Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/00339/2014**

THE IMMIGRATION ACTS

Heard at Field House
On 31 October 2017

Decision and Reasons promulgated
On 22 February 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SU
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr C Yeo instructed by Renaissance Solicitors
For the Respondent: Mr Bramble Senior Home Office Presenting Officer

DECISION AND REASONS

1. The history of this matter shows that on 10 September 2014 First-tier Tribunal Judge Warren Grant dismissed the appeal under the Immigration Rules but allowed the appeal pursuant to article 8 ECHR against the respondent's decision to refuse to revoke a deportation order made against the appellant on 17 February 1998, pursuant to section 5(1) Immigration Act 1971.
2. The Secretary of State sought permission to appeal to the Upper Tribunal which was granted by a Designated Judge of the First-tier Tribunal on 1 October 2014. On 11 December 2014, Upper Tribunal Judge Moulden found that the First-tier Tribunal Judge did not err in law and dismissed the Secretary of States appeal.

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3. The Secretary of State sought permission to appeal to the Court of Appeal for which permission was refused by the Upper Tribunal on 18 March 2015. By an order dated 24 July 2015, sealed on 27 July 2015, the Right Honourable Lord Justice Richards, considering the renewed application for permission to appeal, granted permission finding that for the reasons set out in Counsel's skeleton argument the application met the second appeal criteria.
4. By an order sealed on 20 July 2017 the Court of Appeal, having heard counsel for both parties, allowed the Secretary of States appeal ordering that the respondent's appeal against the Secretary of State's refusal to revoke the deportation order made against him is remitted for reconsideration by a different constitution of the Upper Tribunal. That judgment is reported as *Secretary of State the Home Department v SU [2017] EWCA Civ 1069*.
5. Following preliminary discussions at the commencement of the hearing both advocates agreed that the effect of the order of the Court of Appeal is that the earlier decisions of both the Upper and First-tier Tribunal have been set aside. When discussing whether in light of this it was appropriate for the matter to remain in the Upper Tribunal or be remitted to the First-tier Tribunal, both advocates agreed that they were happy for the matter to remain before the Upper Tribunal.
6. In light of the fact no CMR had been listed before the Upper Tribunal, as is ordinarily the case with an appeal remitted by the Court of Appeal, Mr Bramble indicated he wanted time to consider the Court of Appeal decision on the papers as he thought the matter had been listed for an error of law hearing and was unaware of the true nature of the hearing in light of the developments before the Court of Appeal. Mr Yeo confirmed that he was relying upon the First-tier Tribunal bundle.
7. The matter was accordingly put back to allow Mr Bramble further time after which he confirmed no evidential issues arose, it was accepted that oral evidence would not be necessary, and that the matter could proceed by way of submissions only. It is accepted by Mr Bramble that the factual findings of the First-tier Tribunal are not disputed.
8. The procedure adopted was for Mr Yeo to make his initial submissions followed by Mr Bramble and then for Mr Yeo to reply.

<u>Background</u>

9. The facts, taken from the judgment of the Court of Appeal, are as follows:

> *The facts*
>
> 3. The respondent is a citizen of Pakistan who was born in May 1959. He entered the UK illegally in March 1994 but shortly afterwards lodged a claim for asylum. That application was refused in November 1997 and his appeal against the refusal was dismissed in June 1998. In October 1995, he married MPP, an Indian national with a right of residence in the UK whom he had met while living in the UK. He was granted leave to remain as a spouse until March 1997. In September 1996, he was convicted on two counts of conspiracy to defraud, sentenced to 42 months' imprisonment and recommended by the trial judge for deportation. In February

1998, a deportation order was made against him. He appealed against the order but by August 1998 his appeal rights had been exhausted and, in October 1998, he was deported to Pakistan.

4. In 2000, the respondent illegally re-entered the UK. His marriage to MPP was dissolved in January 2002 and he subsequently married JU, who had come to the UK from Pakistan and become a British citizen by virtue of a previous marriage. In June 2003, he applied for leave to remain as JU's spouse. In November 2005, he applied for indefinite leave to remain as part of the "family exercise 2003" but his application was dismissed in September 2006 on the grounds that he did not meet the relevant criteria.

5. No progress was made with the original application for leave to remain as JU's spouse until December 2013, when the Secretary of State wrote to the respondent requesting information, to which the respondent promptly replied.

6. The Secretary of State determined that it was first necessary to decide whether to revoke the extant deportation order made in 1998. In February 2014, she determined not to revoke it, setting out her reasons in a letter dated 5 February 2014.

7. As earlier mentioned, the respondent successfully appealed to the FTT against the refusal to revoke the deportation order and the Secretary of State unsuccessfully appealed that decision to the Upper Tribunal.

8. The respondent's application for leave to remain as JU's spouse has yet to be determined, pending the outcome of these proceedings.

The law

10. The Court of Appeal summarised the applicable law before them in the following terms:

The relevant legislation and rules

9. The statutory framework for deportation orders and the system of appeals against them (and against a refusal to revoke a deportation order) relevant to this appeal are or were set out in a number of statutory provisions. There have since been some further changes but I shall refer only to the applicable provisions.

10. Section 3(5) of the Immigration Act 1971 (as amended) (the 1971 Act) provides that a person who is not a British citizen is liable to deportation if the Secretary of State deems it to be conducive to the public good, and section 3(6) (as amended) provides that a person who is not a British citizen is also liable to deportation if, after he has attained the age of 17, he is convicted of an offence punishable by imprisonment and on his conviction he is recommended for deportation by a court empowered by the Act to do so. Section 5(1) provides that, where a person is liable to deportation under section 3(5) or (6), the Secretary of State may make a deportation order against him.

