Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05350/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th October 2018	**On 21st December 2018**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

OLALEKAAN OLATUNDE ALLI BALOGUN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer
For the Respondent: Miss D Revill of Counsel, instructed by Rock Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Colvin promulgated on 6 February 2018, in which Mr Balogun's appeal against the decision to refuse to revoke his Deportation Order dated 18 March 2017 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Balogun as the Appellant and the Secretary of State as the Respondent.

2. I found an error of law in Judge Colvin's decision promulgated on 6 February 2018 following the first hearing of this appeal on 15 May 2018. The history to this appeal

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is set out in the error of law decision contained in the annex and will not be repeated here save where reference to the background is needed. This decision is the remaking of the appeal.

The appeal

Explanation for refusal

3. The Respondent refused the human rights application/application to revoke the Deportation Order on 13 March 2017 for the following reasons. The Appellant's circumstances were considered by reference to paragraph 399D of the Immigration Rules to the effect that his claim under Article 8 could only succeed if there were very exceptional circumstances over and above those described in paragraph 399 and 399A. The Respondent considered that there was a significant public interest in deporting the Appellant due to his criminal history of submitting false documents in support of an application for leave to remain in the United Kingdom for which he was successfully prosecuted and sentenced to 18 months in prison; that the Appellant is the subject of a Deportation Order and has continued to use deception as a means of remaining in United Kingdom by not declaring his criminal convictions or alias names on further applications.

4. The Respondent considered the best interests of the Appellant's children pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009, but it was considered that they could remain residing in the United Kingdom with their mother or the option of relocating with the Appellant would be open to them and neither would be unduly harsh. There were no exceptional features of the Appellant's family or private life to constitute a very compelling circumstance to outweigh the public interest in deportation.

5. Overall it was considered that the Appellant's deportation would not be a disproportionate interference with his right to respect for private and family life under Article 8 of the European Convention on Human Rights and the application to revoke the Deportation Order was refused under paragraph 390 and 390A of the Immigration Rules. It was however accepted that the Appellant's further submissions amounted to a fresh claim under paragraph 353 of the Immigration Rules and there was therefore a right of appeal against the refusal to revoke the Deportation Order on human rights grounds.

The Appellant's evidence

6. In the course of this appeal, the Appellant made written statements dated 24 August 2016 and 21 August 2018. In these statements he sets out the following in relation to his history and current circumstances.

7. In the years 2000 - 2006 the Appellant said he used his names in the short version, 'Tunde Balogun', short for 'Olatunde Alli Balogun'. The Appellant was detained on 6 December 2007 at Belfast airport giving his un-truncated names and fingerprints. On 6 June 2008 he was detained at Dublin airport, during which his fingerprints

were scanned showing both of his identities. These were both referred to in correspondence between the authorities in the Republic of Ireland and those in the United Kingdom in relation to a transfer between the two territories.

8. Although the Appellant states that he recognises his mistake concerning his criminal offence, he also describes his conviction in 2006 as being due to reliance on the documents provided to him by the accountant he had employed, which he then in turn submitted to the Home Office in good faith with his application for leave to remain as the spouse of an EU citizen in 2000. The Appellant did not live with his spouse and the couple subsequently divorced.

9. In 2009, the Appellant states that his partner informed him that the Respondent had requested the names of her dependents further to her application for leave to remain made in 1999. All the documents and information requested were submitted and the Appellant and his family were granted indefinite leave to remain in 2010. The Appellant and his partner had assumed that it was not necessary to write details of the Appellant's other identity when submitting details of her dependents because the Respondent had full knowledge of both identities from previous fingerprints.

10. The Appellant thought that because of the grant of Indefinite Leave to Remain, the Respondent had no intention to deport him and he had not been served with the Deportation Order. The Appellant further thought that the Respondent had pardoned his criminal convictions and cancelled deportation proceedings with the grant of Indefinite Leave to Remain. For these reasons, no mention was made of the Appellant's criminal convictions in his 2011 application for the transfer of the no time-limit stamp to his new passport. The Appellant's belief as to this set of circumstances was reinforced in 2012 and 2014 when he travelled to Nigeria and was permitted to re-enter on both occasions. The Appellant states that he was detained on both occasions during which he was interviewed and confirmed his conviction in 2006 but was permitted to enter. Similarly, there was no difficulty when the Appellant attended a police station in June 2011 for his fingerprints to be taken for a Criminal Record Bureau certificate which was subsequently issued containing both of his identities and criminal convictions.

11. After travelling to Ireland, the Appellant returned to the United Kingdom sometime in February 2010 with his partner. He stated that he wasn't aware of the Deportation Order against him at that time and if he was, he would have remained in Ireland rather than breach UK immigration law.

12. The Appellant has three siblings in the United Kingdom who are either British Citizens or are settled here. He says he has been in a relationship with his partner, since 1999 and they have three children together born in 2002, 2003 and 2009. The Appellant and his partner have always lived together other than times when she travelled to Ireland for short stays. The Appellant states that his children have only known the UK as their home country and were only born in the Republic of Ireland because he and his partner did not want their lack of leave to remain in the United Kingdom to effect them, so the Appellant's partner travelled to Ireland to give birth

pursuant to advice as the children would have had no leave to remain in the United Kingdom.

13. The Appellant provides day-to-day care for his children when his partner is at university and/or work and he also provides care for his brothers' two children after his wife passed away. The Appellant is closely involved with his children's lives including being the primary contact for their school.

14. The Appellant attended the oral hearing, adopted his written statements and gave oral evidence in English. He stated that his true and correct date of birth is 4 December 1968.

15. In cross-examination the Appellant stated that he wasn't aware that he had lost his appeal against deportation in the First-tier Tribunal in 2007, stating that he went to court but went to Ireland before the decision was received. When asked if he had chased the decision, he only stated that he relied on his lawyer. He was asked repeatedly when he was aware he had lost his appeal to which he gave no clear answer, claiming not to understand the questions or referring only to the intention to deport or not being able to remember.

16. In relation to the application to fix a no time-limit stamp to the Appellant's passport, the Appellant stated that the form was completed by his partner, although did contain his signature on the final page. He accepted that 'no' to the question about criminal convictions was incorrect and stated that this was a mistake. It was a mistake because he thought it was over and he had learned his lesson.

17. As to his travel to and from Ireland, the Appellant stated that he went there to meet his partner and gave contradictory answers as to whether she was living in Ireland, or the United Kingdom, or both. The Appellant stated that he did not go to Ireland to escape the Respondent as although it may look like that, he didn't believe that there was a Deportation Order against him. When asked if he went to avoid his immigration difficulties, the Appellant stated that he got fed up so went to Ireland, he wasn't sure what was going to happen after he left but was relieved when he eventually came back. He did not want to know the result of his appeal because he was fed up and so far as he was concerned he had an immigration problem but that did not mean that he was going to be deported. In fact he had a strong belief that he would not be deported because he had been in the United Kingdom for a while. The Appellant thought that his appeal was still pending when he left the United Kingdom and he confirmed that he would not have left had he won his appeal.

18. The Appellant had first tried to visit his partner in Ireland in December 2007 and then again around the middle of 2008. On that occasion he stayed about two years, although could not say that for the whole duration he was living with his partner and children as she was in and out of the country. He decided to come back to the United Kingdom in February 2010 to live here after his partner had been granted indefinite leave to remain.

19. I asked the Appellant what he thought his immigration status was on return to the United Kingdom in 2010, to which he replied he had settlement here. He thought that his immigration history didn't matter because of knowledge of a friend in prison who was deported and came back to be with his wife and he thought a similar thing happened to him, that he had been pardoned for his past given the grant of indefinite leave to remain, that some kind of discretion had been used in his favour in February 2010. He could not explain why discretion would suddenly have been exercised at that point in time.

20. The Appellant visited Nigeria in 2004, 2012 and 2014, the last occasion for about 10 days. His partner went to Nigeria last year to visit her mum. The Appellant has no family in Nigeria, but has brothers and sisters and their family in the United Kingdom.

21. After the grant of indefinite leave to remain to the Appellant, he was working part-time as bank staff, choosing the days to work when he was free when his partner was at home. He stated that his written statement was correct that he worked full-time when his partner was on holiday but when asked clarification, he stated that he worked part-time.

22. I asked the Appellant why he would declare his criminal convictions to an immigration officer when detained at the airport in 2012 and 2014 but not in 2010 or 2011 when he said that he thought his immigration history was no longer a problem and that he had been pardoned by the Respondent. His response was that he didn't declare his convictions in 2012 and 2014, only that he had previous immigration problems when his fingerprints were taken.

23. In re-examination, the Appellant stated that he came back to the United Kingdom in the middle of 2010 with his wife after the grant of indefinite leave to remain, although he was reminded that this was made on 13 September 2010, he maintained that he returned with leave in the middle of the year.

The Appellant's partner's evidence

24. The Appellant's partner also made a number of written statements during the course of this appeal, dated 21 December 2017, 21 August 2018 and 13 September 2018. In those statements she states that she has been in a relationship with the Appellant since 2000 and that he is a supportive partner and father, and was responsible for the daily care of the children while she is at work or studying.

25. Neither the Appellant's partner, the Appellant nor the children have been to Ireland since about February 2010 when they all decided to remain in the United Kingdom regardless of the immigration threat because at that time they had no fear of the children being removed from the United Kingdom because they were Irish citizens. She stated that Ireland was never their home it was always the United Kingdom.

26. The Appellant's partner travelled to Nigeria to visit her mother in 2017 but could not return to live there because of the conditions in that country and because the children

know nothing about Nigeria, their life and culture being centred in the United Kingdom and the family having no resources or property in Nigeria to use to care for them.

27. In the United Kingdom, the Appellant ensures that the children are washed, taking them to and collecting them from school, attending meetings at school and implementing support plans for them, sometimes cooks for the children, shops for them, pays for extra tuition and assists the children with their schoolwork and their behaviour. The Appellant's partner describes the children as struggling and displaying poor behaviour during the period of the Appellant's detention in 2016, that the children were very angry, withdrawn, uninterested in going to school and were afraid. If the Appellant were deported the children would be devastated.

28. The Appellant's partner attended the oral hearing, adopted her written statements and gave oral evidence in English. In cross-examination she confirmed that she was in a relationship with the Appellant in 2007 and was aware both of his convictions and prison sentence although she denied being aware of the notification of intention to deport him. She stated she was only aware of this last time he travelled to Nigeria in 2016 and had not known of the appeal proceedings in 2007 or 2008. She stated that the Appellant knew she was a worrier and that he would not tell her of the details to avoid this. It was too stressful for her to have ever attended court. The Appellant's partner knew that the Appellant was married to someone else during the course of their relationship.

29. The Appellant's partner went to Ireland in 2002 and agreed that her home was there from which she visited the United Kingdom. Although she then said that most of her time was spent in the United Kingdom when the children were young and not in education. The eldest started primary school in 2007 and completed the first three years of education in Ireland. The Appellant was living in the United Kingdom up until 2008 at then came to visit in Ireland and moved there in 2008.

30. The Appellant's partner and children returned to the United Kingdom in November or December 2010 and the Appellant returned a few months before them. When asked clarification from her written statement that they left Ireland in February 2010, the Appellant's partner said that she had been confused and they might have returned in September 2010, then thought it might have been 2011 as the eldest child's first birthday in December 2010 was celebrated in Ireland. When referred to a London address being used in June and September 2010, the Appellant's partner stated that she was always coming back to the United Kingdom and she gave the address she had always used here where she normally lived when in the country and where her post was sent.

31. The application for a no time limit stamp in the Appellant's passport was completed by the Appellant who signed the form and his partner could not explain why his evidence was that she completed it.

