Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13091/2018

THE IMMIGRATION ACTS

Heard at Field House
On 11 February 2020

Decision & Reasons Promulgated
On 16 March 2020

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

R M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted at an earlier stage of the proceedings because the case involves child welfare issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

Representation:

For the Appellant: Ms S. Jegarajah, W.H. Solicitors
For the Respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

© CROWN COPYRIGHT 2020

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 13 June 2018 to refuse a human rights claim in the context of deportation proceedings. First-tier Tribunal Judge Wyman determined the appeal in a decision promulgated on 24 April 2019. On 25 June 2019 a panel of the Upper Tribunal (Lord Boyd and Upper Tribunal Judge Canavan) found that the First-tier Tribunal decision involved the making of an error of law and set aside the decision relating to human rights issues (Annex 1).

2. The appeal comes before the Upper Tribunal for remaking. The scope of the appeal is a preliminary issue, which is determined below. The long procedural history of the case is integral to understanding the conclusions of the Upper Tribunal. As such, it is necessary to set out the background in detail. The evidence before the Upper Tribunal is incomplete and some aspects of the chronology are unclear. The chronology of events discloses shortcomings and errors made by both parties over the course of many years.

BACKGROUND

Criminal offence

3. On 05 February 2002 the appellant was convicted of attempted rape of a female under the age of 16 years. He was later sentenced to six years' imprisonment with a four-year extended licence. The judge's sentencing remarks outlined the serious nature of the offence:

> "[RM] late at night on 27th August you selected a victim wholly unknown to you, you pursued her and you dragged her into a park from the public place in which she had been walking home. There you subjected her to a terrifying and humiliating ordeal in which you used violence to inflict extensive although superficial injuries in an endeavour to force her to submit to your attack.
> The fact that you only succeeded in an attempt to rape was largely brought about by her far sightedness in using her mobile phone to dial 999, although she had to do so without talking into the telephone.
> I am quite satisfied that you had selected her for the purposes of such an attack and I wholly reject the protestations that you make in your interviews with those who have interviewed you since your conviction that either the way in which she was dressed or the fact of where she was or how she behaved in any way mitigates this offence.
> She was a 14 years old child and you are now 22 years of age and were an adult of 21 at the time of this offence. There are only effectively three matters of mitigation which [have been] brought to my attention. The first is that you are a man of good character. You have never committed any criminal offence of this sort before. Second, is that you are in fact only just 22 years of age and have experienced considerable difficulties and hardship in your upbringing and I take into account that your clearly respectable family are going to suffer greatly in the eyes of your community because of your conviction of this offence.
> The third matter is really hardly to your credit, but I take into account that you did fail in your attempt to have forcible sexual intercourse against your victim's will but the experience is one which self-evidently has had a considerable impact upon that young woman and common sense dictates that it would."

4. The PNC record indicates that the appellant was given a caution on 11 October 2008 for failure to comply with notification requirements. There does not appear to be any evidence relating to the detail of this incident, but it took place during the licence period. It was not considered sufficiently serious to recall him to prison. Since 2008 there is no record of any other offences.

5. A letter from the appellant's Probation Officer dated 24 June 2011 said that she had known the appellant for a period of five years. He complied with his licence conditions. He was assessed as medium risk of harm because of the nature of the offence, but the risk of re-offending was low. The appellant took positive steps to find work after his release from prison and had a long-term partner.

6. Despite the serious nature of the offence the appellant's witness statement sidelines the conviction and is silent as to whether he acknowledges responsibility for his actions or feels remorse for the crime. The fact that he still appeared to deny responsibility for the offence in his evidence before the First-tier Tribunal in 2014 is a serious concern. I note that he acknowledged some regret during cross-examination at the hearing before the First-tier Tribunal in 2019, but it is difficult to assess his sincerity if it was not thought important enough to mention in his statement. However, by his actions over many years it seems that his lack of insight has not led to further offending. He has not been convicted of any further offences for a significant period. At the date of the hearing there is no evidence to suggest that he presents anything other than a low risk of reoffending. One can only hope that he has reflected on the serious nature of the crime and the effect that it is likely to have had on the victim, a child. Now that he is a father, I trust that he may have a better understanding of the gravity of the offence.

Residence under EU law

7. The appellant is a citizen of India who entered the UK on 20 January 1998 with a permit as the family member (son) of an EEA national who was exercising rights of free movement in the UK. The appellant was 17 years old when he arrived in the UK. On 02 July 1999 he was issued with another residence permit recognising a right of residence under EU law, which was valid until 02 July 2004.

8. The appellant was granted Indefinite Leave to Remain (ILR) on 20 January 2005 at a time when it is likely that he was still serving the custodial part of his sentence. The decision letter is in a standard format and does not indicate the basis upon which ILR was granted. Neither party has produced enough evidence to explain on what basis the appellant was granted ILR. A document, which appears to be his father's original sponsorship application from 1997, suggests that the appellant entered the UK as part of a family unit with his mother and siblings. His mother's grant of ILR letter of the same date suggests that he might have been granted ILR as part of a family application, but there is no evidence to show the nature of the underlying application for ILR.

9. Since the appellant initially entered and remained in the UK under EU law, it is possible that ILR might have been granted to reflect a right of permanent residence at a time preceding the transposition of the Citizens' Directive (2004/38/EC). However, I find that there is insufficient evidence to show on the balance of probabilities that ILR was granted on that basis. There is no copy of the original application, the appellant's witness statement and the supporting letter from his mother are both silent on the issue. The respondent asserts that it was granted in error, which is also possible, given that a lengthy prison sentence would usually preclude a grant of ILR. Nevertheless, there is evidence to show that the appellant was granted ILR. The only evidence of revocation was the deportation order signed on 15 September 2009, which has since been withdrawn.

Deportation decision (2005)

10. The respondent made a decision to make a deportation order on 20 December 2005. The decision involved an EEA decision to remove the appellant on public policy grounds with reference to Council Directive 64/221. The appellant had a right of appeal under regulation 29 of The Immigration (European Economic Area) Regulations 2000 ("the EEA Regulations 2000").

11. The decision also involved the refusal of a human rights claim. The appellant also had a right of appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") on human rights grounds (see notice of Decision to Make a Deportation Order).

First-tier Tribunal decision (2006)

12. Immigration Judge Pullan dismissed the appeal in a decision promulgated on 27 March 2006. The judge noted the deportation decision was made with reference to Council Directive (64/221 EEC) as well as domestic human rights law. He outlined further detail about the crime, the appellant's history of denial, and subsequent appeals. He acknowledged that there was an outstanding application to the European Court of Justice (the evidence suggests it was in fact an application to the European Court of Human Rights). His appeal to the Court of Appeal and an application to the Criminal Cases Review Commission were unsuccessful. At the date of the hearing, the appellant's continued denial of responsibility for the offence raised concerns about his future behaviour. The judge concluded that the appellant continued to pose a "real and serious risk" of re-offending. The decision did not breach the appellant's rights under the Community Treaties.