11. Section 32(4) of the UK Borders Act 2007 (the 2007 Act) provides that, for the purposes of section 3(5) of the 1971 Act, "the deportation of a foreign criminal is conducive to the public good". A "foreign criminal" is a person who is not a British

citizen, is convicted in the UK of an offence and is sentenced to a period of imprisonment of at least 12 months. Further, section 32(5) provides that the Secretary of State must make a deportation order in respect of a foreign criminal, subject to section 33. So far as relevant to the present appeal, the obligation to make a deportation order under section 32(5) is displaced by section 33 where deportation would breach "a person's Convention rights", i.e. their rights under the Convention on Human Rights and Fundamental Freedoms.

12. The grounds on which an appeal can be made against a deportation order (or a refusal to revoke an order) are set out in section 84(1) of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act) and include that the decision is not in accordance with immigration rules, that the decision, or removal pursuant to a decision, is or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights, or the decision is otherwise not in accordance with the law.

13. The relationship generally between immigration decisions and Convention rights, and particularly between decisions to deport foreign criminals and their Convention rights, is the subject of provisions contained in Part 5A of the 2002 Act, which was introduced by the Immigration Act 2014 with effect from 28 July 2014.

14. Section 117A provides:

"(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)."

15. The decision of the FTT in the present case was made on 10 September 2014 and accordingly, by virtue of section 117A, it was required to apply Part 5A in determining whether the refusal to revoke the deportation order against the respondent breached the respondent's rights under Article 8 of the Convention: see *YM (Uganda) v Secretary of State for the Home Department* [2014] EWCA Civ 1292; [2015] INLR 405, at [38].

16. Section 117B(1) provides that "[t]he maintenance of effective immigration controls is in the public interest". Section 117B(4) provides:

"(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."

17. Section 117C(1) provides that "[t]he deportation of foreign criminals is in the public interest". Section 117C(3) provides that in the case of a foreign criminal (C) who has not been sentenced to a period of imprisonment of more than four years, "the public interest requires C's deportation unless Exception 1 or Exception 2 applies". It is common ground that neither Exception applied in the present case.

18. The Immigration Rules applicable to the decision of the FTT were those in force at the time of its decision: *YM (Uganda) v Secretary of State for the Home Department* at [39].

19. The relevant provisions of the Immigration Rules are paragraphs 390 – 400, as in force immediately following their amendment with effect from 28 July 2014.

20. Paragraphs 390 – 392, under the heading "Revocation of deportation orders", provided:

"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

391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:

(a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order, or
(b) in the case of a conviction of an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,
Unless, in either case the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

392. Revocation of a deportation order does not entitle the person concerned to re-enter the United Kingdom; it renders him eligible to apply for permission under the Immigration Rules. Application for revocation of the order may be made to the Entry Clearance Office or direct to the Home Office."

21. Those paragraphs were considered by this court in *ZP (India) v Secretary of State for the Home Department* [2015] EWCA Civ 1197; [2016] 4 WLR 35 at [20] – [27]. In that case, ZP had been deported from the UK pursuant to an order made on 28 November 2008, following her conviction of offences for which she received two concurrent sentences of 12 months' imprisonment. While still in India, she applied for the revocation of the deportation order on Article 8 grounds and, by a decision made on 17 April 2014, the Upper Tribunal allowed her appeal and revoked the order. In this court, the parties were not agreed as to which of the paragraphs governed the case. Underhill LJ, with whom Christopher Clarke LJ and Sir Timothy Lloyd agreed, held that paragraph 390 applied to all applications, albeit that its provisions are "at a very general level" and were in practice, in that case, superseded by the more specific provisions that follow.

22. The court held that paragraph 390A applied only in a case where the applicant had not yet been deported. In the present case, the respondent was deported pursuant to the deportation order in October 1998, having exhausted all appeals procedures. The fact that he subsequently re-entered the country illegally and so made his application for revocation of the deportation order from within the UK does not provide grounds for applying paragraph 390A to it. Any doubt on this question was resolved by the introduction of paragraph 399D, to which I refer below.

23. The court held that paragraph 391 applies to applications to revoke a deportation order by a person who has been deported following conviction for a criminal offence. In *ZP (India)*, the applicant applied for revocation of the deportation order less than 10 years after it had been made. Accordingly, continuation of the order was "the proper course" unless, so far as relevant, continuation would be contrary to her Convention rights "or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors". In addressing that issue, and taking account of the relationship between the Immigration Rules and Article 8 rights as explained in *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544 (and, in large part, subsequently confirmed by the Supreme Court in *Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799), Underhill LJ said at [24]:

"Decision-takers will have to conduct an assessment of the proportionality of maintaining the order in place for the prescribed period, balancing the public interest in continuing it against the interference with the applicant's private and family life; but in striking that balance they should take as a starting point the Secretary of State's assessment of the public interest reflected in the prescribed periods and should only order revocation after a lesser period if there are compelling reasons to do so."

24. In the present case, the application to revoke the deportation order, and the FTT's decision, was made over 10 years after the order was made. The effect of paragraph 391 in these circumstances was the subject of consideration and decision below, and forms part of the Secretary of State's grounds of appeal. The unusual feature of the present case, that the applicant had been deported but subsequently re-entered the country illegally, is expressly addressed in paragraph 399D.

25. Paragraphs A398, 398, 399, 399A-399D and 400 are contained in a section headed "Deportation and Article 8". Paragraph A398 provides:

"A398. 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."
>
> 26. Paragraphs 398 – 399A apply where the applicant has yet to be deported; this formed part of this court's reasoning in *ZP (India)* and follows from the express terms of paragraph 398: see *ZP (India)* at [22].
>
> 27. Paragraph 399D was introduced with effect from 28 July 2014 and so was applicable at the time of the FTT's decision in the present case. It provides:
>
> "399D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances."
>
> 28. No reference was made to paragraph 399D in the decisions of either the FTT or the UT, nor does it appear that either Tribunal was referred to it.