32. In re-examination the Appellant's partner said she lived with the Appellant when she was, in her words, in and out of the United Kingdom, which she said was most of the time. She stated that they were currently living in the same house although the Appellant had given a different address which was his brother's address because this was his bail address. She then stated that he shares time between her property and his brother's property to comply with bail conditions and her working nights when he has to be there with the children.

Other witness evidence

33. The Appellant's bundle also contained a number of written statements from other family members and friends, of which the Appellant's brother and sister also attended court and gave oral evidence. I set out their evidence in much less detail but a full record of it is on the file and has been taken into account.

34. In particular the Appellant's brother, gave evidence as to the Appellant's support to him and his children following the death of his wife and as a consequence of his medical condition and treatment. He stated that he relies on the Appellant for the support which other members of the family could not give him for their own personal reasons and in part because he needed to rely on a male family member. The Appellant's sister also gave evidence that she relied on the Appellant for childcare and as a father figure as her son who had no relationship with his own father. Again, she said that other family members would not be able to assist in the Appellant's absence.

Closing submissions

35. On behalf of the Respondent, Mr Wilding relied on the reasons for refusal letter. He submitted that the starting point in this case is that there was an application to revoke a Deportation Order meaning that paragraph 390 and following of the Immigration Rules, together with paragraphs 398 to 399A of the same were as relevant to his human rights claim as they would be in the first instance decision.

36. The Respondent's position is that the Deportation Order was valid even though it was not served on the Appellant as he had left the country, it was signed and had taken effect and was deemed enforced given the Respondent's knowledge that the Appellant was in Ireland. The making of a Deportation Order was the only rational consequence which was could follow from the Appellant's unsuccessful appeal and it is clear that the only rational inference for the Appellant's travel to Ireland was to make his immigration problems go away.

37. The Appellant's submissions that the Deportation Order was valid but not in force or effective unless and until it had been served on the Appellant, or he was notified of its existence, were not accepted by the Respondent. The facts of the present appeal are very far from those in R v Secretary of State for the Home Department ex parte Anufrijeva [2003] UKHL 36, where there was lack of any notice of anything happening at all and a third party later informing the party in that case. In the present case the statutory scheme required the Respondent to notify the Appellant of

the intention to deport him and that was the decision which gave rise to a right of appeal. The Appellant was aware of that decision and pursued his appeal against it. There could be no further appeal against the actual Deportation Order which follows. There can be no suggestion that the rule of law was breached in this process.

38. Mr Wilding also submitted that the same reasoning as given by the Court of Appeal in the case of Decker v Secretary of State for the Home Department [2017] EWCA Civ 1752, applies to the present case as a natural extension of the consequences of a person attempting to avoid the effect of a Deportation Order. The Respondent knew that the Appellant was in Ireland which was outside its jurisdiction and was entitled to conclude that the Deportation Order was deemed effective. There is nothing in primary legislation or in case law which supports the Appellant's claim that the Deportation Order could not take effect until he had been physically served with it and had notice of it.

39. As to the Appellant's evidence, it was submitted that the Appellant was not credible. He was continuously evasive in response to questions and when answers were given those were deeply unimpressive and leaves the Tribunal none the wiser as to his circumstances between 2007 and 2010. From his evidence it is possible to submit that the Appellant went to Ireland to avoid the consequences of proceedings he was involved in in relation to his immigration problems and despite his claimed inability to remember. We do know that he attended to First-tier Tribunal hearings as this is recorded in the decisions issued as a result. It is also the inevitable consequence of the failure in his appeal that a Deportation Order would follow. It was submitted as not credible that the Appellant was stressed about his immigration status but had no concern whatsoever as to the outcome of his appeal.

40. The Appellant has submitted the public interest in deportation has been reduced on the unusual circumstances of this appeal, on the basis of the Appellant's claimed reasonable belief that his grant of indefinite leave to remain in 2010 was not obtained by deception and was somehow a pardon of his conviction and previous history. However, the Appellant's application in 2011 for no time limit stamp in his passport was on its face incorrect as he failed to declare his criminal convictions and this is just one example of the Appellant on numerous occasions attempting to conceal information in his interactions with the Respondent. There remains inconsistent evidence as to who completed that application in 2011. In the circumstances there can be no reduction in the public interest in deportation.

41. The Appellant was refused leave to enter the United Kingdom on 25 August 2016 on the basis that his leave had been obtained by deception. This is reflected in the Respondents GCID notes and that decision was the subject of an application for Judicial Review. The decision for the cancellation of leave to enter on the basis of deception was not in any way impugned in those proceedings which was settled on the basis that further submissions could be made as a human rights claim in support of an application to revoke a Deportation Order. It is therefore not correct to say that leave to remain was not obtained by deception.

42. The Appellant's reliance on the period of time since the Deportation Order was signed is also misplaced under paragraph 391A of the Immigration Rules as this is only relevant to a period of time in which the Appellant has in fact complied with a Deportation Order and has remained outside of the United Kingdom. In any event, this still does not talk about a reduction in the public interest but that this may be a change of circumstances instead. In this case the Appellant has not complied with the Deportation Order and re-entered the United Kingdom in breach of it. The facts of MN-T (Colombia) v Secretary of State for the Home Department [2016] EWCA Civ 893, relied upon by the Appellant are very different to the facts in the present appeal and provide no support for his position.

43. Overall it was submitted by Mr Wilding that the Appellant is required to establish a very strong case indeed to outweigh the public interest in his deportation in all of the circumstances. It is clear that applying the unduly harsh criteria, this is not met in relation to his family in the United Kingdom and there is little to suggest any disproportionate interference with family life on a standard Article 8 basis. The Appellant has been convicted of an offence of deception and has continued to have difficulties with being honest with the Respondent since his conviction. Mr Wilding invited me to dismiss the appeal.

44. On behalf of the Appellant, it was submitted in outline that paragraph 399D of the Immigration Rules does not apply to the Appellant, first because although it was accepted that the Deportation Order was valid, it was not effective because no notice of it has been given to the Appellant until at the earliest 2016 and secondly because he had not been deported by the Respondent, he had left the United Kingdom voluntarily. On that basis, the Appellant could rely on the unduly harsh provisions, that it will be unduly harsh for his children to either remain in the United Kingdom without him or to accompany him Nigeria and in any event there would be very compelling circumstances to outweigh the public interest in deportation. In the event that paragraph 339D of the Immigration Rules is found to apply to the Appellant, it was in any event submitted that there were very exceptional circumstances in this case to outweigh the public interest in deportation. Those submissions were developed in detail both in the skeleton argument submitted by Ms Revill and also in oral submissions as follows.

45. In relation to paragraph 399D of the Immigration Rules, the Appellant accepts following the Court of Appeal decision in Decker, that the Deportation Order made against him on 8 May 2008 was valid notwithstanding the lack of service on him until 18 March 2017, but Counsel submitted that it was not effective or in force until it was served upon him, or at the earliest, until he was notified of its existence. Reliance was placed on the opinion of Lord Steyn in Anufrijeva, at paragraph 26, that notice of the decision is required before it can have the character of a determination with legal effect. Although it was accepted the facts of that case were very different from the present appeal, the basic principles were said to still apply. A Deportation Order has a specific legal effect, including a requirement to leave and a prevention of re-entry and invalidation of any existing or future grant of leave to remain, which goes beyond the effect of an intention to deport a person which was, at the time in

2008, subject to a specific right of appeal. If the Appellant is right, his entry to the United Kingdom before 18 March 2017 (or before 22 August 2016, the date of initial notification of it) did not breach the Deportation Order because it was not effective prior to that date. Accordingly, paragraph 399D of the Immigration Rules does not apply to the Appellant.

46. In the alternative, it was submitted that paragraph 399D of the Immigration Rules did not in any event apply because the Appellant had left the United Kingdom voluntarily and had not 'been deported', the natural and ordinary meaning of that phrase being someone whose removal had been enforced by the Respondent.

47. With regard to the public interest in deportation, although the significant public interest in the Appellant's removal as a foreign criminal was acknowledged by the Appellant, it was submitted that the public interest is reduced in the unusual circumstances of his case. First, as the Appellant had or reasonably believed that he had Indefinite Leave to Remain from 13 September 2010 until at least 22 August 2016 and this leave to remain was not obtained by deception. No such application had been specifically made by the Appellant or his partner, it was granted following a review of the Appellant's partner's status by the Respondent's Case Resolution Directorate (otherwise known as the legacy exercise) during which she listed details of her partner as a dependent. There is no evidence from the Respondent that at any stage during this process was the Appellant or his partner asked about any other identities or past criminal convictions.

48. Further, the Respondent has been aware of the two different identities used by the Appellant since at least 2008 with both being expressly acknowledged in correspondence between the Respondent and authorities in Ireland with regards to a takeback request. The Appellant's reasonable belief with regards to the grant of Indefinite Leave to Remain was based on the Respondent knowing of both of his identities and also that he had successfully applied for a no time limit stamp to be entered into his passport in 2011 and had been permitted to re-enter the United Kingdom in 2012 and 2014. The Appellant's explanation as to why he did not disclose his criminal conviction in his application for a no time limit stamp in his passport was a reasonable one given that it was some years previously and he had since been granted Indefinite Leave to Remain.

49. Secondly, the Deportation Order was signed over 10 years ago, the Appellant has never reoffended and has since held responsible employment when permitted to do so. The offence for which he was convicted which triggered the intention to deport was nearly 13 years ago and it was submitted that the Appellant had rehabilitated in this period.

50. Thirdly, the Respondent has significantly delayed enforcing the Appellant's deportation given that he was aware of his return to the United Kingdom in 2010 and took no action until 2016. This operates to reduce the public interest in deportation and has permitted the Appellant to strengthen his private and family life in the United Kingdom in the intervening period. Reliance was placed on the Court of

Appeal's decision in MN-T as to the reduction in public interest further to a delay on the basis of the same principles in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41.

51. The passage of time is also said to be relevant given its express inclusion in paragraph 391 of the Immigration Rules and in the Respondent's policy that maintenance of a deportation order may no longer be the proper course after a period of 10 years had elapsed where a person had been sentenced to less than four years imprisonment. It was submitted that these factors cumulatively significantly reduce the strength of the public interest in the Appellant's deportation.

52. With regard to the issue of whether the Appellant's deportation would be unduly harsh, it was submitted that there is no dispute as to the existence of family life in this case and the preserved findings of fact are that it would be the best interests of the Appellant's children to remain in the United Kingdom with both parents. Further, it was submitted that the Appellant has a closer relationship with his children than average given that he is the primary carer for them due to their mother's work and studies. The Appellant's removal would therefore have a greater effect on the children than it would in the circumstances of an average relationship with an average level of involvement by a father, which means that separation would be unduly harsh. The Appellant also relies on relationships with extended family with care and support provided to his siblings and their children, which would also be unduly harsh on them.

53. Finally, it was submitted that in any event there are very exceptional circumstances which outweigh the public interest in the Appellant's deportation, notwithstanding the Appellant's entry to the United Kingdom in breach of the Deportation Order (if his position on the effectiveness of the Deportation Order is not accepted). The same private and family life submissions are relied upon, with immediate and extended family members, as well as the factors in relation to delay and the grant of Indefinite Leave to Remain. In addition, the Appellant speaks fluent English and is likely to be financially independent through employment if permitted to work. Cumulatively, it was submitted that these factors are sufficient to create very exceptional circumstances to outweigh the public interest in deportation required in paragraph 399D of the Immigration Rules or if necessary, very compelling circumstances pursuant to section 117C of the Nationality, Immigration and Asylum Act 2002.

Findings And reasons

54. I deal with the legal position and findings of fact in relation to the Appellant's claim initially in chronological order. At the outset, it is important to set out that the Appellant has used two different identities, initially with the name Tunde Lekan Balogun, date of birth 4 December 1967 and also Olalekaan Olatunde Alli Balogun, date of birth 4 December 1968. The Appellant claims that the latter is his correct name and date of birth (and is the one used in these appeal proceedings), seeking to explain that the former was only a truncated version of his own name and that there was originally an administrative error as to his year of birth which he later corrected.