13. The judge went on to consider the appellant's private and family life in the UK with reference to Article 8 of the European Convention. At the time, his situation was markedly different. He was a 25 year old man, without children, and in good health. His family ties with his parents and siblings were not considered to be sufficiently compelling to show that his removal would be unlawful under section 6 of the Human Rights Act 1998 ("HRA 1998").

14. On reconsideration, a panel of the Asylum and Immigration Tribunal found that there was no error of law in the Immigration Judge's decision. A further application to appeal was refused. His appeal rights became exhausted on 19 October 2006.

Deportation decision (2012)

15. The records indicate that the respondent took no further action until a deportation order was signed on 15 September 2009, over three years later. The evidence indicates that some action might have been taken to attempt to document the appellant in preparation for removal around that time, but then no further action was taken until 2011, when he was detained pending removal. The deportation order was not served on the appellant until 10 June 2011, nearly five years after his appeal rights became exhausted.

16. After the belated service of the deportation order, there was a series of applications, decisions and legal proceedings seeking to resist removal. Moses LJ granted a stay on removal by order sealed on 13 April 2012 in the following terms:

> "The applicant has been on immigration bail for six years with no evidence of any further crime. If the purpose of the deportation order was primarily protective, then the delay in providing protection against the applicant's continued presence in the UK and the absence of any apparent need for protection does suggest that this applicant's case is not clearly unfounded. .."

17. The respondent eventually agreed to consider an application to revoke the deportation order. The representations made on 28 June 2011 focussed solely on his family life with his wife and did not make any submissions relating to EU law. It is unclear whether other written submissions were made. If they were, no copies are included in the bundles. If EU law arguments were made, one might expect the respondent to have addressed them in her subsequent decision.

18. On 05 November 2012 the respondent made a decision to refuse to revoke the deportation order. No copy of the decision appears to be included in the respondent's bundle. However, the summaries in the subsequent decisions of the First-tier Tribunal and the Upper Tribunal indicate that it focussed solely on human rights grounds. No consideration seems to have been given as to whether it was appropriate to revoke the deportation with reference to European law in light of the Probation Officer's assessment that he posed a low risk of reoffending.

19. At this point it may be useful to note that there is a different procedure for an application to revoke an 'expulsion order' (a deportation order) made pursuant to European law. Regulation 24A(3) of The Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations 2006"), which was applicable at the relevant time, required an application to revoke a deportation order to be made from outside the UK. This was broadly consistent with the procedural safeguards outlined in Article 31(4) of the Citizens' Directive in a case where the deportation

order was made following a judicial decision. Aside from the fact that there is no evidence to show that the appellant's representatives raised EU law issues, this provision may explain why the respondent dealt with the application under the domestic provisions for revocation of a deportation order contained in the immigration rules. However, it was still open to the respondent to exercise discretion to consider the application in country or to consider EU law issues as part of the overall balancing exercise under Article 8. Article 31(4) does not preclude the possibility of an application to revoke the order being made from inside the UK.

20. The appellant appealed the decision under section 82 NIAA 2002. The appeal was initially dismissed by a panel of the First-tier Tribunal (Judge Morris and Ms Singer) in a decision promulgated on 07 May 2013. The decision was set aside by the Upper Tribunal and remitted to the First-tier for a fresh hearing.

First-tier Tribunal decision (2014)

21. The documentation relating to the subsequent appeal before the First-tier Tribunal is incomplete. The First-tier Tribunal (FTTJ Pullig and Mrs Jordan) allowed the appeal on human rights grounds in a decision promulgated on 12 June 2014. The decision noted that the appeal was brought on human rights grounds. Nothing in the decision suggests that any rights of residence under EU law were argued on behalf of the appellant. The First-tier Tribunal determined the appeal solely by reference to Article 8 of the European Convention and the relevant provisions by then contained in the immigration rules.

22. By 2014 the appellant was married and had a British child. The panel heard evidence from a range of witnesses and considered other evidence from the Probation Officer and social services. The First-tier Tribunal considered the prolonged delay from the date the appellant's appeal rights became exhausted to the date when the deportation order was served. During the period of delay the appellant established a family life. It was in the best interests of his child for him to remain the UK. The evidence showed a low risk of reoffending. The First-tier Tribunal found that there was a significant change in circumstances since the deportation order was made. The panel concluded that there were exceptional circumstances to outweigh the public interest in deportation, which justified revocation of the order.

23. In a decision promulgated on 03 October 2014, Upper Tribunal Judge Chalkley found that there was no error of law in the First-tier Tribunal decision.

Court of Appeal proceedings (2015-2018)

24. The respondent was granted permission to appeal to the Court of Appeal at a renewed oral hearing on 02 July 2015 (*SSHD v RM (India)* [2015] EWCA Civ 855). Permission was granted only in relation to human rights grounds. Lord Justice Longmore found that it was at least arguable that there was an important point of

principle relating to the assessment of deportation cases under Article 8 involving sentences of imprisonment of more than four years. He granted permission on the condition that:

> "…by the time the appeal comes on for hearing, there will be a proper explanation from the Home Office of how it was that after Mr RM (India)'s appeal had been dismissed…. It was not until the 10 June 2011 that he was detained and deportation actually set for a date in July 2012. That was something that obviously weighed very considerably with the Tribunals in the RM (India) case, and if the matter is to proceed there should be a proper explanation of how that came about."

25. The appeal was listed for hearing on 18 October 2016. The hearing was adjourned with directions for the parties to consider the position in relation to EU law. It is clear from the correspondence that Ms Jegarajah was instructed during the early stages of the proceedings before the Court of Appeal. Correspondence between the parties indicates that the appellant's solicitors belatedly highlighted the potential applicability of EU law.

26. A consent order was sealed on 16 March 2018. It is unclear why it took so long for the order to be agreed. There is no evidence to suggest that a substantive hearing ever took place before the Court of Appeal. The Secretary of State agreed to withdraw her appeal before the Court of Appeal. She also agreed to withdraw (i) the decision to make a deportation order dated 20 December 2005; (ii) the deportation order dated 15 September 2009; and (iii) the decision to refuse to revoke the deportation order dated 05 November 2012, which was the subject of the appeal. The Secretary of State recognised that the original decision was made *"a long time ago and considers that it would be appropriate for her to reconsider the matter afresh"*.

