedings. He said that he did not know who prepared the document but he had written a signed statement on a piece of paper. He confirmed that his elderly mother lived in Algeria. He had not seen her since 2001 but did call her at Eid and Christmas. A brother looked after his mother and he had another brother living in the USA.

(ii) The Evidence of Marion Faulkner

25. Mrs Faulkner adopted her witness statement at A13-16. She married the appellant in 1993 and they were subsequently divorced in 2004/2005 but they still maintain a good relationship. In her statement she describes the appellant as a wonderful stepfather to her twin daughters, Natalie and Jessica and he helped her raise them from the age of 5. When he was arrested and sent to prison she was completely shocked as she knew what a good person he was. When he was released he continued to abide by the rules for his probation which demonstrated his compliance and reliability. She suffers from physical health problems. She has been diagnosed with arthritis, high blood pressure and a stomach hernia which really affects her day-to-day life. She is in constant pain with arthritis and finds it difficult to walk, pick things up and carry out chores and strenuous or demanding tasks.

26. Her daughter Laila also suffers from a very distressing physical problem which is ongoing and has left her very emotionally unstable. Because of her health problems

she is unable to care for Laila optimally and the appellant has been her rock through this difficult time. In addition he plays a valuable role in Laila's religious life. She is an atheist and cannot meet Laila's religious needs as she practises Islam. She says that the appellant plays a vital role in a number of people's lives and most importantly in his daughter Laila's life. She would be emotionally devastated, religiously deprived and psychologically damaged if he had to leave.

27. In her oral evidence she confirmed that she has five brothers but she last saw them at her mother's funeral. She said that her brothers would not have heard from the appellant. When he was released from prison, he came to visit and she asked him where he was staying but she could not now remember the address. She did not know of him living outside London and said that he had never lived in Leeds. She had kept in touch with him and he had come to see his daughters. She confirmed that Laila's health was better than it was but she was still continuing to suffer from problems. The appellant did odd jobs for her, gardening and shopping, as she could not do anything. In September 2012 he had been bailed to her address.

28. In cross-examination she was asked about para 3 of her statement where she said that the appellant had not committed the crime of which he was accused. She said that he had told her that he had not done it and there had been nothing to suggest that he was acting differently. She said that she knew nothing about the £12,500 in cash which had been found in the house. That had been kept from her. She thought he had lived in Edmonton when he came out of prison but she did not visit there. He had asked if he could stay with her but at that stage she said no. She could not remember where he moved to when his tag was removed but did remember that he went to Enfield, then Southgate or Potters Bar. There was no reason why her brothers would wish him any harm and they would not know anything about what was going on.

(iii) The Evidence of Laila Aknouche

29. Ms Aknouche adopted her witness statement at A9-12. There were no further questions and no cross-examination. In her statement she confirms that the appellant is her father and he has brought her up from birth. She explains about her health, how she has experienced bouts of vomiting and severe diarrhoea which have led to her being hospitalised a few times with the health professionals not knowing the cause. Following this she experienced a large amount of internal blood loss and it was speculated that she might have Crohn's disease. She has had a number of appointments at the hospital and with a doctor which she could not have attended without her father's support. The colonoscopy came back clear but she is still experiencing blood loss and pain and her consultant does not know what is causing this.

30. She says that her mother cannot manage to look after herself properly and struggles to look after her. Her father's role is important as he looks after her mother and her to the best of his ability. She had fond memories of her father when she was growing

up and also remembered how her sisters Jessica and Natalie used to play games together. Since his release from prison in May 2005, her life has returned to the way it was before. When her father was detained on 23 August 2012, she was very negatively affected by his detention and went into complete shock. She followed Islam and had been encouraged by her father, whom she described as a brilliant role model. If he were to be deported, it would greatly affect her family life. She would follow him to Algeria if he was made to leave the United Kingdom. She had never been abroad before and the prospect of living in an entirely different country scared her but she could not be apart from him. Her father has no-one in Algeria, his life was in this country and so was hers as was that of the family.