The use of two different identities at particular times and the question of whether the Respondent knew (or at least had constructive knowledge of this) is relevant throughout parts of the analysis that follows.

55. At the outset, I make general comments as to the credibility of the Appellant and the evidence he gave before me. I did not find the Appellant to be a credible witness for a number of reasons and specific examples of these are given throughout my decision below. In general terms, although the Appellant had made detailed written statements by reference to specific dates, these were inconsistent with his oral evidence and his general approach to giving oral evidence before me. In cross-examination, the Appellant was vague, evasive and deliberately sought to avoid answering direct questions. He made repeated claims to not understand straightforward questions and contrary to what was adopted from his written statement, claimed not to remember a wide variety of matters and dates. The appellant failed, for example to even be able to give a consistent answer about his work history as to whether he works full or part-time giving answers which were inconsistent or heavily caveated. Secondly, the Appellant's explanation for certain matters was inherently implausible. Thirdly, the evidence of the Appellant and his partner was inconsistent in a number of respects (again examples will be given below). Finally, there was in general a lack of supporting evidence from the Appellant, for example documentary evidence of where he was living or when he travelled between the United Kingdom and Ireland.

56. The Appellant claims to have arrived in the United Kingdom in 1998, but there is no evidence to support entry at that time, lawful or otherwise. In the identify of Tunde Lekan Balogun, he made a postal application for asylum on 8 June 2000 which was withdrawn following his marriage to a Portuguese national on 28 July 2000 further to which he was granted an EEA Residence Card as her dependent on 16 November 2000. That residence permit was valid to 16 November 2005. An application was made on 11 February 2005 by the Appellant and his wife for Indefinite Leave to Remain in the United Kingdom which was refused on 31 May 2005, by reference to the Respondent's awareness of the Appellant's wife writing to him from Portugal in 2004 requesting a divorce. A further application was made on 8 December 2005 on the same basis which was refused on 28 June 2006. The Appellant states that he separated from his ex-wife in 2007 and he claims to have in a continuous relationship with his partner since 1999, prior to his marriage and during his marriage, albeit no mention of the same is made of this relationship, or the children born to it, to the Respondent until many years later.

57. The Appellant's first child was born in Ireland on [~] 2002, with the father named as Olalekan Alli-Balogun and an address for him given in Lagos, Nigeria. His second child as born on [~] 2003 in Ireland, with the same details for the father entered on the birth certificate. It is noted that on both birth certificates the Appellant's full name is used, contrary to his evidence that for the period 2000 to 2006 he was only using the truncated version of his name. The Appellant has not claimed that he was living in Nigeria at this time, nor has he ever suggested that he was living with his partner and children in Ireland prior to 2008. The use of the same address in Lagos

given approximately a year apart does however indicate that the Appellant was living there at the time, rather than in the United Kingdom as claimed and there is no reasonable explanation as to why a United Kingdom address would not be used if that was the correct one and where the Appellant was actually living at the time.

58. On 30 November 2006, the Appellant was convicted of seeking leave to remain in the United Kingdom by deception and possessing a false identity document (including submitting false P60s in his wife's name in support his application for further leave to remain) for which he was sentenced to 18 months' imprisonment on each count to be served concurrently. There was no appeal against sentence or conviction. The Appellant was convicted in the name of Tunde Balogun, date of birth 4 December 1967, with two alias names of Olatunde Olalekan Alli-Balogun and Tunde Lekan Balogun and an alias date of birth of 4 December 1968.

59. The Appellant sought to minimise his role in this offence and blame an accountant for providing him with false documents that he then simply passed on in the course of his application. That does not accord with his conviction nor length of sentence, nor the subsequent findings that the marriage was not genuine or subsisting and the finding by the Tribunal that the EEA national never exercised treaty rights in United Kingdom. The Appellant was convicted of two offences involving dishonesty, both of which were for the ultimate purpose of evading immigration control and were for all of these reasons serious offences.

60. The Appellant applied for Indefinite Leave to Remain, in the identify of Tunde Lekan Balogun, on the basis of long residence on 3 May 2007, in which he did not declare his criminal convictions (he expressly ticked no to the question of whether he had any criminal convictions in the UK or any other country and did not complete the sections for giving details of any such convictions) and the application was ultimately withdrawn on 14 April 2011. The Appellant did not volunteer any explanation as to why he did not declare his then very recent criminal convictions in this application. There can be no suggestion at that stage that the convictions were some time ago and no longer relevant. The Appellant would have either still been in prison at that time or only very recently released.

61. On 18 June 2007, the Appellant, in the identify of Olalekan Olatunde Alli-Balogun, applied for an EEA Residence Card on the basis that he had an Irish born child. The application was refused on 4 March 2008 and the Respondent has noted that at that time the Appellant was on bail in the identity of Tunde Lekan Balogun. This appears to be the first occasion on which the Appellant used his full name with the Respondent although it had been used, for example on the birth certificates, prior to then. There is no explanation as to why two different identities were used in two separate applications made less than two months apart to the Respondent.

62. On 15 June 2007, the Appellant was served with a notice of decision to make a deportation order by the Respondent, which he appealed on 27 August 2007.

63. On 28 September 2007, an application was made for an EEA Residence Card on behalf of the Appellant's son, with linking to the Appellant's identity of Olalekan Olatunde Alli Balogun and with no mention of his other identity or criminal convictions. That application was refused.

64. In the first appeal decision against the notice of intention to deport the Appellant, promulgated on 20 November 2007, Immigration Judge Cockerill and Mr AP Richardson JP dismissed the Appellant's appeal under the Immigration Rules. The Appellant attended the hearing and gave evidence but was not found to be a reliable or truthful witness on important issues concerning his case. There was a fundamental inconsistency over the date when he entered the country, asserting that he had arrived in 1998 to the Respondent but before the Tribunal asserted that he entered in April 1992 and had not left the United Kingdom since. He had also stated in evidence that he left in 2004 to go to Nigeria and it was found that his asylum application was clearly not genuine for this reason. At that time, the Appellant was not in contact with his wife, in fact he could not trace her at all. There was no reliance by the Appellant in the course of that appeal on any relationship with his current partner or children born in 2002 and 2003, rather, the Appellant's claim was judged to be on the basis that the Appellant perceived he would have a better life in the United Kingdom, particularly for employment, than he would in Nigeria.

65. On 6 December 2007, the Appellant was encountered by immigration officers in Belfast attempting to travel to the Republic of Ireland to visit his partner and children who lived there. It was considered that he was attempting to abscond from bail granted in United Kingdom to travel to Ireland and was re-detained after seeking to frustrate his re-documentation. At this time he would also have been in the process of appealing against the first Tribunal decision dismissing his appeal, which he was therefore clearly aware of when he sought to leave the United Kingdom. The Appellant was then granted bail on 21 December 2007.

66. The Appellant sought permission to appeal from the first Tribunal decision, which was granted and ultimately the appeal was remitted on EEA grounds only. In the second appeal decision promulgated on 3 March 2008, Immigration Judge M E Lewis and Mrs J Harris (non legal member) dismissed the Appellant's appeal under the EEA Regulations. The Appellant appeared in person before them on 19 February 2008. The Appellant's written statement before that tribunal dated 23 August 2007 relied on a continuing relationship with his Portuguese wife, with a statement that although there were problems in 2004 with a threat of divorce, they had reconciled and made an application to the council for accommodation wanting their own place rather than living in shared accommodation. It does not appear that there was any evidence at all from the Appellant's then wife. Again, no mention was made by the Appellant of his partner or two children.

67. The Tribunal were cautious about a finding that the Appellant's marriage was one of convenience at its inception and never intended to be of any substance as they did not have a copy of the original application made to the Respondent, but made a clear finding that the evidence they did have was that the marriage had no substance and

the Appellant's wife had never exercised treaty rights in the United Kingdom. The best evidence from the Appellant was the P60s but these were false and the subject of criminal charges. Although the Appellant pleaded guilty, he sought to minimise his offending before the Tribunal (as he has continued to do in the course of this appeal) and was unable to give any satisfactory answer as to why false documents were submitted if his wife was genuinely working. There was a lack of evidence of cohabitation and it was noted that the Appellant had a propensity to use fraud such that what documents there were carried the possibility of someone using a false identity.

68. The Appellant was appeal rights exhausted on 20 March 2008.

69. The Appellant's evidence, supported by related documentation from the Irish authorities, is that he left the United Kingdom and went to Ireland around the middle of 2008 and we can see from correspondence with the Irish authorities that he was there by 6 June 2008. In fact, the Appellant's evidence was that he was detained at Dublin airport on that date, suggesting that he may have been detained on entry given the location which he was encountered. The Appellant maintained in evidence that he did not know of the outcome of his appeal hearing before he left and had not chased it up since nor tried to find out the outcome.

70. The Appellant's evidence was that he was fed up with his immigration difficulties but did not go to Ireland to escape them. He went so far as saying that he did not want to know the outcome of his appeal because he had a strong belief that in any event he would not be deported. However, he also confirmed that if he had won his appeal he would not have left the United Kingdom at all. On the basis that the latter is true, combined with his claimed strong beliefs of winning his appeal, it is inherently implausible and inconceivable that the Appellant would have left the United Kingdom without knowing the outcome of his appeal. The suggestion that he relied on his lawyer is also not credible in relation to the final outcome of his appeal given that he was appearing in person without legal representation by the time of the second hearing in early 2008.

71. Contrary to his oral evidence, I find the Appellant was clearly aware of the outcome of the first Tribunal decision dismissing his appeal because he sought and obtained permission to appeal that decision and thereafter appeared in person before the second Tribunal dealing with the EEA aspect of his appeal. There is nothing in the Appellant's evidence or otherwise to suggest that he had left the United Kingdom before being notified of that second decision promulgated on 3 March 2008 and no reason why he would not therefore have received it before going to Ireland. Contrary to the Appellant's claim that he simply left the United Kingdom without chasing the decision or waiting for it, I find that he knew full well that his appeal had been dismissed and a Deportation Order was imminently likely. That is also consistent with what he told the Immigration Officer in August 2016 when detained on arrival from Nigeria, that he had fled the United Kingdom to avoid deportation.

72. I find that the Appellant was fully aware that he had lost his appeal against deportation in the Tribunal and deliberately fled the United Kingdom to avoid the almost inevitable consequences of a Deportation Order being signed and served on him. Of course, moving to Ireland was not in fact a solution to his immigration difficulties in the United Kingdom, nor was it a viable option to avoid immigration difficulties more generally. The Appellant entered Ireland unlawfully and there is nothing to suggest he made any application for entry clearance to Ireland nor ever had any lawful leave to remain there either.

73. A Deportation Order was signed against the Appellant (in the name of Tunde Lekan Balogun) on 8 May 2008 but could not be served on him as he was treated as an absconder from 3 March 2008 following his failure to report in accordance with his bail conditions.

74. The Appellant accepts, for the reasons given by the Court of Appeal in Decker that the Deportation Order signed against him was valid, even though he claims to have been out of the United Kingdom by that date (although it seems more likely that he went to Ireland at the beginning of June after the Deportation Order was signed, it was just that it could not be served on him because he had absconded). In Decker, the Court of Appeal refers to the three effects of a Deportation Order, the first being the removal of a person from the United Kingdom, the second being the prohibition on the person re-entering the United Kingdom on the third, that any leave to enter or remain in United Kingdom given to a person before the order is made or whilst in force is invalidated (section 5(1) of the Immigration Act 1971).