27. It is not clear why the appellant's representatives agreed to such an order having succeeded in the appeals before the Tribunals below. Having withdrawn the appeal before the Court of Appeal the decisions of the First-tier and Upper Tribunal stood unappealed. However, the effect of the appellant agreeing to the Secretary of State withdrawing the underlying immigration decisions relating to deportation, including the one that was the subject of the appeal before the First-tier Tribunal in 2014, was that any advantage gained by the positive decision of the First-tier Tribunal was lost. In any event, the First-tier Tribunal decision only related to the human rights claim and did not make any findings relating to EU law. The effect of the consent order was to reset the position and to pave the way for the respondent to make a fresh decision.

Deportation decision (2018)

28. The respondent wrote to the appellant on 08 May 2018 requesting further information relating to claimed rights of residence under EU law with reference to regulation 22 of the EEA Regulations 2006. The appellant's then representatives, Malik & Malik Solicitors, made further representations on 29 May 2018. Apart from

a general assertion that his removal grounds of public policy was not justified, and enclosure of various payslips and other documents relating to his life in the UK, the representations were poorly drafted and did not put forward any meaningful arguments relating to the appellant's position under EU law.

29. The respondent made a fresh decision on 13 June 2018, which is the decision that is the subject of this statutory appeal. It included a decision to make a deportation order under section 5(1) of the Immigration Act 1971 ("IA 1971"). The appellant's conviction pre-dated the coming into force of the UK Borders Act 2007 ("UKBA 2007").

30. The decision went on to consider the appellant's position under European law with reference to The Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations 2016"). The respondent concluded that there was insufficient evidence to show that the appellant had resided in the UK in accordance with the regulations for a continuous period of five years. The appellant might have been dependent upon his father until he was 21 years old, but there was no evidence of dependency after that age. The respondent concluded: *"It is considered that you do not benefit from the provisions under the EEA Regulations and that your liability for deportation is covered within the Immigration Act 1971."*

31. The decision went on to consider whether the appellant had rights of residence under European law with reference to the Court of Justice of the European Union decision in *Zambrano*, but concluded that the child would not be compelled to leave the area of the European Union because he could remain with his mother in the UK.

32. Even though the respondent considered whether the appellant had rights of residence under EU law, no formal decision appeared to be made to remove him on public policy grounds under regulation 27, which would give rise to a right of appeal under regulation 36 of the EEA Regulations 2016. It seems that the respondent proceeded on the basis that EU residence rights were no longer engaged.

33. However, no consideration was given to the assertion made during the Court of Appeal proceedings that the appellant might have been granted ILR in 2005 as a means of recognising a permanent right of residence under EU law. The decision letter acknowledged that ILR was granted but merely stated that it was done in error. There is no evidence before the Upper Tribunal to suggest that it was revoked by any other order of the Secretary of State than the making of the deportation order in 2009. The impact of withdrawing the deportation order should have been considered. If the applicant had acquired a right of permanent residence, a different legal framework would need to be considered.

34. The rest of the decision involved consideration of the human rights claim with reference to the relevant provisions of the immigration rules relating to Article 8 of the European Convention. The decision letter stated that the appellant <u>only</u> had a right of appeal under section 82(1) NIAA 2002, which by that time was confined to

grounds relating to the refusal of the human rights claim following amendments made by the Immigration Act 2014 ("IA 2014").

First-tier Tribunal decision (April 2019)

35. First-tier Tribunal Judge Wyman determined the appeal in a decision promulgated on 24 April 2019. She purported to allow the appeal "under the Immigration Rules" and with reference to Article 8 of the European Convention on Human Rights. She noted that counsel for the appellant, Ms Jegarajah, did not make any submissions in relation to EU law. She dismissed the appeal in so far as it involved consideration of EU law.

Upper Tribunal hearing (June 2019)

36. The Secretary of State was granted permission to appeal the First-tier Tribunal decision relating to the human rights claim. The appellant did not apply to appeal the decision in so far as the judge made findings relating to EU law. The skeleton argument served under rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008 replied to the grounds of appeal but did not put forward any arguments relating to EU law. At the hearing, Ms S. Iengar (counsel) represented the appellant. Again, no EU law issues were raised.

37. In a decision promulgated on 09 October 2019 the Upper Tribunal (Lord Boyd and Upper Tribunal Judge Canavan) found that the First-tier Tribunal decision relating to the human rights claim involved the making of an error of law. The judge failed to explain what weight she placed on the public interest in deportation. The Upper Tribunal concluded that the findings relating to EU law should stand. The parties were directed to serve any further evidence and any application to call oral evidence at least 14 days before the resumed hearing.

Upper Tribunal hearing (December 2019)

38. Even though the appellant did not seek to challenge the First-tier Tribunal's findings relating to European law at the relevant time, and did not raise the issue at the error of law hearing on 25 June 2019, and had since the promulgation of the Upper Tribunal decision on 09 October 2019 to formulate further arguments, Ms Jegarajah sought to raise arguments relating to the appellant's rights of residence under European law, without notice, at the beginning of the resumed hearing on 02 December 2019.

39. Even after some discussion, the focus of the application, if one was being made, was unclear. It was not clear whether Ms Jegarajah was seeking to reopen an issue relating to European law, even though the appellant did not make an application for permission appeal that aspect of the First-tier Tribunal decision. It was unclear whether she was confining her argument to how rights of residence under European law might impact on the proportionality assessment under Article 8 of

the European Convention in so far as it related to the only issue that needed to be remade following the Upper Tribunal's error of law decision. In the circumstances, it was difficult to proceed without more coherent and better particularised argument. The fact that these points were made at such a late stage forced an adjournment.

40. The Upper Tribunal made directions for the appellant to serve written submissions, and a bundle of any indexed and paginated documents relied upon, by 09 December 2019. Ms Jegarajah's written arguments dated 17 December 2019 were served on the same date in breach of directions and without an explanation for the delay or an application to extend time. The respondent served a written response within the relevant directions deadline.

Preliminary decision - scope of the appeal (February 2020)

41. It is possible that submissions could have been made to the First-tier Tribunal that those aspects of the deportation decision made in 2018 relating to EU law were capable of amounting to an 'EEA decision' within the meaning of regulation 2 of the EEA Regulations 2016 thereby giving rise to a right of appeal under regulation 36 of the EEA Regulations 2016. However, it is not necessary to go into any detailed consideration of the issue for the following reasons:

(i) No such argument was made when the appeal was lodged. The notice and grounds of appeal lodged with the First-tier Tribunal related solely to Article 8 of the European Convention i.e. the appellant lodged an appeal under section 82 NIAA 2002 on the ground that the refusal of a human rights claim was unlawful under section 6 Human Rights Act 1998 ("HRA 1998").