11. Mr Yeo also refers in his skeleton argument to the General Grounds for Refusal in Part 9 of the Immigration Rules with specific reference to paragraph 320(2) which provides that a person must be refused entry if he or she "has been convicted of an offence for which they have been sentenced to a period of imprisonment for at least 12 months but less than 4 years, unless a period of 10 years has passed since the end of the sentence". It is argued that these are the circumstances applying to the appellant in this case as he was sentenced to 42 months imprisonment, his sentence ending at the latest in 2000, and the 10-year period therefore expiring in 2010.
12. The specific rule recognises that where paragraph 320(2) applies, unless refusal would be contrary to the Human Rights Convention or Refugee Convention, it will only be in exceptional circumstances that the public interest in maintaining refusal will be outweighed by competing factors.
13. Mr Yeo also seeks to rely upon law relating to the issue of delay which he submits is capable of being taken into account in the context of deportation proceedings.
14. In relation to the general approach to delay, in *EB (Kosovo) (FC) v SSHD [2008] UKHL 41* the House of Lords said that delay could be relevant in three ways. First the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of delay the likelier this is to be true. To the extent that it is true the applicant's case will be strengthened. Secondly, delay may be relevant to an immigrant without leave to enter or remain who is in a precarious situation, liable to removal at any time. Any relationship into which such an applicant enters is likely, initially, to be tentative, being entered into under the shadow of severance by administrative order. This is more true where the other party to the relationship is aware of the precarious nature of the position and is treated as relevant to the quality of the relationship. With delay

the sense of impermanence in such a relationship will fade. Thirdly delay may be relevant in reducing the weight that would otherwise be accorded to fair and firm immigration control if the delay is shown to be the result of a dysfunctional system which yields unpredictable and unfair results.

15. The Supreme Court in *Agyarko [2017] UKSC 11* considered (para 52), referring to *EB (Kosovo),* that the cogency of the public interest in the removal of a person living in the UK unlawfully was liable to diminish or looking at the matter from the opposite perspective, the weight to be given to precarious family life was liable to increase if there was a protracted delay in the enforcement of immigration control.

16. In relation to case law specifically addressing the issue of delay in the context of deportation proceedings, in *Kaplan and Others v Norway (Application no. 32504/11) ECtHR (First Section)* it was held that there was a breach of Article 8 in removing the claimant to Turkey despite a 1999 conviction for aggravated assault, in part because family life had been established before going to Norway, because of the burden on the youngest autistic child, because on the facts the offence was not that serious, but also because the authorities took no measures to deport the Claimant for about six years and apart from minor offences he had not offended again.

17. In *KD (Jamaica) [2016] EWCA Civ 418* the Jamaican appellant arrived here in 1999. In 2003, he was convicted of supplying class A drugs. Thereafter he committed two relatively minor offences. A deport order was signed in 2007 but he was not deported. It was held that the Secretary of State's delays and administrative failings in taking steps to deport the foreign national had given him time to achieve rehabilitation and form strong family bonds with his British-born children, which amounted to exceptional circumstances outweighing the high public interest in deporting foreign criminals. Conversely in *ZZ (Tanzania) v SSHD [2014] EWCA Civ 1404* when there was an extensive delay, the Court of Appeal took into account when dismissing the appeal that the Respondent was overworked and under-resourced.

18. In *KD (Jamaica)* the Jamaican appellant had a British citizen partner and three children, aged thirteen, ten and seven. In 2003 he was sentenced to five for class A drugs offences. In 2007/2008 he received non-custodial sentences for possessing class A drugs and driving without insurance. Due to administrative errors, neither the subsequent notice of intention to deport nor the deportation order was served upon the Claimant. In 2008, the Claimant applied for leave to remain as the unmarried partner. More than three years after receiving the application, the SSHD requested further information about the Claimant's family life, which was supplied. She decided to treat the application as an application to revoke the deportation order. The 2012 decision letter never reached the Claimant because the offices of his solicitors had closed down. Although the Upper Tribunal, in allowing the appellant's appeal, applied the wrong Rules the Court of Appeal upheld the decision noting that it was thirteen years since the Claimant's conviction for a serious offence, the Secretary of State had delayed inordinately in taking any effective steps to deport him, the Claimant had put that period of respite to good use and had achieved rehabilitation, he had established a family of which he was a crucial member

and built up such firm relations with his three children that deportation would be devastating for the family.

19. In *MN-T (Columbia) v SSHD [2106] EWCA Civ 893* the Court of Appeal held that the Upper Tribunal was entitled to find very compelling circumstances over and above the section 117C(4) exceptions in the case of a 48 year old Colombian woman who had lived in the UK since the age of 9 and had served eight years in prison for a drugs offence. Delay was a major reason for the court coming to that conclusion. The court explained the reasons why delay was significant – if the appellant became rehabilitated he no longer posed a danger to the public; the deterrent effect of the policy of deporting foreign criminals was weakened if the Secretary of State for the Home Department did not act promptly; it could not be said to express society's revulsion if there was a delay of many years.

20. It was held in *RLP (BAH revisited – expeditious justice) Jamaica [2017] UKUT 330* that in cases where the public interest favouring deportation of an immigrant is potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in the underlying decision-making process is unlikely to tip the balance in the immigrant's favour in the proportionality exercise under Article 8(2) of the ECHR. In this case, although it had taken the Secretary of State 10 years to make a deportation order, the appellant had been in the UK unlawfully for more than 16 years, he had been sentenced to 4 years' imprisonment and his family life consisted only of the indirect contact he had with his 15-year-old daughter – see [23] of the decision.