75. However, the Appellant submitted that although valid, the Deportation Order was not effective against him unless and until he was served with it, or at least made aware of it, which did not happen until 2016/2017. That point was not directly addressed by the Court of Appeal in Decker and it is not apparent that any such argument was made to the Court on that point. In the alternative, the Appellant relies on the House of Lord's decision in Anufrijeva, the key relevant passages of which include as follows:

> *"26. The arguments for the Home Secretary ignore the fundamental principles of our law. Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice. That is a fundamental and constitutional principle of our legal system: Raymond v Honey [1983] 1 AC 1, 10G per Lord Wilberforce; R v Secretary of State for the Home Department, ex p Leech, [1994] QB 198, 209D; R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115.*
>
> *28. This view is reinforced by the constitutional principle requiring the rule of law to be observed. That principle too requires that a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected. The antithesis of such a state was described by Kafka: a state where the rights of individuals are overridden by hole in the corner decisions or knocks on doors in the early hours. That is not our system. I accept, of course,*

> *that there must be exceptions to this approach, notably in the criminal field, e.g. arrests and search warrants, where notification is not possible. But it is difficult to visualise a rational argument which could even arguably justify putting the present case in the exceptional category. If this analysis is right, it also engages the principle of construction explained by Lord Hoffman in Simms.*
>
> *29. In European law the approach is possibly a little more formalistic but the thrust is the same. It has been held to be a "fundamental principle in the Community legal order … that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it". …*
>
> *30. … Where decisions are published or notified to those concerned accountability of public authorities is achieved. Elementary fairness therefore supports a principle that a decision takes effect only upon communication."*

76. Although the House of Lords refer to fundamental constitutional principles, the context in which that decision was made is very different to the one in this appeal. The background to the challenge in that case was that the person had their Social Security benefits stopped from the date on which their asylum claim had been recorded as determined, which itself was the result of specific requirements of notice set out in legislation. The person had no notice at all of the refusal of the asylum claim and therefore no warning of the consequences of that on the financial support she was in receipt of. It is clear on the facts that that person had been significantly adversely affected before having any knowledge of the decision or any opportunity to challenge it.

77. In the present appeal, the decision is a Deportation Order which is of a fundamentally different character and was not subject to any express requirements in primary legislation or otherwise as to service or notice of it. It is also preceded by the Respondent's notice of intention to make a deportation order, which carried with it at that time a statutory right of appeal which this Appellant duly exercised. Although there may be reasons, most likely administrative failings, meaning that a Deportation Order is not always the inevitable consequence of a notice of intention to deport which has not been successfully appealed, it is at least the expected next step which could and should have been anticipated by the Appellant.

78. The Deportation Order itself gave rise to no separate of appeal, although does of course have specific consequences to the named individual in terms of removal, prohibition of entry and invalidation of any leave to remain. The removal part was of no practical effect in the present case because the Appellant voluntarily left the United Kingdom. That leaves the prohibition of entry and invalidation of any possible future grant of leave to remain as the formal consequences which the Appellant claims to have been unaware of because he was not served with the Deportation Order. However, from the process beginning with the notice of intention to deport from the Respondent and the Appellant's subsequent appeal, the Appellant was or should have been fully acquainted with the consequences and likelihood of a Deportation Order being signed against him and not only had he a

statutory right of appeal against the intention to deport but he duly exercised this. There was also no statutory route by which he could mount a further challenge to the consequent Deportation Order itself. This is not, on its facts, a case in which it can be said that the Appellant had not had the opportunity to acquaint himself with the situation nor that he had not been given any opportunity to challenge the decision in the Courts. There is therefore no breach of any fundamental constitutional principle of our legal system such as that identified in Anufrijeva, nor any restriction on access to justice to challenge an adverse decision before the consequences of it fully took effect.

79. In the alternative, if I am wrong to distinguish the application of the basic principles in Anufrijeva, on the stark difference in the facts compared to the present appeal, I consider that in any event this would be an exceptional circumstance in which the usual principle which not apply. That is the case not only because of the history of decision making and appeal which precedes the Deportation Order in which an individual has a full right of access to justice and knowledge of the basis for the decision and consequences, but also because of the potential for the type of abuse identified by the Court of Appeal in Decker that a person could avoid the consequences by leaving the country (or even by lesser methods to avoid service, as in this case for example by absconding), even for a short period of time, which would significantly undermine effective immigration control in cases where there is significant public interest in the deportation of foreign criminals and clearly set out consequences for those who do re-enter in breach of a Deportation Order.

80. In conclusion on this point therefore, the Deportation Order signed on 8 May 2008 in respect of this Appellant was valid and effective from that date.

81. The Third Country Unit advised the Respondent on 6 June 2008 that the Appellant was residing in Ireland having voluntarily departed the United Kingdom and therefore his Deportation Order was deemed enforced. The correspondence arose from the claim for asylum by the Appellant in Ireland, which was subsequently examined there due to information that the Appellant had a partner and children residing in Ireland. There is no further documentation or evidence in relation to this application and it is presumed that it was unsuccessful.

82. On 20 November 2009, the Appellant's partner returned a pro forma to the Respondent's Case Resolution Directorate naming the Appellant and the two children as her dependents, including a declaration of age for the Appellant and birth certificates for the children.

83. The Appellant's third child was born on [~] 2009, with the father listed as Olatunde Olalekan Alli-Balogun, a student resident in Ireland.

84. In their written statements, the Appellant and his partner both refer to returning to the United Kingdom in February 2010, although that was not consistent with their oral evidence. The Appellant claimed to have returned later in 2010 after the grant of Indefinite Leave to Remain, such that he was returning with settled status. He

specifically said that he travelled back with his partner and children as a family, at the same time. To the contrary, the Appellant's partner stated that she had always been coming back and forth to the United Kingdom from Ireland and that they returned permanently in either November or December 2010, several months after the Appellant did. When asked for clarification, she then thought that she might have returned in September 2010 or even in 2011, but was consistent in her evidence that she did not return with the Appellant. It was not possible to tell the date of return by the use of an address in London in June and September 2010 because of her use of that address on and off whenever the Appellant's partner returned to the United Kingdom from Ireland. That explanation was not specifically relied upon by the Appellant who sent correspondence from a London address in July 2010 and had previously used different addresses in the United Kingdom.

85. I find that the Appellant returned to the United Kingdom in February 2010 as originally and consistently claimed in the written statements made by himself and his partner, all of which were formally adopted by the witnesses at the outset of their oral evidence without any corrections. The only plausible explanation for that position to have changed in oral evidence was to fit the date of return to the United Kingdom after the grant of Indefinite Leave to Remain in September 2010 which was pointed out to the Appellant and his partner as being after their return, and thus inconsistent with the Appellant's claim to have been returning lawfully to the United Kingdom with settled status. The Appellant has failed, on the balance of probabilities to provide any supporting evidence of when he returned to the United Kingdom and I make this finding taking into account the inconsistency in the evidence, the rational explanation for the inconsistency and the documentary evidence from the Appellant from a London address in July 2010 indicating that he had returned to the country by then. Contrary to the evidence in relation to the Appellant's partner and children, there was no suggestion that the Appellant was fluidly moving between the two countries, only that he had moved to Ireland in 2008 and returned in 2010.

86. In his written statement, the Appellant states that he was unaware of the Deportation Order against him at the time of his return to the United Kingdom and if he was, he would have remained in Ireland rather than breach the United Kingdom's immigration laws. I did not find his explanation on this to be credible and was contrary to his entire immigration history to date which had showed a consistent and blatant disregard for the immigration rules of both the United Kingdom and Ireland, even to the extent that he was convicted and sentenced to imprisonment for seeking leave to remain by deception. The suggestion by the Appellant that all of a sudden in 2010 that he would not have re-entered the United Kingdom in breach of immigration law is not credible.

87. However, whether or not he was aware of the Deportation Order, for the reasons set out above, it was in any event valid and effective whether he returned in February 2010 or later after the grant of Indefinite Leave to Remain in September 2010 (which pursuant to section 5(1) of the Immigration Act 1971 was invalidated by the Deportation Order) and therefore he entered the United Kingdom in breach of the

Deportation Order. Paragraph 399D of the Immigration Rules therefore applies to this Appellant such as that it is in the public interest for a Deportation Order to be enforced unless there are very exceptional circumstances to outweigh that significant public interest.

88. Even on the Appellant's claim that he was unaware of the Deportation Order, he in any event breached immigration law by returning unlawfully prior to the purported grant of Indefinite Leave to Remain, without any entry clearance or leave to remain in the United Kingdom. That conduct is consistent with the Appellant's criminal and immigration history including multiple breaches. As the Appellant's partner candidly accepted in her written statement, the family decided to remain in the United Kingdom in February 2010 regardless of the immigration threat because they no longer had any fear of removal from the United Kingdom because their children were Irish citizens. Her travel to Ireland being undertaken deliberately so that her children would be born there, thus obtaining Irish citizenship and avoiding a lack of immigration status in the United Kingdom which she and the Appellant as parents have since sought to benefit from.

89. On 21 May 2010, the Respondent wrote to the Appellant's legal representatives requesting information as to when the Appellant entered the United Kingdom and what he has been doing during his time here, for example to provide wage slips. Further information was also requested about the Appellant's partner's time in the United Kingdom and about the children, for example school reports. A further letter was sent to the Appellant's partner directly on 16 June 2010 requesting information about her and the Appellant including information on what they have done since the time in the United Kingdom, friends, social life, employment and so on as well as a further request for school reports evidence in relation to their children.

90. The Appellant responded to this correspondence on 1 July 2010, from an address in London, stating that 'due to our circumstances we have been moving from one place to the other in the course of this we have been unable to keep records of most documents.' There followed a plea for compassion in their case. It is not apparent that any of the questions asked by the Respondent were answered nor any documents enclosed with the reply. There is only a letter from a GP practice dated 6 July 2010 confirming that the Appellant's partner is registered as a patient at the practice and has been since 7 February 2001, with visits in 2004 and 2005. It is not clear if or when that document was submitted to the Respondent.

91. Although technically the Appellant's claim that he was never asked about any criminal convictions or use of different identities in the process leading to the grant of Indefinite Leave to Remain to him, his partner and children appears to be correct (the Respondent not being able to show any such specific enquiries having been made), it is clear from his response on 1 July 2010 that he was being evasive about his circumstances and I would find deliberately so, consistent with his history of use of deception and evasiveness to avoid immigration control. A direct question was asked about when the Appellant had entered the United Kingdom, what he had been doing and in particular of any employment and he simply responded that he has not

been able to keep records of documents. That fails to answer any of the questions posed and specifically fails to notify the Respondent that the Appellant had not in fact even been in the United Kingdom between 2008 and earlier in 2010. The bland reference to moving from one place to another I find is deliberately vague and contrary to the Appellant's partner's evidence that at least she maintained the use of a consistent address in the United Kingdom throughout the time that she was in Ireland from 2002 until her return, whether permanently or on a fluid basis living between the two countries or at least frequently visiting one from the other.

92. The Appellant's partner, together with her listed dependents were granted Indefinite Leave to Remain in the United Kingdom on 13 September 2010. It is however apparent from the Respondent's records that that grant was made on a mistaken factual basis, namely that the Appellant's partner had been continuously resident in the United Kingdom for 10 years and nine months, together with her partner and two children born in the United Kingdom, all living together as a family unit. PNC checks were said to have been complete and there was no evidence of employment submitted or on file. However, the birth certificates submitted by the Appellant's partner shows that the two children were born in Ireland and the evidence before me, albeit inconsistent and contradictory in a number of respects (to which I return further below), was that the Appellant's partner and children had resided in Ireland for at least some of the period (between 2002 and 2010, although neither the Appellant his partner give any clear evidence on this point) and had not always resided as a family unit with the Appellant.