(iv) The Evidence of Natalie Faulkner

31. Natalie Faulkner's evidence is set out at A5-8. The appellant is her stepfather and she has known him since she was 5 years old. She and her twin sister had relied on his support and wisdom. When she left her mother's home many years ago, the support she received from the appellant continued. They saw each other regularly. He had bought her a laptop so that she could complete her college work as her goal was to become a radiographer. Since being released from prison in May 2005, the appellant has continued to be the respectful and caring person he had always been. Her children were born in 2007 and 2008 and the appellant had always behaved as their grandfather. Her children loved him very much and would be devastated if his deportation order was not retracted. She had acted as a surety and her family life would be greatly affected if he had to return to Algeria.

32. In her oral evidence she confirmed that she had never met her biological father and had effectively been brought up by her mother and the appellant. She was a single parent as she was separated from her children's father. She was now studying at college and near to completing her course. She had the offer of a university place in September. She lived close to her mother and the children saw the appellant regularly. She was really worried that they would be psychologically affected if they lost contact with him.

33. In cross-examination she said that when the appellant left prison she was then about 15. She knew he used to live in Edmonton when he had a tag. She then came back to their address as they needed his support because they had a number of problems. She had met his mother once when she visited from Algeria but that was when she was really young, of primary school age.

(v) The Evidence of Mr R Brilis

34. Mr Brilis confirmed the contents of his statement dated 15 November 2012 at A71. He met the appellant in 2005 after being introduced through a friend and later they became friends themselves. They had stayed in touch working together in 2009 and later that year the appellant approached him with an opportunity to work with a

date supplier in Algeria and they went into business together. The business imports dates and date paste from Algeria used in whole fruit bars sold in the UK's major supermarkets. The appellant deals with the supply side communications and handles all of the inbound freight and deliveries. They had been working with a bodybuilder to develop two new products aimed at the fitness industry, a high protein bread and a high protein pasta. The appellant has been invaluable in creating the recipes. He keeps in regular contact with his daughter.

35. In his oral evidence he said the appellant had been open about his offences which had not been a secret and they had had a conversation about it. He understood it related to a fraud when he was working in the restaurant business. However, he believed that he was a good judge of character and this was borne out by the success of their business. Their turnover was now about £600,000 a year. There were no other employees at present but they were now advertising for a marketing assistant. He confirmed that the appellant dealt with the supply side for dates from Tunisia and Algeria. The products they were producing were being made in France. He said it would be devastating if the appellant could not work as a partner.

36. In cross-examination he confirmed that the appellant did speak regularly on the phone to his daughter. He would not be able to carry out his duties to the business from abroad.

(vi) Witness Statement of Jessica Faulkner

37. This witness was not able to attend because of work commitments but reliance was placed on her statement at A1-4. This confirms that the appellant brought her and her twin Natalie up from the age of 5. Natalie's children adored him and saw him as a grandfather. His detention in August 2012 came as a massive shock. She describes the appellant as a very well respected and law abiding citizen saying that after being released from prison for a crime he did not commit, he has not committed any other crime but has reintegrated himself back into society by complying with and respecting the UK's laws. It would greatly affect their family life if he were to be deported.

Submissions

38. Mr McGirr relied on the reasons for refusal letter of 18 February 2007. He accepted that the appellant had at least a strong private life in the UK but the strength of the bond with his family did not outweigh the seriousness of the offence. His position could not be described as exceptional. His daughters were adults. The unusual features of the case such as his daughter's health problems and the childcare and assistance he gave to his stepdaughters and grandchildren were not sufficient to make the case exceptional, neither was the length of his residence. He was not able to meet the requirements of para 398 or 399A as he had not lived continuously in the UK for twenty years immediately preceding the date of the immigration decision and

in any event he was not someone who had no ties whether social, cultural or family with Algeria.