21. Mr Yeo seeks to distinguish the decision in *RLP* on the basis that in that case the delay by the Secretary State was to enforce a decision to remove whereas is in the instant case it is in the making decision in the first place, that the facts of RLP are very different in that appellant was described as having a "flimsy" family life whereas in the instant case the appellant is married, has family life, contributes positively his time, and his offences were not as serious as the one in RLP.

Submissions

22. Whilst not in verbatim form, the advocate submissions can be summarised in the following terms:

23. Mr Yeo: The appellant does not dispute that he committed a serious offence and that he re-entered the United Kingdom in breach of the existing deportation order. It is not disputed by either advocate that the issue was the proportionality of the respondent's decision that the deportation order should be enforced.

24. The appellant accepts that his action in re-entering the United Kingdom in breach of the deportation order was wrong and that ordinarily there will be no decision to revoke a deportation order for at least 3 years from the date the order was made in accordance with the terms of the rules in force at the date of the Secretary State's decision.

25. Mr Yeo accepted that the period of eleven years delay in making the decision was perhaps the appellants strongest point; especially as had the Secretary State acted in removing the appellant in 2003 it would have been highly unlikely the appellant would have had any realistic prospects of defending the decision to

remove him from the United Kingdom. It is however submitted that as a result of delay the situation has now changed.

26. In *EV (Kosovo)* it was accepted that delay, which enabled a person to develop and strengthen protected rights in the United Kingdom, family or private life, may make their position more secure. If the Secretary of State tolerates a person's presence in the United Kingdom for a substantial period of time, such as occurred in relation to the appellant and his wife, this arguably reduces the weight otherwise to be given to the requirements of immigration control.

27. It is submitted both the appellant and his wife have formed family life in the United Kingdom to the extent they have in light of the Secretary of States delay. It is also the case that family in the United Kingdom includes the presence of the appellant's stepdaughter who, although now an adult, form part of the appellant and his wife's private life. The evidence also indicates contribution by the appellant to the community.

28. Mr Yeo also refers to the age of the appellant and his wife. The appellant is now 58 years of age and it was submitted it will be harder for him to reintegrate and rebuild a life in Pakistan after his time in the United Kingdom. The appellant's wife has lived in the United Kingdom since 1974 and been a British citizen since 1979. It is also said the appellant's wife has health issues although it is not submitted they are sufficient to enable her to succeed pursuant to Article 3 as medical treatment is available in Pakistan.

29. It was submitted there are very exceptional circumstances made out on the facts of this appeal.

30. The appellant is also a Christian which it is claimed is an obstacle to his reintegration into Pakistan. The appellant attends events in the United Kingdom and would be concerned as a result of acts of persecution against Christians in Pakistan.

31. It was submitted that in addition to the Rules, it was necessary to have regard to section 117 of the 2002 Act. It was submitted section 117B was relevant but Mr Yeo was not sure how it applied as the appellant is a foreign criminal. It is accepted however section 117B(iv) provides that little weight should be given to a person's protected rights relied upon if they are in the United Kingdom unlawfully.

32. It was submitted the test remains that of "very exceptional circumstances" and it is arguably unreal to seek enforcement after the deportation had been made and the appellant brought himself to the attention of the authorities who took no immediate action to remove him but who are responsible for the considerable delay in making the decision under challenge.

33. On behalf the Secretary of State, Mr Bramble accepted the legal provisions relied upon by Mr Yeo but submitted that in relation to a revocation application it was necessary to consider paragraph 390 of the Rules.

34. Mr Bramble placed reliance upon a decision of the Upper Tribunal in the case of *Smith (paragraph 391 (a)-revocation of deportation order) [2017] UKUT 166* and specifically head note (iii) in which it is stated "paragraph 391(a) will only be engaged in a 'post-deportation' case if the person is applying for revocation of the order from outside the UK. Nothing in the strict wording requires the 10-year period to be spent outside the UK. However, the main purpose of

deportation is to exclude a person from the UK. Any breach of the deportation order is likely to be a strong public policy ground for maintaining the order even though a period of 10 years as lapsed since it was made.

35. The headnote reflects the finding at [25] of that decision where the Upper Tribunal state:

> "however, the whole purpose of a deportation order is to exclude the person from the UK for a specified or indefinite period. Although there is nothing in the wording of paragraph 391(a) to require the 'prescribed period' to be spent outside the UK, the fact that a person might return to the UK breach of the order, and has spent a ten-year period living in the UK, is a serious matter that should be given sufficient weight in favour of the public interest. A person should not be able to benefit from a clear breach of the order, which undermines the effectiveness of a system of immigration control. Such actions are likely to provide strong justification the continuing the order even if the 10 year period has lapsed."

36. It is submitted by Mr Bramble that the Judge in *Smith* did not consider paragraph 399D of the Immigration Rules which the Court of Appeal in *SU* noted not been referred to in either of the decisions made by either of the courts below by that stage of the proceedings.

37. Mr Bramble submitted this provision, introduced with effect from 28 July 2014, was applicable at the time of the First-tier Tribunal's decision in the present case, which provides:

> "Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances."

38. Mr Bramble agreed the test is that of 'very exceptional circumstances'.

39. In response to the submission made by Mr Yeo concerning delay, it was submitted that the appellant entered the United Kingdom in 2000 but only made an application in 2003. It is submitted that notwithstanding the period of delay section 117B(iv) provides that little weight should be given to the private life or a relationship with a qualified person that is established by a person at a time that person is in the United Kingdom unlawfully. It is therefore submitted that although delay is a factor the effect of delay and benefit to the appellant is not as strong as it may have been in the past.