(ii) Nothing in the evidence prepared for the First-tier Tribunal hearing indicated that the appellant intended to put forward any meaningful case relating to rights of residence or removal under EU law. The appellant's statement did not explain how or why he might have been granted ILR in 2005. No evidence was submitted to prove that he was. It was not even mentioned. The rest of his statement concentrated on his family life with his wife and children and did not cover any issues that were material to establishing any rights of residence under EU law.

(iii) The evidence shows that Ms Jegarajah raised EU law issues in negotiations during the Court of Appeal proceedings. Despite having raised issues relating to rights of residence under EU law in 2016, it seems that she made no submissions on the issue when she appeared before the First-tier Tribunal in <u>this</u> appeal in April 2019. Under the heading "The appeal under the EEA Regulations", First-tier Tribunal Judge Wyman stated: "*81. …I note that that Counsel chose not to make any submissions in this regard*."

42. On closer inspection, it appears that no appealable 'EEA decision' was made, no arguments were put forward to suggest that there was an appeal against an EEA decision when the notice appeal was lodged, no grounds of appeal were put forward in relation to EU law, little evidence was adduced, and no submissions were made in relation to EU law.

43. Having considered the written submissions from both parties in response to directions, the arguments raised on behalf of the appellant were no better particularised. There was a lack of clarity as to what was being argued in relation to the scope of the appeal. I make the following findings in relation to the three points that could be discerned from Ms Jegarajah's written submissions.

(i) The first point outlined somewhat incomprehensible arguments relating to the terms and effect of the consent order agreed during the Court of Appeal proceedings [2-7]. It matters not if the conditions of the previous grant of permission to the Court of Appeal were not met when the Secretary of State withdrew the appeal before the substantive hearing with the appellant's consent. The condition of the grant of permission was to produce evidence in time for the substantive hearing but the appeal did not get to that stage. It matters not whether permission was technically granted or not because the effect of the consent order was to agree to the withdrawal of the outstanding appeal and all the underlying immigration decisions relating to deportation whether they were made under the EEA Regulations or domestic law. The decisions of the First-tier Tribunal and the Upper Tribunal in 2014 stand unappealed. The previous findings can be considered but had no binding effect once the decision to which they related was withdrawn with a view to reconsidering the case.

(ii) In so far as I understood the second point, it was asserted that any EU law issues should be considered within the context of the human rights claim. If that was the argument, I accept that they can form part of an overall proportionality assessment under Article 8, but only in the context of the outstanding appeal brought under section 82 NIAA 2002 on human rights grounds for the reasons outlined above.

(iii) The third point appeared to relate to an entirely new issue, asserting that the appellant is an EEA national by descent. I cannot find any evidence to show that this issue was raised in the further submissions to the Secretary of State before she made the decision that is the subject of this appeal. The issue was not raised in the subsequent notice and grounds of appeal to the First-tier Tribunal. Judge Wyman noted that no submissions were made on any issue relating to EU law at the hearing. On the evidence currently before the Upper Tribunal this appears to be the first time the argument has been raised. It is difficult to see how this could be anything other than a 'new matter' that requires the consent of the Secretary of State under section 85(5) NIAA 2002 before the Upper Tribunal could consider it as part of the appeal

against the decision to refuse a human rights claim brought under section 82 NIAA 2002.

44. The Upper Tribunal issued a preliminary decision outlining its findings relating to the scope of the appeal on 04 February 2020 (Annex 2). The Upper Tribunal concluded that the remaking is confined to an appeal brought under section 82 NIAA 2002. The only ground of appeal is whether the decision to refuse a human rights claim in the context of deportation proceedings was unlawful under section 6 HRA 1998. The Upper Tribunal concludes that EU law issues can only be argued in the context of the human rights claim. The issue relating to the appellant's claimed nationality by descent is a 'new matter' that would need to be considered with reference to section 85(5) NIAA 2002.

Upper Tribunal hearing (February 2020)

45. Mr Lindsay refused permission for the Upper Tribunal to consider the new matter of the appellant's claimed nationality by descent. Having refused consent, the Tribunal does not have discretion to consider the issue. The appellant had more than sufficient time to raise this issue in the 15 years since he was first notified of the Secretary of State's intention to deport him. Counsel who appears before the Upper Tribunal raised EU law issue with the respondent as long ago as 2016, but there is no evidence to show such arguments were put forward for the respondent when the case was reconsidered, nor was the argument put forward at the First-tier Tribunal hearing.

46. The hearing proceeded by way of submissions only. The details are a matter of public record.

DECISION AND REASONS

47. It was necessary to outline the procedural history in detail to explain why this case is not being decided with reference to the potentially relevant legal framework under EU law, and instead, is being decided with reference to domestic human rights law.

48. Neither party produced adequate evidence to explain why the appellant was granted ILR in 2005. Whether the appellant was granted ILR as a means of recognising a permanent right of residence as the family member of an EEA national under EU law, at a time preceding the transposition of the Citizens' Directive, seems to have been lost in the shrouds of time. The appellant has not been able to show on the balance of probabilities that it was granted on that basis. The respondent has not produced evidence to show why it might have been granted in error as claimed.

49. The only mechanism that might have revoked ILR was the deportation order made in 2009, which the respondent subsequently withdrew. The Supreme Court decision

in *R (George) v SSHD* [2014] 1 WLR 1831 suggests that it is unlikely that ILR was revived, but there may be a distinction between ILR granted under domestic law and ILR granted to reflect a permanent right of residence under EU law. It is unlikely that permanent residence could be 'revoked' in the same way as ILR granted under domestic law although it is open to a Member State to make an expulsion order if a person with permanent residence poses a genuine and present threat to one of the fundamental interests of society. The effect of the withdrawal of the deportation order was not the subject of argument. There is insufficient evidence before the Upper Tribunal to determine the issue.

50. In 2005, the initial decision to deport referred to the relevant provisions of EU law and considered human rights grounds. By 2012, the subsequent decision to refuse to revoke the deportation order was made under domestic law with reference to human rights issues. By 2018, when both parties should have been focussing their attention on the relevant EU law issues, again, the question of whether the appellant was granted ILR to reflect a permanent right of residence and the effect of the withdrawal of the deportation order on that status was overlooked. If he was granted ILR to reflect permanent residence it is possible that an appealable EEA decision should have been made under the EEA Regulations 2016. Instead, no consideration was given to the issue. The appellant lodged the appeal under section 82 NIAA 2002 solely on human rights grounds and failed to argue any EU law issues at the hearing.

51. The Upper Tribunal is left in the unsatisfactory position of trying to draw several issues that have been left unnoticed, unargued or unresolved over many years based on limited and inadequate evidence.