39. Ms Solanke adopted her skeleton argument. She submitted that the appellant did come within the provisions of para 399A as the date of the immigration decision should be treated as the date of service. She relied on R (ex parte Anufrijyeva) [2003] UKHL 36 to support her submission that 31 August 2012 was the relevant date of service. The appellant had only returned once to Algeria and this was for a funeral in 2001. Taking into account the guidance in Ogundimu (article 8 – new rules) Nigeria [2013] UKUT 60, the appellant did not have any connection to life in Algeria and making a rounded assessment of all the circumstances, he could not be said to have any social, cultural and family ties. She submitted that the appeal should be allowed on article 8 grounds in any event, referring to MF (article 8 – new rules) Nigeria [2012] UKUT 393. She referred to the criteria set out in Uner v the Netherlands [2007] 45 EHRR 14, in Maslov v Austria 1638/2003 23 June 2008 and in Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 0048. She submitted that the appellant's appeal should be allowed against the decision to make a deportation order and further that the deportation order also served on 31 August 2012 was unlawful and therefore a nullity as it had been made while the appellant had an appeal pending against the decision to make an order: s.79(1)(a) of the Nationality, Immigration and Asylum Act 2002.

Assessment of the Issues

40. The decision to make a deportation order was made under the provisions of s.3(5)(a) of the Immigration Act 1971 and is dated 15 February 2007. The appellant had previously been served on 31 March 2005 with notice of a person liable for deportation and he subsequently replied setting out in document E1 the reasons why he should not be deported. According to the immigration history set out in the appeal papers the appellant was released from prison on 20 May 2005 to an unknown address. Subsequent checks obtained what was believed to be a permanent address but an enforcement visit did not yield any result and he was listed as an absconder. Evidence has been produced in a record dated 1 May 2006 of what is recorded on the respondent's computer system about the enquiries that were made. The deportation order was made on 28 August 2007. The appellant only came to the attention of the authorities on 22 August 2012 when he was arrested and he was then served with the decision to make a deportation order and the signed deportation order on 31 August 2012. He gave notice of appeal on 13 September 2012.

41. I am satisfied that by reason of the provisions of the Immigration (Notices) Regulations 2003 that the decision to make a deportation order, which is an immigration decision within s.82 of the 2002 Act, was served in accordance with the provisions of reg 7(2). Ms Solanke relies on the opinions of the House of Lords in R (ex parte Anufrijeva) but that sets out the general principles relating to service but the 2003 Regulations make statutory provision for giving notice of immigration

decisions. Notice of an immigration decision shall be deemed to have been given in cases where the requirements of reg 7.2 are met when the decision maker enters a record of the circumstances and places the notice on the relevant file. The decision is in the present case is properly regarded as given on 29 June 2007.

42. The appellant has sought to rely on the provisions of para 399A of HC 395 as amended. The provisions relating to deportation and Article 8 in the amended Immigration Rules are at paras 398-400. The appellant falls within the provisions of para 398(b) as he has been convicted of an offence for which he has been sentenced to a period of less than four years but at least twelve months. This enables him to rely on para 399 or 399A but if those provisions do not apply, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors. The provisions of para 399A apply if:

> "(a) The person has lived continuously in the UK for at least twenty years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK ..."

43. It is argued that the date of the immigration decision should be treated as the date when the decisions were served on him on 31 August 2012 and that the appellant at that stage had lived in the UK for 23 years. I am not satisfied that this is the case. The wording of the rule specifically refers to the date of the immigration decision which was 15 February 2007 and in any event notice has been given under reg 7(2) of 2003 Regulations. I am therefore not satisfied that the appellant is able to show twenty years' continuous residence within the provisions of para 399A.

44. I am also not satisfied that he is able to show that he has no ties including social, cultural or family ties with Algeria. He has a mother and brother still living there and the evidence about his business is that he is involved in importing dates from Algeria. This is not a case where it can be said that has not ties to Algeria. He therefore does have a connection to life in that country within the guidance set out in Ogundimu. In that case it was held that the natural and ordinary meaning of the word "ties" in para 399A of the Immigration Rules imported a concept involving something more than really remote or abstract ties to the country of proposed deportation. It involved there being a connection to life in that country. There should be a rounded assessment of all the relevant circumstances which were not to be limited to "social, cultural and family" circumstances. I am not satisfied therefore that the appellant's appeal can succeed under the provisions of the Immigration Rules.