40. Mr Bramble submitted that the appellants deportation arose as a result of criminal matters and that he entered the United Kingdom in breach of a deportation order. It is accepted that in the seventeen years since the appellant has been in the United Kingdom there is evidence he has worked in the community and further medical evidence regarding his wife's position.

41. Mr Bramble refers to the findings of First-Tier Tribunal Judge Grant in the decision promulgated on 10th December September 2014 in which it was found that there were no insurmountable obstacles to the appellant's wife joining and living with him in Pakistan [27], that any interference with the appellants private and family life with his wife and her daughter, including private life by the appellant within his church community, was in accordance with the law and the legitimate aim of immigration control and the overarching aim of protecting

the public from criminal behaviour [45]. Mr Bramble also referred to the findings at [47] which are in the following terms:

> 47. I therefore find that by reason of the particular delay in this case which is not attributable in any way to the appellant the decision to refuse to revoke the deportation in this particular case would be disproportionate to the legitimate interests of immigration control and protection of the public against criminal behaviour. I bear in mind that the conviction related to an offence committed almost 20 years ago and that there has been no suggestion of any criminal behaviour on the part of the appellant since his return to the UK even though as I have found his behaviour towards his wife, his community and toward UK immigration control is highly tainted by dishonesty.

42. It was submitted that the appellant circumstances have not changed and that he entered the United Kingdom in breach of the deportation order which makes this a very different case.
43. It is submitted that it is necessary to consider the matter by reference the rules and article 8 including the statutory provisions. Paragraph 399D finds the public interest in enforcement is still a live issue if a person returns in breach of a deportation order.
44. It was submitted by Mr Bramble that a unique factor of this case, as recognised by Mr Yeo, is that section 117 does not deal with the application of a revocation although 117C(1) provides that "the deportation of foreign criminals is in the public interest".
45. It is submitted the offences committed by the appellant, two counts of conspiracy to defraud, are serious offences for which the appellant received a sentence of three years imprisonment. It is accepted by Mr Bramble that a considerable period of time has passed since sentence was handed down and that the appellant has not been convicted of further criminal activities.
46. Mr Bramble submitted the exceptions to deportation provided for in section 117C do not apply as this is a revocation decision.
47. Mr Bramble submits that it was not established very exceptional circumstances have been made out and that in such circumstances the appeal should be dismissed.
48. In relation to the decision of the Upper Tribunal in *RLP*, Mr Bramble refers to [22 -23] of that decision in which it was found:

> 22. At this juncture we turn to consider the relevant provisions of the Rules, reminding ourselves of the emphasis in Hesham Ali, these have the status of neither statutory provisions nor legal rules of any kind. They are, rather, an expression of the Secretary of State's policy to which substantial weight must be attributed. Paragraphs 398, 399 and 399A are, in a sense, a self-denying ordnance to which the Secretary of State must give effect, subject to and in accordance with established principles of public law, having opted for the mechanism of a published policy in this way. We have reproduced these provisions in Appendix 2 above. In brief compass, these provisions of the Rules yield the following analysis and conclusions in this case:
>
> (i) Paragraph 398(a) applies, as the sentence of imprisonment was one of four years, with the result that the deportation of the Appellant is presumptive conducive to the public good and in the public interest.

> (ii) Neither paragraph 398(b) nor 398(c) applies.
>
> (iii) The next question is whether paragraph 399 of 399A applies: this was not, properly, argued and we answer this in the negative in any event.
>
> (iv) Thus the question becomes, per paragraph 398: is the public interest in deporting the Appellant outweighed by "other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A"?
>
> The submission of Ms Rutherford is that this test is satisfied by reason of the extreme delay on the part of the Secretary of State during the period 2002 – 2012, the hallmarks whereof were incompetence and maladministration.
>
> 23. We reject this argument. On the one hand, the delay on the part of the Secretary of State can only be characterised egregious, is exacerbated by the absence of any explanation and is presumptively the product of serious incompetence and maladministration. However, on the other hand, the case against the Appellant is a formidable one: the public interest favours his deportation; the potency of this public interest has been emphasised in a series of Court of Appeal decisions; the Appellant's case does not fall within any of the statutory or Rules exceptions; the greater part of his life was spent in his country of origin; there is no indication of a dearth of ties or connections with his country of origin; he is culturally and socially integrated there; his family life in the United Kingdom is at best flimsy; and most of his sojourn in the United Kingdom has been unlawful and precarious. We take into account all of these facts and factors in determining whether very compelling circumstances have been demonstrated. This is a self-evidently elevated threshold which, by its nature, will be overcome only by a powerful case. In our judgement the maladministration and delay of which the Secretary of State is undoubtedly guilty fall measurably short of the mark in displacing the aforementioned potent public interest in the Article 8(2) proportionality balancing exercise. We conclude that the Appellant's case fails to surpass the threshold by some distance.

49. In reply Mr Yeo submitted that the reference to 'insurmountable obstacles' is not the correct test as applied by First-tier Tribunal Judge Grant in his decision made three years ago.
50. It was submitted section 117C applies if an initial deportation decision is being considered so the two exceptions may apply which was argued of relevance as the appellant's wife is a qualifying partner.
51. It was submitted that regarding the wording; whether it is 'unduly harsh' or 'exceptional circumstances' may make no realistic difference.
52. It was submitted that if the current rules applied, and the appellant stayed outside the United Kingdom, he would normally succeed which required consideration of the impact of any breach. The public interest is about enforcement of the rules.
53. In all the circumstances the appeal should be allowed.

<u>Discussion</u>

54. The appellant's protection claim was dismissed and is not part of the proceedings, the appellant has not established an entitlement to a grant of international protection on any basis - *AK and SK (Christians: risk) Pakistan CG [2014] UKUT 569 (IAC)* and general country conditions considered.