52. The Tribunal only has power to determine the current statutory appeal. I have explained why the appeal against the decision dated 13 June 2018 is an appeal brought under section 82 NIAA 2002 on the sole ground that the decision to refuse a human rights claim in the context of deportation proceedings is unlawful under section 6 HRA 1998. In so far as EU law issues might be relevant to the proportionality of the decision, I will take them into account as part of the overall balancing exercise under Article 8 of the European Convention.

Best interests of the children

53. The appellant has two British children. At the date of the hearing they were six and four years old. The children were born in the UK and know no other life. There is no evidence to suggest that either child suffers from serious health issues or has any particular vulnerabilities that need to be considered.

54. I have considered the report prepared by an independent social worker called Etmond Palamani dated 28 November 2019. He reported that the children were in good physical and mental health. He observed the appellant appeared to have a good connection with the children and that his removal from the UK would cause

them "significant emotional damage". The stress of the appellant's wife becoming a single mother was also likely to have a negative effect. Neither child was reported to have behavioural problems. The social worker expressed his opinion that it would be unduly harsh to expect the appellant's wife and children to relocate to India, but he gave no reasons for this aside from the fact that they are used to living in the UK. Nor is there any evidence to suggest that he understood the stringent legal test that those words were clearly intended to convey. Understandably, he concluded that separation of the children from their father would have a damaging effect.

55. There is no evidence to suggest that the appellant is anything other than a loving and supportive parent. It is normally in the best interests of both children to be brought up by both parents. The appellant is a long-standing resident of the UK. His wife was born here although she has familial connections to India. Both children were born in the UK and are familiar with life here. Although there is little evidence to suggest that it would be unduly harsh to expect the family to relocate to India, the children are British citizens who are entitled to the benefits that status brings. I conclude that it is in the best interests of the children to be brought up by both parents in the UK.

Article 8(1) – private and family life

56. The appellant entered the UK when he was 17 years old. He has lived in the UK for a period of 22 years. It is likely that he has established a significant private life in the UK during that time. Since his release from prison he has also established a family life in the UK with his wife and children. I am satisfied that his removal in consequence of the decision would affect his right to private and family life in a sufficiently grave way as to engage the operation of Article 8(1) of the European Convention.

Article 8(2) – proportionality

57. Article 8 of the European Convention protects the right to private and family life. However, it is not an absolute right and can be interfered with by the state in certain circumstances. It is trite law that the state has a right to control immigration and that rules governing the entry and residence of people into the country are "in accordance with the law" for the purpose of Article 8. Any interference with the right to private or family life must be for a legitimate reason and should be reasonable and proportionate.

58. Part 5A NIAA 2002 applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8 of the European Convention. In cases concerning the deportation of foreign criminals the additional public interest considerations contained in section 117C apply. The 'public interest question'

means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

59. The courts have repeatedly emphasised that significant weight should be given to the public interest in deportation. However, that is not to say that the weight to be given to the public interest is uniform or monolithic: see *Akinyemi v SSHD* [2019] EWCA Civ 2098. The more serious the offending behaviour; the greater the weight is placed on the public interest in deportation. The less serious the offending behaviour; the more readily an individual's compelling or compassionate circumstances might outweigh the public interest in deportation.

60. The exceptions to deportation outlined in section 117C NIAA 2002 reflect the respondent's position as to where a fair balance is struck between the weight that must be given to the public interest in deporting foreign criminals and the person's right to private or family life. If the appellant meets the requirements of one of the exceptions the respondent accepts that his removal would be disproportionate.

61. Section 117C(6) NIAA 2002 states that the public interest requires deportation unless there are 'very compelling circumstances' over and above Exceptions 1 and 2. The test has repeatedly been described as a demanding one involving a high threshold: see *NA (Pakistan), KO (Nigeria) v SSHD* [2018] UKSC 53 and *RA (s.117C: "unduly harsh"; offence; seriousness) Iraq* [2019] UKUT 123.

62. The assessment under section 117C(6) of the NIAA 2002 and paragraph 398 of the immigration rules reflects the overall balancing exercise undertaken by the Strasbourg court when assessing whether the interference with a person's private or family life is justified and proportionate under Article 8(2) of the European Convention. After all, that is the stated intention of the statutory scheme. The need to consider the relevant principles outlined in the Strasbourg jurisprudence was emphasised by the Supreme Court in *Hesham Ali* v SSHD [2016] 1 WLR 4799 [25-33]. After section 117C NIAA 2002 was introduced the Court of Appeal in *NA (Pakistan)* expressly recognised the need to consider Strasbourg principles when applying the statutory scheme [38].

63. I conduct my assessment with these principles in mind. I turn to consider what weight should be placed on the public interest in deportation and what factors might weigh in favour of the appellant in order to assess whether the decision strikes a fair balance for the purpose of Article 8(2) of the European Convention.

64. I have taken into account the following factors in assessing what weight to place on the public interest in deportation:

(i) The serious nature of the crime was reflected in the length of the sentence. The appellant was convicted of an offence attracting a sentence of six years' imprisonment and was subject to extended licence requirements. The more serious the offence the great the weight that must be placed on the public interest in deportation;

(ii) Particular weight must also be given to the public interest in cases involving drugs, violence or sexual offences. The appellant was convicted of a sexual offence against a minor. The nature of the offence must also lend weight to the public interest in deportation;

(iii) One aspect of the public interest includes the need to deter others from committing crime. In *Hesham Ali v SSHD* [2016] 1 WLR 4799 Lord Wilson agreed that the emotive language he used in *OH (Serbia) v Secretary of State for the Home Department* [2009] INLR 109, that the public interest in deportation ought to reflect public revulsion at serious crime, ought not to be used. Deportation is said to reflect society's disapproval of such crimes. However, if this issue is given undue weight it is difficult to see how anyone would be able to resist deportation. It forms part of the picture, but in my assessment is not something that attracts significant weight in light of other factors that affect the weight to be given to the public interest in this case.

(iv) The passage of time is a significant factor in this case. I accept that some crimes are so serious that the public interest in deportation is not weakened. In my assessment, this is not one of those cases. The appellant committed a serious crime in 2001 when he was 21 years old. The six-year sentence reflected the serious nature of the crime but was still in the medium range of the sentencing spectrum. The appellant served his sentence and complied with the licence conditions. When Judge Pullan first heard his appeal in 2006, the public interest in deportation was more pressing, but after the appeal no action was taken to sign a deportation order until 2009 and then the order was not served until 2011. If the public interest in deportation was so pressing, one might have expected the respondent to act promptly to effect removal after the appeal was dismissed, but no explanation has been provided for the delay. Moses LJ cited the delay as a factor that might weaken the public interest in deportation as long ago as 2012.