93. On 8 February 2011, the Appellant applied for a no time limit stamp to transfer his Indefinite Leave to Remain, in the name of Olalekan Olatunde Alli-Balogun into his Nigerian passport. In that application he was expressly asked whether he or any dependents who were applying with him had any criminal convictions in the UK or any other country (including traffic offences) or any civil judgements made against him. The box for 'no' was ticked and the space to include details of any such convictions was left blank. The form included a note on the Rehabilitation of Offenders Act 1974 as enabling criminal convictions to become spent or ignored after a rehabilitation period, the length of such periods depending on the sentence given in this opposed to further information and advice is given. The Appellant did not suggest in evidence that he considered his conviction to have become spent in accordance with this Act and in accordance with the provisions in section 5 of the same, it would not be in any event be treated as spent until 17 May 2012.

94. In oral evidence, the Appellant stated that he did not complete this application for a no time-limit stamp in his passport, that it was completed by his partner, although he accepted that the signature at the end of the document was his. A similar application made by the Appellant's partner on 16 August 2011 shows distinctly different handwriting and in her own oral evidence she denied completing the Appellant's form. In the alternative the Appellant appeared to suggest that he thought he did not need to disclose his criminal conviction due to the passage of time since he received it and because he had effectively been pardoned by the Respondent prior to or at the time he was granted Indefinite Leave to Remain. I find the Appellant completed the

application form himself (and claimed his partner did so so as to distance himself from yet a further example of dishonest conduct) and deliberately lied to the Respondent to conceal his past conviction, as he also did in 2007 when making an application for leave to remain which omitted his then very recent conviction. For the reasons also set out elsewhere in this decision, there is no reasonable or rational basis upon which the Appellant could have thought that he had somehow been pardoned from his previous offences, or that the Respondent had no further interest in deporting him. There is nothing to suggest any active consideration by the Respondent, no representations by the Appellant, no evidence provided by him to the Respondent for example what he had been doing or rehabilitation and no basis upon which the Respondent could or would review the Appellant's circumstances at this or any other time. The deliberate false answer to the question about convictions is just one of many examples of the Appellant acting deliberately and dishonestly to evade immigration control.

95. The Appellant in his written statement and submissions more generally relied upon his re-entry to the United Kingdom in 2012 and 2014 from Nigeria, which in his written statement he said included full disclosure to the Immigration Officer at the time about his previous convictions and other identities. However, he did not maintain that statement in oral evidence when challenged as to why he would do so if he genuinely thought he had been pardoned with no further intention to deport him in 2010. I find the Appellant lied in his written statement, seeking to elevate his re-entry to the United Kingdom as being based on a full assessment of his history after full disclosure, whereas in fact, the Appellant continued to do what he had on many occasions in the past, which is not to mention his criminal conviction, his alternative name or date of birth and hope that the Respondent did not notice the same.

96. A letter from the Royal Borough of Greenwich dated 30 August 2016, stated that the they had been involved with the Appellant's children under a Child in Need plan and in November 2015, the Appellant's son had gone to reside with his father, although has since been returned to his mother's care. This strongly indicates that the Appellant has not been living consistently with his partner in a family unit as claimed. Similarly, as above there is nothing to suggest that the Appellant and his partner were residing together between 2002 and 2008 when she predominantly lived in Ireland (particularly in the latter years when the eldest child was in full-time education) and where there is nothing to suggest that the couple were even in the same country for any consistent period of time, in fact to the contrary, the Appellant gave evidence to a previous Tribunal that he was in Nigeria in 2004 and the birth certificates of his two eldest children also supported him living there in 2002 and 2003. In addition, at this time he was claiming, up to at least 2008, that he was in a genuine and subsisting marriage with a Portuguese national and no mention had been made of his current partner or children at the time.

97. As to the more recent position, it is clear from the social services letter that the Appellant and his partner had not been living together as a family unit at least in November 2015. The Appellant's partner's oral evidence also indicated that the

current position was that the Appellant did not live with her on a full-time basis, given that he had been bailed to his brother's address and spent time there other than when she was working nights when he had to stay with his children.

98. On 22 August 2016, the Appellant was detained on arrival from Nigeria returning in breach of a Deportation Order following a fingerprint match showing both of his claimed identities. When interviewed, the Appellant accepted he had used two different identities and had left the United Kingdom previously to avoid deportation, although he maintained he had not obtained his Indefinite Leave to Remain by deception. The Appellant was served with the detention paperwork and was scheduled return to Nigeria on 26 August 2016, however removal was deferred further to an application for Judicial Review and subsequent agreement for the Respondent to consider human rights representations. At this time the Appellant's Indefinite Leave to Remain was revoked due to the signed Deportation Order and that part of the Respondent's decisions were upheld in the application for Judicial Review. In fact, given the operation of section 5(1) of the Immigration Act 1971, there was no need to revoke the Indefinite Leave to Remain on the basis that it was obtained by deception because it was in any event invalidated by operation of statute because the Deportation Order was in force.

99. As to the Appellant's current circumstances, it was not disputed that he is in a genuine and subsisting relationship with his partner (who has now naturalised as a British Citizen) and three children (all of whom are Irish nationals) in the United Kingdom, albeit there are factors in the evidence which undermined that, including that the Appellant married someone else in 2002, the lack of evidence of any cohabitation between the Appellant and his partner between 2000 and 2008, that the couple were not living together at least in November 2015 and that they are only partially cohabiting now, it seems for childcare reasons. The Appellant provides day-to-day care for his children and as per the preserved findings of fact from the First-tier Tribunal, it is in the children's best interests to remain in the United Kingdom with both parents, including the Appellant. There is also evidence from the Appellant and his brother and sister about the relationship the Appellant has with their children and the support he also provides to them, which has not been specifically challenged by the Respondent.

100. Overall and for the reasons set out above, I did not find the Appellant to be a credible witness, nor did his partner give consistent or reliable evidence about the relationship and her circumstances, in particular where she was living or even which country she was living in for what period of time. On the limited evidence before me, I find it more likely than not that the Appellant's partner was living/residing in Ireland between 2002 and 2010, with only short visits back to the United Kingdom during that period. The Appellant's evidence was inconsistent and evasive and there is almost a complete lack of any supporting documentary evidence for many of the claims he has made all to support his travel residents to and from the United Kingdom and Ireland and to from Nigeria in the past. I also bear in mind that the Appellant has convictions for offences of dishonesty, has continued since those convictions to fail to answer direct questions from the Respondent about his

convictions honestly or at best has avoided answering questions which could identify his adverse criminal and immigration history.

101. I find the most reliable part of the evidence to be the Appellant's partner's candid admission in her written statement that she organised her life and place of residence according to the perceived means of either mitigating her lack of immigration status in the United Kingdom or using of the Irish nationality of her children, deliberately obtained by travelling there to give birth when there was no other reason to go or connection with the country and which expressly sought to avoid a consequence of removal from the United Kingdom. Although the Appellant's partner's grant of Indefinite Leave to Remain appears to be based on factual errors by the Respondent, at least as to the nationality of her children, the responses given to enquiries made by the Respondent by the Appellant were deliberately evasive and did not admit to the number of years or even any time spent living in Ireland.

102. Considering all of the evidence and the above history in the round, I find that the Appellant and his partner have conducted themselves over an extended number of years in a way which has been to deliberately avoid immigration control, either by dishonesty (for example, by stating that there were no criminal convictions and by the use of deception in an application for leave to remain for which the Appellant was successfully prosecuted), omission (for example, in the Appellant's reply in 2010 to the Respondent which gave no actual details as to where he had been or what he had been doing in the preceding years) or deliberate acts such as the Appellant fleeing the United Kingdom to try to avoid the consequences of deportation and the Appellant's partner's move to Ireland to obtain Irish nationality for the children and thereby rely on the same to avoid removal from the United Kingdom due to her own previous lack of immigration status.

103. Against those background facts I consider the Appellant's appeal against the Respondent's decision dated 30 March 2007, refusing the Appellant's human rights application/application to revoke the Deportation Order. The relevant parts of the Immigration Rules which apply are set out directly below.

104. Paragraph 390 and following of the Immigration Rules sets out provisions relating to the revocation of a deportation order, which so far as relevant to the present appeal provide as follows:

> *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 criminal offence, the continuation of a deportation order against a 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 four years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case-by-case basis with the deportation order should be maintained, or …*

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 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 one revocation of the order."

…

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

> *(a) …*
>
> *(b) the deportation of the person from the U.K.'s conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than four years but at least 12 months; or*
>
> *(c) … the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraph 399 and 399A.*

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

> *(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and*
>
> > *(i) the child is a British Citizen; or*
> >
> > *(ii) the child has lived in the UK continuously for at least seven years immediately preceding the date of the immigration decision; and in either case*

(a) it would be unduly harsh for the child to leave the country to which the person is to be deported; and

(b) it would be unduly harsh of the child to remain in the UK without the person who is to be deported; or

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

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

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

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

…

399D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation orders in the public interest and will be implemented unless there are very exceptional circumstances.

105. The Appellant submitted that paragraph 339D of the Immigration Rules is not applicable to him, first because the Deportation Order was not effective at the date he returned to the United Kingdom and secondly, because he had not in fact been deported. For the reasons already given above, the Deportation Order was valid and effective from the date it was signed, 8 May 2008 and the Appellant entered the United Kingdom in 2010 in breach of it.

106. As to the second submission, the Appellant cannot seek to avoid the application of paragraph 399D by virtue of the fact that he voluntarily fled the United Kingdom rather than waiting to have his deportation enforced by the Respondent, particularly in circumstances where he had absconded whilst on bail. On the basis of the same reasoning given by the Court of Appeal in the case of Decker, it is not a precondition of the application of paragraph 399D that a person has been deported by the Respondent (i.e. his removal being enforced by the Respondent), it is sufficient that a Deportation Order has in effect been enforced by a person voluntarily leaving the United Kingdom, particularly in the circumstances in the present appeal. To find otherwise would be to significantly undermine effective immigration control and allow a person to effectively avoid the full consequences of a Deportation Order by voluntarily leaving the United Kingdom on his own volition.

107. In the present appeal, pursuant to paragraph 399D of the Immigration Rules, the test is therefore whether there are very exceptional circumstances to outweigh the public interest in enforcement of a Deportation Order, a test which is more onorous on the Appellant than the unduly harsh criteria in the exceptions to deportation and the test of very compelling circumstances in paragraphs 398 to 399A of the Immigration

Rules. As the Court of Appeal found in Secretary of State for the Home Department v SU (Pakistan) [2017] EWCA Civ 1069 at paragraph 45;

> *"The difference in the language of paragraphs 398 and 399D, suggesting a more stringent requirement under paragraph 399D, reflect the real difference in the circumstances covered by each paragraph. Paragraph 398 addresses the question whether a deportation order should be made, or an existing order maintained, against a person who has yet to be deported, whereas paragraph 399D addresses the very different case of a person who has been deported and then re-entered illegally and in breach of that order. In the latter case, any Article 8 claim that was raised by the deportee before his original deportation will, it is hypothesised, have been decided against him. It is readily understandable that in the cases covered by paragraph 399D of 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."*

108. That is in effect to say that the hurdle faced by the Appellant is even higher than being able to show that the situation is unduly harsh on family members and even higher than the need to show very exceptional circumstances for those situations in which a person who has been sentenced to a term of imprisonment of over four years or who does not otherwise individually meet either of the exceptions. Whilst bearing in mind that higher hurdle, it is useful to start with a reminder of the application of the normal rules to be considered before a Deportation Order is made. These were set out by the Supreme Court in the case of Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60, by reference to the then new Immigration Rules in paragraph 399 and 399A, confirming the approach to be considered to these provisions and the task of the tribunal as follows:

> *"38. The implication of the new rules is that rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of rules 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in SS (Nigeria). The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and rules 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves,*

are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with Huang [2007] 2 AC 167, para 20), but they can be said to involve "exceptional circumstances" in the sense that they involve a departure from the general rule.