55. It is not disputed that the appellant is the subject of a deportation order and that he entered the United Kingdom in breach of that order. The general rule applicable to an appeal considering a refusal to revoke a deportation order is paragraph 390. This provides that the application will be considered in light of all the circumstances including (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; and (iv) the interests of the applicant, including any compassionate circumstances.

56. Paragraph 390A and 398 were found by the Court of Appeal in *ZP (India)* to apply to a person against whom a deportation order had been made but before the deportation order had occurred and are therefore not applicable in the present case. Neither is it suggested that paragraph 399 or 399A apply on the facts of this appeal.

57. The argument by Mr Yeo that the requirement of 'very compelling circumstances' was not in substance different from the 'very exceptional circumstances' required by paragraph 399D was rejected by the Court of Appeal in *SU [2017] EWAC Civ 1069* at [45].

58. Paragraph 399D is applicable to this appeal. It is a provision which postdates the case law concerning the impact of delay referred to above, prior to it coming into forces. At [45] of *SU* the Court of Appeal noted the difference in language between paragraphs 398 and 399D which is suggestive of a more stringent requirement under 399D reflecting a real difference in the circumstances covered by each paragraph. Paragraph 398 addresses the question of whether a deportation order should be made or an existing order maintained against a person who has yet to be deported whereas 399D addresses the very different case of a person who has been deported and then re-enters illegally and in breach of the order.

59. The Court of Appeal in [45] stated *"in the latter case any Article 8 claim that was raised by the deportee before his original deportation order will, ex hypothesisi, have been decided against him. It is readily understandable that in the case governed by paragraph 399D the Secretary of State should have formed the view that there is a particularly strong public interest in maintaining the integrity of the deportation system as it applies to foreign criminals."*

60. The decision of the Upper Tribunal in *Smith* did not consider paragraph 399D and so reliance upon the guidance provided in that case may have to be treated with a degree of caution.

61. Paragraph 399D provides that it is in the public interest for the existing deportation order to be implemented unless there are very exceptional circumstances. The rule does not define how this question should be assessed indicating that it must be by reference to all applicable facts. The wording of the rule does not provide that such illegal re-entry is determinative but a high threshold must be reached to enable a person lawfully removed as a result of his or her criminal activities, and excluded for the requisite period, who re-enters the UK illegally in breach of the deportation order, to be permitted to remain.

62. In relation to the question of the duration of the deportation order this tribunal has not been referred to any provision which sets a finite period during which a person may be excluded by a deportation order made against them. It is accepted that the rules provide some guidance, see 391 and 391A, but even with

the ten-year period for which the deportation order made against the appellant would ordinarily remain in force before he was permitted to re-enter the United Kingdom, this would not prevent the appeal being dismissed and the appellants removal if the same was warranted on the facts, after the ten-year period had expired.

63. The offence for which the appellant was convicted relates to two counts of conspiracy to defraud which is a serious offence. It warranted a sentence of 42 months imprisonment and recommendation by the trial judge for deportation. These are not minor offences as they involved a conspiracy to defraud British Telecom in relation to which the exact cost to the victim was estimated to exceed £100,000. The sentence of imprisonment is composed of a sentence of 2 ½ and one of 3 ½ years concurrent. It is accepted that the conviction is dated 18 September 1996.

64. The appellant relies upon his claim to both family and private life in the United Kingdom. The finding of the First-tier Judge, on the facts, is that the appellant and his wife are able to continue their family life in Pakistan as it had not been made out that there were insurmountable obstacles to the appellant's wife going to live with him in Pakistan [decision of First-tier Tribunal Judge Grant [27] dated 10 September 2014].

65. The test being applied by Judge Grant is different from that found in 399D. It is not disputed by Mr Bramble that there has been a change in the appellant's wife circumstances based on medical grounds although it is conceded before this tribunal that those medical issues do not allow success on the basis of article 3 or 8 ECHR as the required threshold has not been shown to be crossed and any medical treatment required is available in Pakistan.

66. The First-tier Tribunal Judge allowed the appeal for the reasons set out at [47] of that decision namely the delay which made the decision disproportionate.

67. Mr Yeo relied on a number of cases relevant to the issue of delay although other relevant caselaw is set out above. In relation to *RLP*, whilst I accept Mr Yeo used his best endeavours to seek to differentiate that decision from this current decision I do not accept that the decision of the Upper Tribunal in that case is such that no consideration can or should be given to the findings of the past President.

68. The impact of the nature of the offending and personal circumstances of the two appellants are factors that should be given proper consideration but even considering the same, it is not made out that the findings at [23] of *RLP* should not be factored into the decision-making process in this appeal. Indeed, it is recorded by the Upper Tribunal that the appellant's advocate before them, Miss Rutherford, submitted that the test in paragraph 398(a) was satisfied by reason of the extreme delay on part of the Secretary of State during the period 2002 to 2012 the hallmarks whereof were incompetence and maladministration.

69. At [23] the Upper Tribunal found:

> "we rejected this argument. On the one hand, the delay on the part of the Secretary of State can only be characterised egregious, is exasperated by the absence of any explanation and is presumptively the product of serious incompetence and maladministration. However, on the other hand, the case against the Appellant is a formidable one: the public interest favours his deportation, the potency of this public

> interest has been emphasised in a series of Court of Appeal decisions: the appellant's case does not fall within any of the statutory or rules exceptions; the greater part of his life was spent in his country of origin; there is no indication of a dearth of ties or connections with his country of origin; his culturally and socially integrated there; his family life in the United Kingdom is at best fluency; and most of his sojourning the United Kingdom has been unlawful and precarious. We take into account all of these facts and factors in determining whether very compelling circumstances have been demonstrated. This is a self-evidently elevated threshold which, by its nature, will be overcome only by a powerful case. In our judgement the maladministration and delay of which the Secretary of State is undoubtedly guilty for measurably short of the mark in displacing the aforementioned potent public interest in the Article 8 (2) proportionality balancing exercise. We conclude that the Appellant's case fails to surpass threshold by some distance.