By 2014, the appellant succeeded in an appeal brought on human rights grounds. First-tier Tribunal clearly thought that the passage of time since the offence and the low risk of reoffending reduced the weight to be given to the public interest in deportation. By 2018, the inexplicable agreement to the withdrawal of the underlying immigration decision meant that the respondent was not obliged to give effect to the First-tier Tribunal decision. The respondent acknowledged the need to review the case, but then failed to take the passage of time into account in the subsequent decision. The weakening strength of the public interest in deportation over the course of such a long period of time dovetails into the next point;

(v) The appellant committed a serious offence in 2001. Around 15 years have passed since his release from prison. He has no further convictions of a similar nature. The offence did not form part of a pattern of criminal

behaviour. There is no evidence to suggest that the appellant holds pro-criminal attitudes. The fact that he has not been convicted of any further offences over such a long period of time demonstrates that he poses a low risk of reoffending. If this were an appeal brought under the EEA Regulations 2016, the fact that the appellant has not reoffended for many years, and there is no evidence to show that he poses a 'genuine and present' threat to one of the fundamental interests of society, would determine the appeal in his favour.

The focus is slightly different when considering the issue in the context of a human rights claim. I bear in mind that the Upper Tribunal in *RA (s.117C: "unduly harsh"; offence: seriousness) Iraq* [2019] UKUT 00123 observed that the fact that a person has not committed further offences is unlikely to have a material bearing on the assessment, but that is not the approach taken by the Strasbourg court, which takes into account the time that has elapsed since the offence and the person's conduct during that period: see *Boultif v Switzerland* (2001) 33 EHRR 50, *Üner v Netherlands* (2007) 45 EHRR 14 and *Maslov v Austria* [2008] ECHR 546.

The risk of reoffending is relevant to whether there continues to be a pressing social need to deport a person. If the appellant was convicted of further criminal offences it would reinforce and give even greater weight to the public interest in deportation. Conversely, the fact that the appellant does not pose a risk of reoffending must have some bearing on the assessment albeit it is unlikely to reduce the public interest in deportation in a determinative way in a case involving a serious offence. The Upper Tribunal in *RA (Iraq)* was right to observe that it is the norm to expect a person not to commit criminal offences. However, I find that the combination of the lengthy passage of time, the fact that there are no other convictions of a similar nature and there is a low risk of reoffending are matters that reduce the weight to be given to the public interest in this case.

65. I have considered the cumulative effect of the following factors relating to the appellant's circumstances.

(i) The appellant entered and remained in the UK on a lawful basis and has lived in the UK for a period of 22 years, which is a particularly long period of residence;

(ii) During this long period of residence, he established significant private life ties to the UK. The appellant entered as a child and has spent all his adult life in the UK. However, there is insufficient evidence before me to conclude that he meets the private life exception contained in section 117C(4) NIAA 2002. The case was not argued or evidenced on this basis;

(iii) During this long period of residence, he established a family life with his wife and children. The appellant's wife entered the relationship in the full

knowledge that the appellant was in prison and could face deportation. They started a family in the knowledge that his status was precarious. However, given the significant delays in the case it is hardly surprising that the appellant went on with his life and started a family.

In so far as I am required to consider whether the exception under section 117C(5) NIAA 2002 might apply, the evidence does not show that it would be unduly harsh to expect the appellant's wife and children to go to India with him or to remain in the UK without him. It would be harsh for the appellant's wife to abandon the business she has established but she could work elsewhere. She has familial and cultural connections to India. It is not in the best interests of the children to leave the UK, but they are young enough to adapt to life in India. Alternatively, it is not in the best interests of the children to be separated from their father. Nothing in the social work report outlines any compelling factors that would be sufficiently serious to reach the stringent threshold of the test of 'unduly harsh'. The report outlines the usual damaging effects of deportation on a family. Albeit the evidence does not show deportation would have an unduly harsh effect on the appellant's wife and children, the best interests of the British children are still a primary consideration and should be given appropriate weight;

(iv) The appellant's private and family life ties were sufficiently strong to amount to 'exceptional circumstances' outweighing the public interest in deportation when the First-tier Tribunal considered the case in 2014. The decision was appealed unsuccessfully. I give significant weight to the fact that a previous Tribunal found that removal would not strike a fair balance under Article 8. There has been no material change in circumstances relating to the public interest considerations since that decision. The appellant's private and family life has only got stronger and deeper in the intervening six years.

There is no material difference between the test of 'exceptional circumstances' and the amended wording of 'very compelling circumstances' now used in the statute. The wording was amended to reflect the way in which the Court of Appeal in *MF (Nigeria) v SSHD* [2014] 1 WLR 544 described the original 'exceptional circumstances' test [43];

(v) The long passage of time since the appellant committed the offence, and the absence of any further convictions, indicates that he poses a very low risk of reoffending;

(vi) The unusual history of the case, including significant delays in the process, reduces the weight to be given to the public interest in deportation. If there was a pressing social need to remove the appellant the deportation order should have been signed shortly after his appeal rights became exhausted in 2006 or action should at least have been taken to remove him after it was eventually signed in 2009;

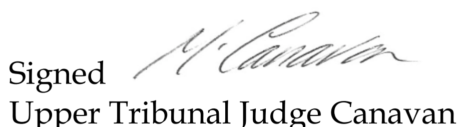
(vii) Although there is insufficient evidence to show that the appellant was granted ILR to recognise a right of permanent residence under EU law, it is difficult to see on what other basis it might have been granted given his immigration history. If this were an appeal brought on EU law grounds the evidence shows that the appellant does not present a genuine and present threat to one of the fundamental interests of society at any level. Because of the lack of clarity surrounding the exact legal status of the grant of ILR, I place little weight on this issue, but it cannot be ignored and forms part of the background to my assessment.

66. I remind myself that the provisions contained in the statutory scheme are intended to be compliant with a proper application of Article 8 of the European Convention. In assessing whether a fair balance has been struck between the undoubted weight that must be placed on the public interest in deportation and the individual circumstances of this case, I conclude that, while none of the factors are sufficient if taken alone, the cumulative effect of the appellant's circumstances are sufficiently compelling to amount to 'very compelling circumstances' that outweigh the public interest in deportation for the purpose of section 117C(6) NIAA 2002.

67. If I was deciding this appeal closer to date the appellant was released from prison my decision would be different, but the prolonged history of this case has over the years weakened the weight to be given to the public interest in deportation, and increased the weight to be given to the appellant's private and family life, to such an extent that removal in consequence of the decision would be unlawful under section 6 HRA 1998.