50. In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders, as explained in paras 14, 37-38 and 46 above, and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in MF (Nigeria) - will succeed."

109. The Supreme Court also recommended to the Tribunal a balance-sheet approach when undertaking the proportionality assessment, considering the factors in favour and against an appellant.

110. In addition, by virtue of section 117A of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act"), a court or tribunal required to determine whether a decision made under the Immigration Acts reaches a person's right to respect for private and family life under Article 8 and as result would be unlawful under section 6 of the Human Rights Act 1998 must in all cases have regard to the considerations listed in section 117B of the 2002 Act and in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C of the same. So far as relevant to the present appeal, section 117B provides as follows:

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

> (b) *are better able to integrate into society.*
>
> (4) *Little weight should be given to –*
>
> (a) *a private life, or*
>
> (b) *a relationship formed with a qualifying partner,*
>
> *that is established by a person at a time when the person is in the United Kingdom unlawfully.*
>
> (5) *Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.*

111. So far as relevant to the present appeal, section 117C provides as follows:

> (1) *The deportation of foreign criminals is in the public interest.*
>
> (2) *The more serious the offence committed by foreign criminal, the greater is the public interest in deportation of the criminal.*
>
> (3) *In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception one or Exception to applies.*
>
> (4) *Exception 1 …*
>
> (5) *Exception to applies where C is a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.*
>
> (6) *In the case of a foreign criminal has been sentenced to a period of imprisonment at least four years, the public interest required deportation unless there are very compelling circumstances, over and above those described in Exceptions one and two.*

112. These statutory provisions, which were not in force at the relevant date of the facts which arose in the case of Hesham Ali, have recently been considered by the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, with the focus on the assessment within the exception to as to whether deportation would be unduly harsh on a family member, which remains relevant when looking at whether a person can show "very compelling reasons" over and above the exceptions, or in this case, the even more stringent requirement to show very exceptional circumstances. The Supreme court summarised the applicable test for the second exception as follows:

> "22. *Given that exception 1 is self-contained, it would be surprising to find exception 2 structured in a different way. On its face it raises a factual issue seen from the point of view of the partner or child: would the effect of C's deportation be "unduly harsh"? Although the language is perhaps less precise than that of exception 1, there is nothing to suggest that the word "unduly" is intended as a reference back to the issue of relative seriousness introduced by subsection (2). Like exception 1, and like the test of "reasonableness" under section 117B, exception 2 appears self-contained.*

23. On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of harshness, that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

113. I turn now to the Appellant's circumstances and those of his family to conduct the proportionality exercise to determine whether there are very exceptional circumstances to outweigh the very significant public interest in his deportation from the United Kingdom in accordance with the provisions set out above, starting in this case with paragraph 399D of the Immigration Rules and using the proposed balance-sheet approach.

114. The factors in favour of maintaining the Deportation Order this case are as follows. First, as is clear from section 117C(1) of the Nationality, Immigration and Asylum Act 2002, the deportation of foreign criminals is in the public interest (as is maintenance of effective immigration control pursuant to section 117B(1)). Secondly, there is a very significant public interest not only the deportation of foreign criminals but in maintaining a Deportation Order against such persons who have re-entered the United Kingdom in breach of a Deportation Order. Thirdly, the Appellant has been convicted of two serious offences of dishonesty, including using deception to obtain leave to remain in the United Kingdom and has consistently failed to disclose those convictions, even when asked a direct and specific question about past convictions. Fourthly, the Appellant has an exceptionally poor immigration history, aside from being issued with an EEA Residence Card in 2000 (the correctness of which has to be questioned in light of the subsequent findings of the Tribunal in 2008 and the Appellant's conviction for relying on false documents in relation to a subsequent application for permanent residence on the same basis), the Appellant has never had lawful leave to remain in the United Kingdom. He has made numerous unsuccessful applications for leave to remain and has, for the reasons already given above, shown a blatant disregard for the laws of the United Kingdom. The Appellant and his partner have deliberately contrived on numerous occasions over a significant period of time to create circumstances in which immigration control can be evaded and/or avoided with the ultimate objective of remaining in the United Kingdom.

115. The Appellant relies on having been granted Indefinite Leave to Remain in the United Kingdom in 2010, which was not curtailed until 2016 (however as stated above, pursuant to section 5(1) of the Immigration Act 1971, it was invalidated immediately by the existence of a Deportation Order) and upon which he claims to have legitimately relied to continue to exercise and strengthen his family life in the United Kingdom for a number of years, with what he claims is a reasonable belief that he had been pardoned for previous offences. Although it is clear from the face of the contemporaneous paperwork from the grant of Indefinite Leave to Remain to the Appellant, his partner and children that errors were made by the Respondent in making the grant which were not directly attributable to the Appellant or his partner, it is also clear from evidence around this time from the Appellant that he was less than open and honest with the Respondent as to his actual circumstances which is likely to have contributed to the grant as well.

116. Further, the Appellant's evidence that he made a full disclosure as to his criminal immigration history to an Immigration Officer on return to the United Kingdom from Nigeria in 2012 and 2014 was not maintained in his oral evidence and I have not found even the original claim to be consistent as it is not plausible that the Appellant would suddenly start making such disclosures after a long history of failing to do so and in fact falsely answering questions and it is inconsistent with his claim to have thought that he had somehow been pardoned in 2010 with no further immigration problems.

117. Although the unusual circumstances in this case of a person remaining in the United Kingdom for an extended period of time, pursuant to what appeared to be a grant of Indefinite Leave to Remain (although curtailed and/or invalid from its start) may allow a person to strengthen their private and family life in the United Kingdom, in the same way that delay by the Respondent may do so (for example in the case of MN-T (Colombia) v Secretary of State for the Home Department [2013] EWCA Civ 893), I do not find that it reduces the public interest in deportation and can only potentially be relevant to whether it is outweighed by very exceptional circumstances. It is however to be noted that in MN-T, the individual was entirely blameless and no fault could be attributed to her at all for the Respondent's delay in signing a Deportation Order. Although in the present case it is clear that the Respondent at least had constructive knowledge of the multiple identities used by the Appellant at the latest by 2008, (given the fingerprint matches and correspondence with the Irish authorities which acknowledge both identities) the Appellant continued to contribute to the circumstances in which this was not detected and no action taken by the Respondent.

118. As to the factors in favour of the Appellant, he relies primarily on family life with his partner and three children. The preserved findings of fact from the First-tier Tribunal in this case are that the Appellant has a genuine and subsisting family life with his partner and three children and that it would be in the best interests of those children to remain in the United Kingdom with both parents. Over and above that, on behalf of the Appellant it was submitted that the relationship the Appellant has with his children is a particularly close one, greater than the average given that he is

the primary carer for them due to their mother's work and study. It was suggested that his removal would therefore have a greater effect on the children than it would in the circumstances of a more average relationship. On the facts, that submission must be slightly countered by the fact that the Appellant has not historically, or even at the present date consistently cohabited with the family, not residing with them prior to 2008 and not continuously or on a full-time basis since returned to the United Kingdom in 2010. They were living apart in 2015 when one of the children went to live with the Appellant for an unknown period of time and at the present date the Appellant lives with his brother pursuant to conditions of his bail, only staying with his children when his partner's working nights.

119. There was a paucity of evidence before me as to the likely effect on the Appellant's partner and children if he were to be deported, and what there was went no further than describing the ordinary and inevitable consequences of the deportation of a parent which is trite to say has an adverse impact on family members and children in particular. I reject entirely the submission that the effect on the children would be greater because of a closer than average relationship with the Appellant, given that this as well would be the normal consequences of deportation of a parent who is more likely to be a day-to-day primary carer of children because, being subject to deportation proceedings, that person would have no entitlement to work, such that the other parent would therefore have to assume the burden of employment or providing for the family. At its highest, the evidence on behalf of the Appellant in this regard falls far short even of establishing that the effect of deportation would be unduly harsh on his partner or children. For the avoidance of doubt, although it was stated in the original refusal letter from the Respondent that it would not be unduly harsh for the children in particular to relocate with the Appellant to Nigeria, this was not positively asserted before me, with the focus during the hearing and in the evidence as to the effect on the Appellant's partner and children if they remained the United Kingdom without him. It is of course remains a matter of choice as to whether the family would relocate to Nigeria with the Appellant.

120. Secondly, the Appellant also relies on relationships with his wider family members in the United Kingdom, in particular his brother and sister and their children. I had before me detailed evidence of the difficult family circumstances of the Appellant's brother in particular and the role the Appellant has played in supporting his brother and his children through difficult times after bereavement and during a continuing period of ill-health. However, the Appellant is not in a parental relationship with his siblings' children and if deported they would remain with their primary carers, their parents with at least some family support remaining, even if less than or different to what the Appellant is currently doing for them.

121. Thirdly, the Deportation Order was signed over 10 years ago in May 2008 and the index offence which triggered this was in 2006, since when he has not reoffended and it was therefore submitted that he had rehabilitated during the period of nearly 13 years. Although the Deportation Order was signed over 10 years ago, it has of course not been properly enforced for that period given that the Appellant re-entered the United Kingdom in 2010. In fact, he was only away from the United Kingdom

for less than two years of that period. In these circumstances, paragraph 391 of the Immigration Rules and the Respondent's policy as to the maintenance of a Deportation Order after a passage of 10 years where there has been a sentence of imprisonment of less than four years can offer no positive weight in the Appellant's favour, nor can it reduce the public interest in deportation.

122. Fourthly, as set out above, the Appellant relies on the delay in enforcing his Deportation Order since his return to the United Kingdom in 2010 and the period of nearly 6 years during which he had what appeared to be a grant of Indefinite Leave to Remain here. For the reasons set out above that period is taken into account as part of the Appellant's family life in the United Kingdom, which has inevitably been strengthened during this period, albeit commenced during a period when he had no leave to remain such that section 117B(4) applies. However, in the circumstances where the Appellant has contributed to that situation by his own conduct, this factor has a relatively minor positive effect in the proportionality exercise.

123. Fifthly, the Appellant speaks English and it is said that he would be financially independent given permission to work in the United Kingdom, but those factors in section 117B(2) and (3) have any neutral rather than positive weight to be placed on the balance for the Appellant.

124. Finally, the Appellant relies on there cumulatively being very exceptional circumstances, given the unusual recent situation and grant of Indefinite Leave to Remain as well as the strength of private and family life in the United Kingdom over an extended period of time.

125. I have weighed up all of the facts and circumstances in this case, balancing the very significant public interest factors in favour of deportation against all of those factors outlined above and during the course of the hearing in favour of the Appellant and find that in this case the Appellant has not established very exceptional circumstances to outweigh the very significant public interest in his deportation. The Appellant's conduct and history significantly increases the already weighty public interest in his deportation further to his criminal conviction and there is simply nothing even arguably approaching very exceptional circumstances, even on the slightly unusual facts, that could outweigh the public interest. The Appellant's family life, even taking into account that this has been strengthened between 2010 and 2016, combined with all of the factors cumulatively falls far short of the test given the paucity of evidence of even an unduly harsh impact on family members in the event of deportation. Mere assertion of this based on a closer than average relationship is wholly insufficient. The Appellant's appeal is therefore dismissed on all grounds.

126. Even if I am wrong as to the applicable test to outweigh the public interest in this case (if paragraph 399D of the Immigration Rules does not apply), I would not in any event have found that the Appellant met either exception in paragraph 399 of the Immigration Rules or section 117C of the Nationality, Immigration and Asylum Act 2002 (because the effect of his deportation would not be unduly harsh on his partner

or children remaining in the United Kingdom, as per the meaning of those sections set out by the Supreme Court in KO (Nigeria) and there being no suggestion that he could meet the private life exception) nor has he established very compelling circumstances that could outweigh the public interest in deportation. The Appellant's appeal on human rights grounds against his Deportation Order is bound to fail on any of the applicable tests and/or exceptions under the Immigration Rules or outside of them.