70. The assessment is therefore fact specific. It is argued that a breach of article 8 is made out on the basis the decision is disproportionate as a result of the delay and that weight should be given to the private and family life relied upon, which may be sufficient to constitute very exceptional circumstances. I do not find, however, that the fact there has been the delay in this case is sufficient in itself to allow the appellant to satisfy the required test per se.

71. Mr Yeo relied on a number of submissions made before the Court of Appeal at the earlier stage in these proceedings which were rejected by that court. There is, for example, reliance upon the decision of the Court of Appeal in *MNT (Colombia)* in relation to which the Court of Appeal found that the facts of that case are a long way from the facts of the present case as the claimant in that case had lived lawfully in the United Kingdom with her mother and sister for twenty 22 years since 1977 when she was 9 years of age before pleading guilty to drug-related offences and been sentenced to a term of imprisonment of 8 years. It is also a case in which although the appellant lost the appeal against a deportation order made in 2008, in March 2009, no steps were taken to deport her until a claim for further leave to remain was made in June 2012 which was rejected on appeal. The Court of Appeal considered it to be a borderline decision in which the First-tier Tribunal had allowed the appeal but found that Tribunal was so entitled which was therefore upheld.

72. In relation to the doubt expressed by the advocates in their submissions concerning the application of section 117 of the 2002 Act to a deportation case, I find that no such uncertainty exists. The position must be that the statutory provisions apply to any case in which article 8 ECHR is being considered unless specifically stated not to apply. Paragraph 399D requires consideration of the public interest for which the statute mandates a need to consider section 117B and in cases concerning deportation, section 117C. An application to revoke a deportation order is a case concerning deportation, albeit not in the context of a case (ordinarily) concerning the removal of a person in the United Kingdom.

73. Section 117B(1) and C(1) reflect the weight to be given to the public interest which is also set out in paragraph 399D in relation to those who have re-entered in breach of a deportation order.

74. Section 117(3) is arguably not applicable as the appellant has been deported and an appeal to prevent such deportation failed and it deemed the public interest requires his deportation. This is an appeal against the refusal to revoke the deportation order.

75. In terms of the weight to be given to private and family life relied upon by the appellant it is necessary to consider the provisions of section 117B(4) of the Nationality, Immigration and Asylum Act 2002. The appellant entered the United Kingdom illegally in breach of a deportation order. The view taken by the United Kingdom government, arguably accurately reflecting the view of the wider public that such conduct is wholly unacceptable, is reflected in paragraph 399D. The statutory provision provides that little weight should be attached to a protected right relied upon in such circumstances. It does not state that no weight should be attached and so only provides guidance as to the weight that is appropriate.

76. The statutory provisions arguably override earlier case law.

77. The appellant relies upon family and private life. The appellants wife told the First-tier Tribunal that she has visited her family in Pakistan "many times". It is a country familiar to her and in relation to which she has connections and family. It was not shown such support as may be required in readjusting to life there will not be available if the appellant and his wife relocated to Pakistan where their family life can continue. The appellants step-daughters are all adults and do not form part of his family life. The required degree of dependency was not made out in relation to his wife and her grown up children to establish family life recognised by Article 8 between them either. It was not shown that contact could not be maintained between the appellant, his wife, and UK based family and friends from Pakistan or that any interference with any such protected right is not disproportionate. It was not made out that the consequences of enforcing the deportation order will result in very exceptional circumstances such as to displace the particularly strong public interest in maintaining the integrity of the deportation system as it applies to foreign criminals.

78. I find that little weight can be given to the protected right relied upon by the appellant in the United Kingdom. In light of the fact that family life can continue in Pakistan, it is hard to see how, on the basic facts, the appellant is able to establish that he can satisfy the test in paragraph 399D on this basis.

79. I accept that in this appeal the period of delay is substantial and an important factor that cannot be ignored. Indeed, Mr Yeo accepted that it is probably the strongest aspect of the appellant's case. However, delay per se is not sufficient. This is not a case where the appellant has not been removed from the United Kingdom. The appellant was removed but re-entered illegally.

80. It is accepted that the appellant has not offended and that he has used his time to make a contribution within the United Kingdom. In relation to this aspect, Section 117B(5) now specifically states that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

81. In *Nasim and others (Article 8) [2014] UKUT 25 (IAC)* it was held that the judgments of the Supreme Court in *Patel and Others v Secretary of State for the Home Department [2013] UKSC 72* serve to re-focus attention on the nature and purpose of Article 8 of the ECHR and, in particular, to recognise that Article's limited utility in private life cases that are far removed from the protection of an

individual's moral and physical integrity. Earlier cases need to be read with that in mind.

82. In *Hamat (Article 9 – freedom of religion) [2016] UKUT 00286* it was held that matters relied on by way of a positive contribution to the community are capable in principle of affecting the weight to be given to the maintenance of effective immigration control and should not be excluded from consideration altogether but are unlikely in practice to carry much weight.

83. The appellant fails to establish that the contribution he makes, which forms part of his private life, is such that the consequences of the loss of the same to him or others will tip the balance in his favour in light of the strong public interest argument.