45. In considering whether I should go on to continue the principles of Article 8 generally I have taken into account the judgment of the Administrative Court in Nagre v Secretary of State [2013] EWHC 720 and the guidance of the Upper Tribunal in Izuazu [2013] UKUT 45 and Green [2013] UKUT 254 and I am satisfied that this is

an appropriate case to move on to consider the position under Article 8 apart from the provisions of the Immigration Rules. As the appellant cannot rely on para 399A, he can only succeed under the rules if he is able to show exceptional circumstances outweighing the public interest in his deportation. This test reflects the requirements of the rules which were in force when the decision was made which provided under para 364 that the presumption should be that the public interest required deportation and that the respondent would consider all relevant factors in considering whether the presumption was outweighed in any particular case although it would only be in exceptional circumstances that the public interest in deportation would be outweighed in a case when it would not be contrary to the Human Rights Convention. I am satisfied that this a case where all the relevant issues involved in the article 8 assessment are not adequately covered by the rules.

46. When assessing whether there is a breach of article 8 I must take into account the step-by-step approach set out by Lord Bingham in Razgar [2004] UKHL 27. I am satisfied that private and family life is established in the present case. The appellant does not have family life with his former wife although I accept that he is on good terms with her and plays a part in looking after her and doing work for her. He is also on good terms with his daughter and his two stepdaughters but they are over 21 so far as his stepdaughters are concerned and Laila is 18. Ms Solanke reminds me that under the EEA Regulations a child is considered to be a minor until the age of 21. Nonetheless, I must follow the guidance in Kugathas [2003] EWCA Civ 31 in assessing whether there is family life and whether there is anything more than the normal level of emotional dependency.

47. I treat the evidence of the appellant's family with some caution as it is inevitably coloured by their desire that he should not be deported but also by the belief that he is innocent of the offence of which he was convicted. I accept that there is a private life arising both from the length of the appellant's residence and his continuing close links with his family and his daughters and step grandchildren. I also accept that the appellant does play a continuing role in the life of his daughters, stepdaughters and grandchildren and that family life is not cut off at the age of majority. Looking at the position as a whole I am satisfied that there is not only private but also family life which will be affected by his deportation. I am also satisfied that the interference by deportation would be such as to engage article 8, that the decision is in accordance with the law and that deportation would be for a legitimate aim.

48. I must then take into account the issues identified in ECtHR authorities of Uner and Maslov. This was a serious offence of fraud. The appellant was employed as an assistant manager in an Italian restaurant and the details of credit cards were copied on to a skimmer and then encoded on to bogus or cloned cards for fraudulent use. When police officers attended the restaurant they found the skimmer in the jacket pocket of the appellant. There were some 49 card numbers in the memory. The total amount of fraudulent use of the cards cloned was some £30,000 to £40,000. The appellant had over £12,000 cash in a briefcase at home as well as £6,000 on his

person. He pleaded not guilty to the offence but was convicted by a jury. In his sentencing remarks, the judge said:

> "To some extent this was a breach of trust against your employer in that you were not carrying out your duties honestly. But on the other hand, it is right to say that your employer was not a loser here. The losers are the banks issuing and operating the credit cards in question. There must also have been inconvenience to the credit card holders whose cards of course would have been returned to them perfectly properly, when it was discovered that they had been debited for things that had no relation to them and were the result of fraudulent misuse of a cloned card.
>
> In one respect this was, in my view a mean fraud. This was a small business. Mrs W was part owner with her husband. She actually worked alongside you in the business and there were few staff and suspicion would inevitably fall on anybody who had been working at the material time.
>
> Credit card fraud in whatever form is all too common. It is lucrative. It is relatively easy to execute. This was a well planned and equipped operation. I accept of course that others as well as yourself were involved; for example, in the cloning of the false cards. But the fact is that you were in a position of responsibility and you played an essential role in this fraud. In my view your motivation could only be sheer greed."