Notice of Decision

For the reasons given in the error of law decision, the making of the decision of the First-tier Tribunal did involve the making of a material error of law and as such it was necessary to set aside the decision.

I remake the appeal as follows:

The appeal is dismissed on human rights grounds.

No anonymity direction is made.

Signed Date 17 December 2018

Upper Tribunal Judge Jackson

ANNEX

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05350/2017

THE IMMIGRATION ACTS

Heard at Field House
On 15th May 2018

Decision & Reasons Promulgated

…………………………………

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

OLALEKAAN OLATUNDE ALLI BALOGUN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Miss D Revill of Counsel, instructed by Rock Solicitors
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals against the decision of First-tier Tribunal Judge Colvin promulgated on 6 February 2018, in which Mr Balogun's appeal against the decision to refuse to revoke his Deportation Order dated 18 March 2017 was allowed. For ease I continue to refer to the parties as they were before the First-tier Tribunal, with Mr Balogun as the Appellant and the Secretary of State as the Respondent.

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2. The Appellant is a national of Nigeria, born on 4 December 1967 or 1968 (both dates of birth have been used by the Appellant). The Appellant claims to have first arrived in the United Kingdom in 1998 but there is no record of him being here prior to June 2000 when he made a postal application for asylum and later on 16 November 2000 he was issued with an EEA Residence Card as the dependent of an EEA national he married in July that year. His application for asylum was withdrawn and on 11 February 2005 and prior to the expiry of his Residence Card, he and his wife made a joint application for Indefinite Leave to Remain. That application was refused on 31 May 2005.

3. On 8 December 2005, the Appellant made an application for an EEA residence card as the spouse of an EEA national which was refused on 28 June 2006. In the course of this application the Appellant had submitted false P60s in the name of his wife and was prosecuted for this and other fraud offences. On 17 November 2006, the Appellant was convicted at Croydon Crown Court in a different identity of obtaining leave to remain in the United Kingdom by deception and possessing a false identity document. He was sentenced 18 months' imprisonment on each count to be served concurrently.

4. On 3 May 2007, the Appellant submitted an application for indefinite leave to remain on the basis of long residence, in which he did not declare his criminal convictions. The application was subsequently withdrawn on 14 April 2011.

5. Following the criminal convictions, the Respondent served the Appellant with notice of the decision to make a Deportation order, against which the Appellant appealed. The appeal was dismissed on all grounds by Judge Cockrill in a decision promulgated on 20 November 2007. Adverse credibility findings were made against the Appellant and it was not considered that he had any objective fear on return to Nigeria, nor that he had any family life in the United Kingdom. The Appellant has separated from his wife was in the process of a divorce and there was no mention of the partner he currently claims to have been in a relationship with since 2000. There are also issues raised in that appeal as to when the Appellant first entered the United Kingdom, he claimed that this was in 1992 and that he had not left the country ever since, but in his evidence the Appellant also stated that he returned to Nigeria in 2004.

6. On 6 June 2008, the Respondent was advised that the Appellant was residing in Ireland, having voluntarily departed the United Kingdom, such that his Deportation Order was deemed enforced.

7. The Appellant's partner had applied for indefinite leave to remain and in 2010 named the Appellant as one of her dependents, in one of the two identities that he had used past and the Respondent asserts that there was no disclosure of the Appellant's criminal convictions or alternative identity in the application. That application was granted on 13 September 2010, although it is apparent from a minute about the grant that this was done on a mistaken basis where the Appellant's partner was thought to have resided continuously in United Kingdom for nearly 11 years,

when in fact she had held residency in Ireland between 2007 and 2010, and on the basis that her two eldest children were born in the United Kingdom and had always resided here, when in fact all three children were born in Ireland, where Irish nationals and had resided there for at least part of their lives. The Appellant's partner subsequently naturalised as a British Citizen on 20 June 2013.

8. On 8 February 2011, the Appellant applied for a no time limit stamp in his passport to transfer his indefinite leave to remain to his new passport which was completed on the same day.

9. On 22 August 2016, the Appellant was detained in the United Kingdom on arrival from Nigeria as a person returning in breach of a Deportation Order when fingerprints matched his two different identities and showed up his criminal conviction and subsequent Deportation Order. The intention was to return the Appellant to Nigeria a few days later, but an application for Judicial Review was issued, removal deferred and the Respondent agreed to make a fresh decision on the Appellant's human rights claim. That decision was made on 18 March 2007 which refused the Appellant's further human rights submissions, but accepted them as a fresh claim under paragraph 353 of the Immigration Rules. It is that decision which is appealed against in these proceedings.

10. At the time of his detention in 2016, the Respondent revoked the Appellant's indefinite leave to remain in light of the outstanding Deportation Order. In the course of Judicial Review proceedings, the Upper Tribunal found that this cancellation was both lawful and justified in all the circumstances. That is not challenged further in the current appeal proceedings.

11. The Respondent refused the human rights application/application to revoke the Deportation Order on 13 March 2017 for the following reasons. The Appellant's circumstances were considered by reference to paragraph 399D of the Immigration Rules to the effect that his claim under Article 8 could only succeed if there were very exceptional circumstances over and above those described in paragraph 399 and 399A. The Respondent considered that there was a significant public interest in deporting the Appellant due to his criminal history of submitting false documents in support of an application for leave to remain in the United Kingdom for which he was successfully prosecuted and sentenced to 18 month's in prison; that the Appellant is the subject of a Deportation Order and has continued to use deception as a means of remaining in United Kingdom by not declaring his criminal convictions or alias names on further applications.

12. The Respondent considered the best interests of the Appellant's children pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009 it was considered that they could remain residing in the United Kingdom with their mother or the option of relocating with the Appellant would be open to them and neither would be unduly harsh. There were no exceptional features of the Appellant's family or private life to constitute a very compelling circumstance to outweigh the public interest in deportation.

13. Overall it was considered that the Appellant's deportation would not be a disproportionate interference with his right to respect for private and family life under Article 8 of the European Convention on Human Rights and the application to revoke the Deportation Order was refused under paragraph 390 and 390A of the Immigration Rules. It was however accepted that the Appellant's further submissions amounted to a fresh claim under paragraph 353 of the Immigration Rules and there was therefore a right of appeal against the refusal to revoke the Deportation Order on human rights grounds.

14. Judge Colvin allowed the appeal in a decision promulgated on 6 February 2018. I will return in detail below to those findings, but in summary, the appeal was allowed following reliance on a number of factors. These included that it was not considered that the Appellant had been in the United Kingdom unlawfully and in breach of a Deportation Order from 2010 given the Respondent's grant of indefinite leave to remain to him at that point; the strength of the Appellant's family life with his partner and three children as well as being an integral part of the lives of his brother and sister and their respective children; that the Deportation Order would lapse in May 2018, three months after the appeal hearing and that there would be no strong public policy reasons for maintaining the Deportation Order beyond that time. Overall, the public interest in removal was reduced in all the circumstances and it was considered that it would be unduly harsh to require the children and consequently their mother, to return to Nigeria with their father. It was also found to be unduly harsh for the Appellant's wife and children to remain in the United Kingdom without him. In these circumstances the exception in paragraph 399 of the Immigration Rules and section 117C(5) of the Nationality, Immigration and Act 2002 applied and the Deportation Order should be revoked. In the alternative, it would also be disproportionate not to revoke the Deportation Order in all the circumstances.

The appeal

15. The Respondent appeals essentially on two grounds. First, that the First-tier Tribunal has failed to give the required weight to the public interest and in particular that any breach of a Deportation Order is likely to be a strong public policy ground for maintaining an order even after a lapse of 10 years. Similarly, the public interest in deportation is not necessarily diluted by the passage of time and the First-tier Tribunal failed to take into account that the Appellant did not disclose his previous conviction and use of different names and dates of birth thus contributing to the error in the grant of indefinite leave to remain to him.

16. Further, the First-tier Tribunal failed to engage with the public interest factors when assessing whether it would be unduly harsh for the family members to remain without the Appellant or return to Nigeria with him as required and confirmed by the Court of Appeal in MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450, and instead conflates the best interests of the children with whether it would be unduly harsh.

17. Secondly, that as a matter of law there could not be very compelling circumstances for the revocation of the Deportation Order on the facts as found in relation to family life.

18. Permission to appeal was granted by Judge Parkes on 6 March 2018 on all grounds.

19. At the oral hearing, Mr Wilding on behalf of the Respondent relied of the grounds of appeal and skeleton argument submitted prior to the hearing. In addition, it was highlighted that the First-tier Tribunal attached weight to what was considered to be a fact that the Appellant's Deportation Order would lapse in May 2018, 10 years after it was made, which is a material mistake of fact. A Deportation Order does not lapse, there must be an application to revoke it, regardless of the passage of time since it was made and a decision would have to be made on whether or not it should be revoked. A Deportation Order will remain in force until revoked.

20. Mr Wilding submitted that as every stage, the decision reads as if the First-tier Tribunal is undertaking a searcher reasons why the Appellant should not be deported rather than conducting a genuine balancing exercise. The Appellant's deeply unattractive immigration history appears to have been entirely swept under the carpet and no weight is given to the public interest against him for his own conduct. It was emphasised that the Appellant had been released on bail and had absconded. He travelled to Ireland and returned in breach of a Deportation Order. The Appellant's claim that the grant of indefinite leave to remain overtook any intention to deport him was not accepted.

21. On behalf of the Appellant, Miss Revill relied on her skeleton argument and made further oral submissions. In relation to the first ground of appeal, it was submitted that the First-tier Tribunal expressly cited paragraph 399D of the Immigration Rules and appreciated the high threshold for breach of Article 8 when the has been a breach of a Deportation Order but that the threshold exceptional circumstances had been met, in particular because the Appellant held a reasonable belief that indefinite leave to remain had been granted by the Respondent in full knowledge of the Deportation Order and that he had been lawfully resident from 13 September 2010 to 22 August 2016. This factual finding has not been challenged by the Respondent and the First-tier Tribunal was entitled to take that into account, as well as the Appellant's assumption that the Respondent was aware of both of his identities and in any event gave adequate reasons why the public interest was reduced in the circumstances. For these reasons, there is no material error of law for the reasons set out in the first ground of challenge.

22. Specifically in relation to whether the First-tier Tribunal had reached a decision in accordance with MM (Uganda), it was submitted that paragraphs 43 to 46 of the decision should be read together and in particular paragraph 46 did not require repetition from the previous paragraph and it has to be assumed that the same balancing exercise taking into account the public interest had been applied, as it was in paragraph 45.

23. As to whether the First-tier Tribunal was wrong to consider that the Deportation Order would lapse in 2018, it was submitted that contrary to the express wording of the decision, the First-tier Tribunal had indicated a proper understanding of the situation and in any event this did not form part of the grounds of appeal submitted by the Respondent. Further, it was appropriate for a Tribunal to place weight on the fact that a Deportation Order can be revoked after 10 years.

24. It was submitted that there was also no material error of law on the second ground of challenge as adequate reasons were given for the separate assessment of the best interests of the children and the reduction in public interest in deportation in this case such that taking everything into account there were very compelling circumstances against deportation.

Findings and reasons

25. For the reasons set out below I find errors of law on all grounds identified by the Respondent in the decision of Judge Colvin in the First-tier Tribunal.