DECISION

The appeal is ALLOWED on human rights grounds

Signed  Date 12 March 2020
Upper Tribunal Judge Canavan

ANNEX 1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13091/2018

THE IMMIGRATION ACTS

Heard at Field House
On 25 June 2019

Decision Promulgated

……………………………………

Before

LORD BOYD OF DUNCANSBY
(Sitting as a Judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R M

Respondent

(ANONYMITY DIRECTION MADE)

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves child welfare issues. We find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

Representation:

For the appellant: Mr T. Lindsay, Senior Home Office Presenting Officer
For the respondent: Ms S. Iengar, instructed by W H Solicitors

© CROWN COPYRIGHT 2019

DECISION AND REASONS

1. For the sake of continuity, we shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The appellant (RM) is a citizen of India who entered the UK on 20 January 1998 as the family member (son) of an EEA national who was exercising rights of free movement in the UK. He was subsequently issued with a residence document recognising a right of residence under EU law until 02 July 2004.

3. On 05 February 2002 the appellant was convicted of attempted rape on a female under the age of 16 years and was later sentenced to six years' imprisonment with a four-year extended licence.

4. The Secretary of State served the appellant with a notice of intention to make a deportation order on 19 December 2005. The appellant appealed the decision. Immigration Judge Pullan dismissed the appeal in a decision promulgated on 27 March 2006. Judge Pullan noted that the deportation decision was made with reference to Council Directive (64/221 EEC) as well as the domestic provisions relating to deportation. On reconsideration, a panel of the Asylum and Immigration Tribunal found that there was no error of law in the Immigration Judge's decision. A deportation order was signed on 15 September 2009.

5. There is no evidence to show that any further action was taken to remove the appellant pursuant to the deportation order. In June 2011 the appellant was detained. On 28 June 2011 he made further representations to the respondent, which was treated as an application to revoke the deportation order. It seems that several decisions were made and then withdrawn during 2011 and judicial review proceedings brought in the first half of 2012 led to the last decision made by the respondent being withdrawn. A further decision to refuse to revoke the deportation order was made on 05 November 2012, which gave rise to a right of appeal.

6. The appeal was initially dismissed by a panel of the First-tier Tribunal (Judge Morris and Ms Singer) in a decision promulgated on 07 May 2013. The decision was set aside by the Upper Tribunal and remitted to the First-tier for a fresh hearing.

7. A panel of the First-tier Tribunal (Judge Pullig and Mrs Jordan) allowed the appeal in a decision promulgated on 12 June 2014. By this time the appellant had married and had a British child. The panel found that it was in the interests of the child to remain in the UK in the care of both parents. The panel found that the evidence showed that there was a low risk of reoffending. They took into account the length of time that had elapsed since the appellant committed the offence. They also considered the impact that deportation would have on the appellant's family as well as the delays which led that family life to become more entrenched. The panel

concluded that there were 'exceptional circumstances' to outweigh the public interest in deportation for the purpose of paragraph 398 of the immigration rules.

8. The Secretary of State sought to appeal the decision to the Upper Tribunal. In a decision promulgated on 03 October 2014 Upper Tribunal Judge Chalkley found that the decision did not involve the making of errors of law.

9. The Secretary of State applied for permission to appeal the Upper Tribunal decision to the Court of Appeal. It is unclear whether permission was granted, but as a result of a renewed application to the Court of Appeal the parties agreed a consent order. The statement of grounds which accompanied the order states that the Secretary of State agreed to withdraw the appeal. The decision to make a deportation order dated 20 December 2005, the deportation order dated 15 September 2009 and the decision to refuse to revoke the deportation order dated 05 November 2012 were also withdrawn. It is not clear why the appellant's representatives would have agreed to such an order having succeeded in the appeals before the Tribunals below. However, it seems that the Secretary of State recognised that the original decision was made "a long time ago and considers that it would be appropriate for her to reconsider the matter afresh". The effect of the consent order was that the situation was reset, paving the way for a fresh decision to be made by the Secretary of State.

10. The Secretary of State invited further submissions from the appellant relating to potential rights of residence under EU law. The Secretary of State made a further decision to make a deportation order under section 5(1) of the Immigration Act 1971 on 13 June 2018. We note that, despite the length of the sentence, this was not a decision to make an automatic deportation order under section 32(5) of the UK Borders Act 2007 ("the UKBA 2007") because the offence was committed prior to the UKBA 2007 coming into force.

11. The Secretary of State was not satisfied that the appellant produced sufficient evidence to show he had acquired a right of permanent residence for the purpose of EU law or that he had any other right to reside on that basis. He failed to produce evidence to show that he had been dependent upon his father for a continuous period of five years. There was no evidence to show that the appellant could claim current rights of residence under EU law. For these reasons the Secretary of State concluded that he was liable to deportation under UK law.

12. The decision letter included a decision to refuse a human rights claim, which is the decision that is the subject of this appeal. The Secretary of State noted that he was sentenced to a period of over four years' imprisonment. The appellant's family life with his wife and children did not disclose 'very compelling circumstances' to outweigh the significant public interest in deportation.

13. First-tier Tribunal Judge Wyman ("the judge") determined the appeal in a decision promulgated on 24 April 2019. She purported to allow the appeal "under the

Immigration Rules" and with reference to Article 8 of the European Convention on Human Rights. However, she dismissed the appeal in so far as it was brought on EU law grounds.

14. The judge outlined the history of the case and the details of the offence [3-22]. She set out the case put forward by both parties [23-36]. She went on to set out the relevant legal framework relating to Article 8 of the European Convention including the provisions of paragraphs 398-399A of the immigration rules and section 117C of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") [37-44] before summarising what happened at the hearing [45-68]. She then returned to summarise a list of case law including cases such as *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 and *KO (Nigeria) v SSHD* [2018] UKSC 53 [69-79]. She noted no submissions were made in relation to rights under EU law and concluded that there was insufficient evidence to show that the appellant's circumstances engaged EU law [81-84].

15. The judge accepted that the appellant had a family life in the UK for the purpose of Article 8(1) and noted that the respondent accepted that it would be 'unduly harsh' to expect his wife and children to live in the country to which he would be deported [86]. The judge correctly identified the fact that the appellant was sentenced to a period of more than four years' imprisonment thereby engaging the higher threshold [88][104]. She went on to consider the appellant's individual circumstances including the nature of his family life, his record while on licence, his work history, his length of residence in the UK, the passage of time and any relevant periods of Home Office delay that might have led the appellant's family life to become more entrenched in the UK [91-100]. She stated that the best interests of the children were of "serious importance" but were not a "trump card" [101] without making any clear finding as to where the best interests of the children lay. The judge went on to make the following findings.