49. The judge took into account the fact that the appellant had no previous convictions and had worked hard in this country but he had not accepted responsibility for his offence. There was no credit for any guilty plea or consequential expression of remorse. A compensation order was made in the sum of £13,000 and the judge passed a sentence of three years' imprisonment.

50. The appellant arrived in the UK in 1989. He had leave to remain. There was a period where he overstayed but subsequently he married and was granted limited leave and then indefinite leave to remain. He has continued to reside in this country save for one brief visit to Algeria many years ago. Since the offence was committed he has remained out of trouble and continued his family life. He is an Algerian national whereas his former wife and his children have British nationality. There has been no evidence as to whether Laila would be entitled to Algerian nationality as the appellant is her father. The appellant is no longer married but is on good terms with his former wife. He plays a continuing part in the life of his daughters and his step-grandchildren. His daughter is now 18 and his stepchildren about 25. No issue arises of whether his former wife should go to Algeria. So far as his daughter and stepdaughters are concerned they cannot reasonably be expected to move to Algeria. This is not a case where deporting the appellant inhibits in any way the exercise of his family's rights as EU citizens. In her witness statement Laila says that she would follow her father to Algeria but she also makes the point that the family would be torn apart if that happened. As I have already indicated their evidence is coloured

by their understandable wish that the appellant should not be deported and I find that they have exaggerated the extent of the impact on their family life. Whilst he does have normal emotional ties with his family, I am not satisfied that they can be described as exceptional.

51. I must take into account the interests of the appellant's step grandchildren as a primary consideration. I accept that they would miss the appellant but I do not accept that they would be psychologically damaged to the extent argued by their mother beyond missing direct contact. The appellant's social, cultural and family ties are now with this country and his ties with Algeria are much more limited but as I have already indicated such ties exist. His mother and brother continue to live in Algeria and he has business links with the country. I accept that the appellant is in business but I do not accept that the impact of deportation would be as devastating as Mr Brilis has claimed. He would not be able to work as a partner in this country but there appears to be no reason why he could not have an input into the business from Algeria.

52. The other important factor I must take into account is the extent of the delay in the matter coming to appeal. The delay was caused by the fact that the decision could not be personally served on the appellant until 2012. Whilst I am satisfied that the computer record is an accurate record of what is recorded on the respondent's computer about the enquiries made to try and locate the appellant after the decision was made, I have concerns about the accuracy of some of the information itself. There is no dispute that after he was released from prison the appellant lived at 32 Swaythling Close during the period when he was tagged. I accept that he left there by the end of 2005 and that he was not living there in 2006 and I attach no weight to information purporting to come from a flatmate. However, I see no reason to doubt the record that there was a call from the appellant's brother-in-law or someone claiming to be so who had knowledge of the appellant' offence and said that he would try and get the appellant to come into Beckett Reporting Centre.

53. I find it hard to accept that the appellant or some members of his family would not have known about this. There must be at least a strong possibility that the appellant knew the respondent was trying to contact him but he chose to wait and see whether or when he was located. There is no doubt that the appellant was aware that the respondent was considering making a deportation order having sought his submissions in March 2005. The appellant responded to a question about the letter appearing at E1 saying that he had not seen this document but it must have been drafted on the basis of information he provided and was quite specifically aimed at the issue of whether he should be deported. I take into account that there was a delay by the respondent in taking the decision to make a deportation order. The subsequent delay before the decision was personally served on him arose from the respondent not being able to locate the appellant. I have had concerns about whether the appellant took steps deliberately to evade being located but the evidence is not sufficiently strong for me to make such a finding on a balance of probabilities. The appellant was aware that the respondent was considering making a deportation

order but I am not satisfied that he took positive steps to frustrate enforcement of the decision not least as it is conceded that there is no evidence of any requirements imposed by the respondent with which he failed to comply.