84. The Court of Appeal in *SU* found that paragraph 391 of the Rules did not expressly provide that continuation of the deportation order was not likely to be the proper course and that while under 3991 there is a presumption that continuation of the deportation order would be the proper course if less than 10 years have elapsed there is no presumption either way after the 10 years period has elapsed. The Court found that paragraph 391 simply requires each case to be considered on its merits taking account of the applicable paragraphs of the rules, including paragraph 390 and the applicable statutory provisions. The Court found that the effect of the expiry of 10 years is only that the previous presumption in favour of maintaining the order falls away. The Court of Appeal found the onus was not upon the Secretary State to establish that maintenance of the order was a proper course. It was also found the paragraph 391 is not applicable to a case where paragraph 399D applies.

85. I do not find it made out that the appellant has established the existence of "very exceptional circumstances" required by paragraph 399D. The appellant's case, at its highest, may establish the existence of exceptional circumstances as a result of the delay by the Secretary of State, passage of time, and lack of reoffending and other matters submitted on his behalf which have merit, especially in light of the decision in *MF (Nigeria)* referred to at [33] of *SU* referring to the judgement of Lord Dyson that a time lag of 10 years is capable of been an exceptional circumstance although such judgement specifically sets no precedent but merely permitted or even required consideration of the position outside the Rules.

86. The position pursuant to Article 8 ECHR arguably reflects that contained in the Rules in that the requirement for very exceptional circumstances reflects the nature of the proportionality exercise that needs to be undertaken. The Secretary of States deportation regime for removing foreign criminals from the United Kingdom who have committed offences which attracted sufficient sentence to justify their deportation, has not been shown in anyway to be unlawful. The Secretary of State has a margin of appreciation in relation to how foreign criminals are treated within the United Kingdom and it has not been found the UK Borders Act or provisions of the immigration rules are contrary to the Human Rights Convention.

87. Paragraph 399D sets a higher threshold as it recognises that this is applicable to a person who is a foreign criminal as a result of the conviction of an offence in the United Kingdom which he or she was sentenced to a period of more than 12

months imprisonment, that that person is the subject of a valid deportation order against which any attempt to appeal the order to prevent removal has failed, that that person has been removed from the United Kingdom in accordance with the terms of the deportation order, but that that person has re-entered United Kingdom illegally without having made an application for the order to be revoked during its continuance from abroad. The requirement of 'very exceptional circumstances' to establish that a refusal to revoke the deportation order is disproportionate, hence finding that public interest does not require the appellant's removal, therefore reflects a valid balancing exercise relating to rights relied upon by the offending person who has re-entered in breach of the deportation order and the strong public interest in preventing breach/abuse of the terms of the deportation order.

88. This is not a case in which the appellant was outside the United Kingdom for any considerable period following the making of the deportation and his removal. The appellant was removed in October 1998 and re-entered United Kingdom 2 years later. The deportation order would ordinarily prevent his re-entering the United Kingdom for at least 10 years.

89. It is open to the appellant once removed to make an application for revocation in the normal course of events from outside the United Kingdom which can be considered on its merits. This is an option that the appellant had previously but which he chose to ignore seeking instead to enter in breach of the order. Whether if removed from the United Kingdom the appellant will be required to "restart the clock" and serve a ten-year deportation order given all that has happened is not an issue that this tribunal needs to consider. If the appellant makes a valid application from outside the United Kingdom for revocation and that is refused and it appears this is the approach taken by the decision-maker, the appellant will have a right of challenge by way of appeal (if available) or judicial review. It is only if this issue arises that this question may need to be considered.

90. The submission that there are insurmountable obstacles based on the degree of integration of the appellant's wife in the United Kingdom, her health, relationship with her adult daughter, dependence of her 82-year-old father on assistance and care are noted, but the evidence did not establish that insurmountable obstacles that could not be overcome exist. It is also the case that even if the appellant's wife refuses to accompany the appellant to Pakistan it is he who is the subject of the deportation order and it has not been made out that it would be disproportionate to remove the appellant as a result of the rejection of the revocation application even if this meant the appellant and his wife living apart.

91. The submission the appellant has led a virtuous life since his conviction 20 years ago is noted and not disputed. The fact the appellant has a home in the United Kingdom is also noted but all his time since 2000 has been since his illegal entry. It is accepted most of the positive personal elements relied upon by the appellant are matters he has only been able to achieve as a result of the delay caused by the Secretary of State but, as noted above, even if that reduces the weight that otherwise would be attributed to the need to maintain a system of

immigration control, the weight to be given to the protected rights is itself reduced by virtue of statutory provisions and the appellants actions.

92. Having considered this matter with the required degree of anxious scrutiny, I find the appellant has failed to discharge the burden of proof upon him to the required standard to establish an entitlement to remain under either the Immigration Rules or ECHR. I find the Secretary State, notwithstanding her delay, has established that the decision to refuse to revoke the deportation order is a proportionate decision when weighing the competing interests pursuant to article 8 ECHR.

93. I find the First-tier Tribunal Judge erred in law in a manner material to the decision to allow the appeal as recognised by the Court of Appeal who found that Tribunal had applied the wrong rules and who failed to adequately or properly considered the issue of delay. I substitute a decision to dismiss the appeal against the refusal to revoke the deportation order. As noted by the Supreme Court in *Hesham Ali*, while the rules do not govern the determination of appeals, the policy to which the Rules give effect are "nevertheless a relevant and important consideration for tribunal determining appeals on Convention grounds, because they reflect the assessment of the general public interest made by responsible ministers and endorsed by Parliament. In particular, tribunals should accord respect of the Secretary of State's assessment of the strength of the general public interest in the deportation of foreign offenders.

Decision

94. **The Immigration Judge materially erred in law. The decision of the original Immigration Judge has been set aside. I remake the decision as follows. This appeal is dismissed**

Anonymity.

95. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…………………………………………….
Judge of the Upper Tribunal Hanson

Dated the 16 February 2018