> "105. I note that Judge Pullig, back in 2014, allowed the appellant's appeal in the light of his findings namely his family, the length of time since the offence was committed and the deportation order was made, the low risk of reoffending and the best interests of the children. He also accepted that due to the respondent's delay that it would not be reasonable for the appellant's wife (at that time) and one child to relocate.
>
> 106. Since this decision, there has been a further period of almost five years that the appellant has lived in the United Kingdom. His family life has become deeper and more entrenched over this time, with the birth of his second child, and his lengthier relationship with his wife and eldest child. To his credit, the appellant has not been involved in any further re-offending. He continues to live with his mother, who is now a widow and therefore depends more on her son. He also lives with his sister and her son. The index offence took place back in 2002 – almost 19 years ago. There has been a considerable delay by the respondent in taking enforcement action between 2006-2009. Had this happened, the appellant would not have had any family life at that time.
>
> 107. Taking all these factors into consideration, I find that there are "very compelling circumstances, over and above those described under Section 117C and this

> outweighs the respondent's position and the public interest in deporting the appellant. (sic)"

16. The Secretary of State's original grounds of appeal made general submissions but were not clearly particularised. At the hearing, Mr Lindsay distilled the Secretary of State's case into the following points.

    (i) The judge erred in failing to give sufficient weight to the public interest considering the serious nature of the offence.

    (ii) The judge erred in treating the previous First-tier Tribunal decision of Judge Pullig and Mrs Jordan as determinative of the appeal at the date of the hearing without having sufficient regard to what were said to be "legal changes" following the decision of the Supreme Court in *KO (Nigeria) v SSHD* [2018] UKSC 53. In particular, the judge failed to recognise the elevated threshold required to show that deportation would be 'unduly harsh' on the appellant's children when considering the overall test of 'very compelling circumstances' outlined in section 117C(6) NIAA 2002.

Decision and reasons

17. The judge erred in purporting to allow the appeal "under the Immigration Rules". There has been no right of appeal on the ground that the decision is not in accordance with the immigration rules since the coming into force of changes made to section 84 NIAA 2002 by the Immigration Act 2014 ("IA 2014") in April 2015, some four years before the First-tier Tribunal hearing. In so far as the immigration rules formed part of the assessment they related to the only available ground of appeal, which was whether the decision was unlawful under section 6 of the Human Rights Act 1998 ("HRA 1998"). However, we find that nothing turns on this loose drafting because the immigration rules the judge was referring to related to the Secretary of State's position as to where a fair balance should be struck for the purpose of Article 8 of the European Convention. For this reason, we find that the error does not make any material difference.

18. The judge directed herself to the relevant legal framework. She understood that the appellant fell within the more stringent threshold requiring 'very compelling circumstances' to outweigh the public interest in deportation contained in section 117C(6) NIAA 2002 and paragraph 398 of the immigration rules. However, that was the extent of her findings relating to the public interest considerations. Although we consider that it was open to the judge to take into account the factors relating to the appellant's individual circumstances, when the findings relating to Article 8 are read as a whole, we accept that there is some force in the Secretary of State's submission that insufficient consideration was given to the weight that should be placed on the public interest in deportation in a case involving a sentence of over four years' imprisonment. Insufficient reasons were given to explain how or why those individual factors might outweigh the significant weight that must be placed on the public interest in deportation in a case involving a lengthy sentence.

19. Mr Lindsay accepted that it was open to the judge to consider the findings made by the First-tier Tribunal in 2014. However, there was no analysis as to whether there were any differences, if any, between the test of 'exceptional circumstances' that was first introduced into the immigration rules at the end of 2012 (HC 760) applied by the First-tier Tribunal at that time and the current test of 'very compelling circumstances', which was introduced following the Court of Appeal decision in *MF (Nigeria)*. The judge summarised the more recent decision in *KO (Nigeria)*, but did not address the principles identified in that case when she came to make her findings. She noted that the respondent accepted that it would be 'unduly harsh' for the appellant's wife and children to go to the country where he would be deported, but made no clear findings as to whether it would be unduly harsh to expect them to remain in the UK without him in light of later authority from the Court of Appeal in *NA (Pakistan) v SSHD* [2016] EWCA Civ 662.

20. We conclude that the First-tier Tribunal decision involved the making of errors of law. That part of the decision relating to human rights grounds is set aside. The findings relating to the EU law aspect of the appeal shall stand. The usual course of action is for the decision to be remade in the Upper Tribunal. The appeal will be relisted for a resumed hearing.

DIRECTIONS

21. The parties are given permission adduce up to date evidence, including any updated witness statements, which must be served at least **14 days before the next hearing**.

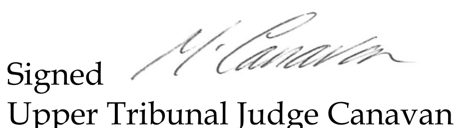
22. The factual background to the case does not appear to be in dispute. It is unlikely that the appellant will need to call further evidence, but permission is granted to do so if there are new circumstances that were not considered by the First-tier Tribunal that would necessitate oral evidence. The appellant shall notify the Tribunal **within 14 days of the date this decision is sent** whether he intends to call further evidence. Otherwise, the hearing will proceed by submissions only.

23. If the appellant intends to call further oral evidence, he shall notify the Upper Tribunal **within 14 days of the date this decision is sent** whether an interpreter is required, and if so, the relevant language.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is set aside and will be remade at a resumed hearing

Signed  Date 07 October 2019
Upper Tribunal Judge Canavan

ANNEX 2

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13091/2018

THE IMMIGRATION ACTS

R M

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND DIRECTIONS

Further to the written submissions made by both parties relating to the scope of the appeal, the Upper Tribunal makes the following directions.

1. The remaking is confined to an appeal brought under section 82 of the Nationality, Immigration and Asylum Act 2002. The only ground of appeal is whether the decision to refuse a human rights claim dated 13 June 2018 in the context of deportation proceedings was unlawful under section 6 of the Human Rights Act 1998.

2. It is questionable whether the decision dated 13 June 2018 made an 'EEA decision' that was appealable under regulation 36 of The Immigration (European Economic Area) Regulations 2016. In any event, the appellant's grounds of appeal to the First-tier Tribunal appeared to be confined to human rights arguments under Article 8, no submissions were made in relation to EU law at the First-tier Tribunal hearing, nor did the appellant apply to appeal the First-tier Tribunal findings relating to EU law.

3. Any general issues relating to rights of residence under EU law that have been considered by the Secretary of State, such as acquisition of a permanent right of residence, will only be considered as part of the overall balancing exercise under Article 8.

4. The assertion that the appellant is likely to be a Portuguese citizen by descent appears to be a significant 'new matter' that has not been considered by the Secretary of State. The parties should be ready to argue whether it should be considered at the resumed hearing with reference to section 85(5) NIAA 2002.

Signed: Date: 04 February 2020

Upper Tribunal Judge Canavan

© CROWN COPYRIGHT 2020