54. I am therefore satisfied that the respondent did make enquiries in an attempt to locate the appellant which were unsuccessful. No evidence has been provided to show that the appellant was under any obligation to remain in contact with the respondent before any decision was made but equally I am satisfied that the appellant was aware of the possibility of a deportation order and did not bring himself to their attention. Even so, I must take into account the lapse of time between the decision in 2007 and the appellant coming to light in 2012 as part of his length of residence and as arising from the delay in being able to serve the notice on him. I do not attach any weight to whether his residence has been lawful or unlawful following the making of the deportation order which would invalidate his leave to remain by virtue of s.5(1) if the 1971 Act. The issue of the validity of that order has been raised in these proceedings on the basis that it is a nullity as it was made when an appeal could be brought but I am not satisfied that this is the case as it was made after the expiry of the permitted time in which an appeal could be brought following service.

55. In EB (Kosovo) [2008] ImmAR 713 the House of Lords said the delay could be relevant in any one of three ways: firstly, during a period of delay a claimant might develop closer personal and social ties and so establish deeper roots in the community, secondly, any relationship entered into which was precarious might have strengthened with time and thirdly, if delay was shown to be the result of a dysfunctional system that yielded unpredictable, inconsistent and unfair outcomes it could be relevant to reducing the weight to be attached to the requirements of firm and fair immigration control.

56. I am not satisfied that the delay here occurred as a result of a dysfunctional system leading to inconsistent and unfair outcomes. It occurred to a large extent because the respondent was unable to locate the appellant. Further, the legitimate aim in this appeal is not the requirement of firm and fair immigration control but the public interest in deporting those who commit serious offences. I am satisfied that the appellant's deportation would have been found conducive to the public good even prior to the UK Borders Act 2007 and the provisions of para 398 of the amended rules.

57. I take into account that the appellant has had no further convictions and has complied with the terms of his licence. Whilst there was a delay in taking enforcement action, I am satisfied that the respondent did take steps in attempting to locate the appellant. The delay in locating the appellant has had two effects. The first is that he has been able to remain in the UK whilst Laila was a minor and when his stepdaughters were young adults and to this extent the interference with his family life is less than it would have been but on the other hand he has maintained

and confirmed his family and private life commitments and built up a relationship with his grandchildren.

58. However, I must give weight to the factors relating to the public interest set out in cases such as OH (Serbia) v Secretary of State [2008] EWCA Civ 694 including the risk of re-offending, which I accept is negligible in the present case, the need to deter foreign criminals by making it clear that one consequence may well be deportation and to reflect society's expression of outrage at the commission of certain types of offence and in building public confidence in the treatment of foreign citizens who have committed serious crimes. I must also consider and take into account and give proper weight to the views of Parliament in the UK Borders Act 2007 and of the Secretary of State and the House of Commons in the provisions of the amended immigration rules. I am not satisfied that the appellant is able to show exceptional circumstances within the immigration rules to outweigh the public interest in deportation. Although there is no test of exceptionality when article 8 is looked at outside the rules, nonetheless Lord Bingham made it clear in Razgar [2004] UKHL 24 at [20] that it would only be in a small number of cases identifiable on a case by case basis that removal would not be appropriate in immigration cases. That observation must apply with even more force to cases involving the commission of serious criminal offences.

59. In summary, the appellant cannot bring himself within the amended immigration rules as falling in one of the categories where deportation would not be the proper course and I am satisfied that the public interest outweighs the interference to his private and family life even taking into account the delay and the personal and compassionate circumstances relating to the appellant, his family and his business and that deportation is necessary and proportionate to a legitimate aim within article 8(2).

Decision

60. The First-tier Tribunal erred in law and the decision has been set aside. I substitute a decision dismissing this appeal on both immigration and human rights grounds.

Signed Date: 19 July 2013

Upper Tribunal Judge Latter