26. As to consideration of the public interest in deportation, in paragraph 30 of the decision it is recorded that the more serious the offence a person is convicted on the greater weight is to be attached to the public interest in removal. In this case the Appellant was convicted of an offence of deception in relation to an immigration application for which he was given an 18-month prison sentence and therefore should be considered a serious offence. Judge Colvin went on to state: *"However, it was committed over 10 years ago and there has been no re-offending. There is also the relevance of matters set out below regarding the grant of ILR to the appellant in 2010 and the fact that he has lived here on this basis since then despite the deportation order which, in any event, is soon to lapse in May 2018. I find that in all the circumstances the public interest in deporting the appellant is lessened significantly in this case and this is a matter that I refer to below again."*

27. Judge Colvin goes on to consider and make findings about the Appellant's immigration history in paragraph 31 to 35 of the decision. These paragraphs record the Appellant's belief that the Respondent knew all of the details about names and dates of birth he had used and that his fingerprints had been taken such that the Respondent was fully aware of all the details of his identity. Further, on behalf of the Respondent it was accepted that the Home Office 'ought to have known' that the Appellant had previously used two names and errors in the grant of indefinite leave to remain in 2010 were accepted. Judge Colvin did not accept that the issue of indefinite leave to remain in 2010 implied any intention on the behalf of the Respondent not rely on the Deportation Order but had simply not joined up the dots when making the decision. It was further noted that the grant of indefinite leave to remain was revoked in 2016 and the Upper Tribunal found that the cancellation was both lawful and justified. The decision continues as follows:

> *"34. However, there is another aspect to this grant of ILR in 2010 that is relevant to this appeal: namely, that it is submitted that the appellant has correctly assumed and conducted his life on the basis that he had legal status in the UK since this time. For*

example, the appellant applied for the ILR to be transferred to a new passport in 2011 which was done. He then travelled to Nigerian 2012 and 2014 with this document in his passport without being apprehended or detained on return to the UK. It was only when returning from Nigeria in 2016 that he was detained as a person who was entering in breach of a deportation order. In assessing this submission I have taken account of the fact that the appellant has been found to have used deception in the past in relation to submitting false documents to support a claim that he was in a genuine marriage with an EEA national. It means that whilst I do not find that it can be shown that the appellant used deception by relying on the ILR document over the five years from 2010 to 2016, I consider that he probably took a pragmatic view that as it had been granted he was entitled to rely on it – particularly as he lived in the reasonable belief for the reasons given above that the Home Office has always been aware of the Deportation order and criminal conviction and, indeed, his presence in the UK during this time.

35. This means that the appellant's immigration history is somewhat mixed. It seems that on his own evidence he entered the UK remained without lawful status from 1998 to 2000 when he made an asylum claim. He has clearly used deception including submitting false documents in relation to the EEA marriage that was found not to be genuine. It is also said that in March 2008 he failed to report to Beckett House in accordance with conditions imposed after he had finished the prison sentence. However, I do not find that in all the circumstances referred to above it would be reasonable to hold the appellant has been in the UK unlawfully and in breach of a deportation order from 2010 when it has been accepted that there were errors on the part of the Home Office in granting the appellant with ILR and effectively allowing him to remain here."

28. These passages within the decision contain a number of errors and omissions which collectively, if not individually as well, amount to material errors of law. First, the public interest in deportation is said to be reduced due to the passage of time since the offences were committed, but there is no sustainable reason for this, in particular having regard to statements of the public interest made in relation to deportation both in primary legislation and in the Immigration Rules.

29. Secondly, although aspects of the Appellant's very poor immigration history are referred to together with his criminal history, there is no clear finding as to whether he entered the United Kingdom in breach of a Deportation Order (only as to whether he remained here in breach since 2010) and no account taken of the Appellant's and/or Appellant's partner's contribution to the mistaken grant of indefinite leave to remain by failing to disclose his other identity, date of birth or criminal conviction. These matters which are adverse to the Appellant and would strengthen the public interest in maintaining and enforcing the Deportation Order, are ginored rather than given appropriate weight.

30. Thirdly, it has to be questionable as to whether the Appellant could, as a matter of law, not be in breach of a valid Deportation Order because of the mistaken grant of indefinite leave to remain to him in 2010. Paragraph 35 of the decision fails to set out adequate reasons as to why this would be the case, separate to the Appellant's reasonable belief which may alter the weight to be attached to remaining in breach but of itself cannot alter the legal position.

31. Fourthly, whilst not expressly raised in the grounds of appeal, it is a very obvious error on the face of the decision that Judge Colvin is under the mistaken impression that a Deportation Order can lapse and will do so in this case. This is dealt with more expressly in paragraph 42 of the decision as follows:

> *"42. In this case the Deportation order lapses under paragraph 391(a) of the Immigration Rules after 10 years on 8 May 2018 – that is, in just over three months' time. Whilst the respondent may consider whether it should be maintained past this period, strong public policy reasons need to justify this. Although the respondent's decision letter does not refer to the lapse of the order permitted to enforcing it on the grounds that it has been breached, it could be said that no specific public policy reasons for extending the order beyond May 2018 have been put forward. On the other hand, the main purpose of the deportation to exclude a person from the UK and a breach of the order is likely to be a strong public policy reason for maintaining the order even though 10 years has elapsed. However, for the reasons given above, it is difficult to find that the appellant has indeed breach the deportation order. In particular, since being granted ILR in 2010 he has, with the apparent or 'ought to have known' knowledge of the respondent, been living and working in the UK, caring for his family and travelling to and from Nigeria – in other words, he has been 'allowed' to remain living here. In these circumstances I do not find on the evidence presently before me that there are strong public policy reasons for maintaining the deportation order beyond 8 May 2018."*

32. I cannot accept the submission on behalf of the Appellant that despite the express wording used repeatedly throughout the decision, that the First-tier Tribunal understood the correct legal position that a Deportation Order is valid unless and until it is revoked. To the contrary, the decision in paragraph 42 above shows a fundamental misunderstanding of the process. It is clear from paragraphs 390 and following in the Immigration Rules that an application must be made for revocation of a Deportation Order, following which the Respondent must make a decision. Although the continuation of a deportation order would be the proper course, in specified situations it may not be, including where a person has been sentenced to a period of imprisonment of less than four years and 10 years have elapsed since the making of the deportation order. This however has to be balanced against paragraph 399D of the Immigration Rules as to the consequences of a person entering the United Kingdom in breach of a Deportation Order and the circumstances looked at as a whole. It is not for the Respondent to establish strong public policy reasons for maintaining a Deportation Order for more than 10 years, to the contrary it is for an individual to make an application which may then be considered under the Immigration Rules.

33. The First-tier Tribunal then falls into error in the test to be applied for revocation of the Deportation Order on human rights grounds. Paragraph 43 of the decision states that paragraph 398 of the Immigration Rules applies in this case and therefore consideration must be given to the matters set out in paragraph 399 and section 117C(5) of the Nationality, Immigration and Asylum Act 2002. However, no reference is made here to paragraphs 390 to 392 of the Immigration Rules, nor to

paragraph 399D of the same, nor is there any evidence of their application in the following final paragraphs of the decision.

34. Paragraph 44 of the decision starts with a statement that it is not possible to require family as a unit to relocate outside of the EU nor that the Respondent could submit that it was reasonable for them to do so. There is then a conclusion that the best interests of the children would be to remain in the United Kingdom. The assessment of the best interests of the children should, at least as a matter of best practice, be undertaken first and separately to any assessment of reasonableness.

35. Judge Colvin then deals with the questions of whether it would be unduly harsh for the Appellant's family to relocate with him or remain in the United Kingdom without him in paragraphs 45 and 46 which state as follows:

> *"45. It was held by the Court of Appeal in MM (Uganda) v Secretary of State for the Home Department [2016] EWCA Civ 450, that when considering whether deportation would be "unduly harsh" for the purpose of rule 399 of the Immigration Rules and section 117C(5) of the Nationality, Immigration and Asylum Act 2000 to regard has to be given to all of the circumstances, including the deportee's criminal and immigration history. The more pressing the public interest in removal, the harder it was to show that the effects of deportation would be unduly harsh. As stated above, in this case, I have found that the public interest in removal is significantly less pressing a number of reasons including the passage of time since the appellant's conviction and the fact that he has been 'allowed' to live in the UK since then despite the Deportation order. Therefore for these reasons I consider that it would be unduly harsh to require the children – and consequently their mother who cares for them – to return to Nigeria with their father.*
>
> *46. The next issue is whether it would be unduly harsh to separate the partner and children from the appellant by them remaining in the UK without him. In Kaur (children's best interests/public interest interface) [2017] UKUT 14 the principles restated that the best interests of the children are to be assessed separately from any wrong-doing of their parents. In this case because the strong relationship that these children have with their father including on a day-to-day practical basis there is again no doubt that their best interests would be served by continuing to live with both parents in the UK. This is particularly so in relation to the boys of this family who seek the guidance of the father as they grow-up as emphasising the written statement of the eldest child. The witnesses used the expression that it would be 'devastating' do not have the presence of the appellant in their lives: on the evidence before me unsatisfied that this is likely to be the consequence of the children and therefore find that it would be unduly harsh to be separated from him."*

36. In paragraph 45, Judge Colvin reaches the finding that it would be unduly harsh to require the family to relocate, expressly on the sole basis that there is a reduced public interest in removal. Although the preceding paragraph refers to the best interests of the children, there is no express consideration of all of the circumstances, including the deportee's criminal and immigration history as confirmed is required by the Court of Appeal in MM (Uganda). Those same considerations also apply to

the issue considered in paragraph 46 about whether it would be unduly harsh for the family to remain in United Kingdom without the Appellant. However, the decision on that point is expressly made on the basis that the best interests of the children equate to it being unduly harsh for them to be separated from him without any wider considerations of all of the circumstances, including the public interest, the Appellant's criminal and immigration history. I do not find that even reading paragraphs 45 and 46 together, it can be inferred that the First-tier Tribunal has undertaken a proper assessment in accordance with MM (Uganda) before reaching a conclusion as to whether the consequences would be unduly harsh.

37. Paragraph 47 of the decision repeats the earlier errors in relation to a reduced public interest and that the Deportation Order is to lapse and again refers only to paragraph 399 of the Immigration Rules and section 117C(5) of the Nationality, Immigration and Asylum Act 2002 without any reference to the wider provisions relevant to the circumstances in an application for revocation of a Deportation Order where an individual has entered the United Kingdom in breach of it. It also contains no reasons as to why in the alternative there are very compelling circumstances making the decision to refuse to revoke the Deportation Order a disproportionate interference with the Appellant's right to respect for private and family life under Article 8 of the European Convention on Human Rights. The statement in paragraph 48 to there being very exceptional circumstances regarding family life, is not supported by the findings contained in the earlier parts of the decision.

38. For all of these reasons, there are material errors of law contained in the First-tier Tribunal's decision such that it is necessary to set it aside and remake the decision on the appeal.

39. There has been no challenge to the findings of fact in relation to family life, nor to the assessment of the best interests of the children in this case, such that those are preserved when the decision is remade. However, it is likely that those findings will need to be supplemented with more detailed findings for the decision to be remade. There will also need to be further findings of fact, in particular in relation to the circumstances in 2009/2010 when the application for and grant of indefinite leave to remain was made; to enable a full assessment of whether removal would be unduly harsh and to determine whether in the alternative, there are any very compelling circumstances to outweigh the public interest in deportation in this case.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law. As such it is necessary to set aside the decision.

I set aside the decision of the First-tier Tribunal and direct that the remaking of the decision under appeal will be undertaken by the Upper Tribunal on the basis identified above.

No anonymity direction is made.

Directions

A. The Appellant to file and serve any further written statement(s) and evidence to be relied upon, no later than 14 days prior to the relisted hearing.

B. The parties to file and serve a copy of the 2009/2010 application/re-opened application for leave to remain made by the Appellant's partner, and the details provided to the Respondent by her of her dependents, if available, no later than 14 days prior to the relisted hearing.

C. Parties are at liberty to file and serve a further or updated skeleton argument, no later than 7 days prior to the relisted hearing.

Signed Date 22nd June 2018

Upper Tribunal Judge Jackson