Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/01745/2014

THE IMMIGRATION ACTS

Heard at: Manchester
On: 2nd June 2016

Decision & Reasons Promulgated
On: 5th July 2016

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

MR
(anonymity direction made)

Respondent

For the Appellant: **Mr Harrison, Senior Home Office Presenting Officer**
For the Respondent: **Mr Nicholson, Counsel instructed by Duncan Lewis & Co Sols**

DETERMINATION AND REASONS

1. The Respondent is a national of Pakistan born in 1982. He is a foreign criminal who has had a deportation order signed against him. As such he does not personally merit an order for anonymity. His case does however turn on his relationship with his British children. The identification of the Respondent

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could lead to the identification of his children and for that reason alone I make an order for anonymity in the following terms:

> "Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Respondent (original appellant) in this determination identified as MR. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

2. On the 23rd February 2016 the First-tier Tribunal (Judge Chambers) allowed the Respondent's appeal against a decision to refuse to revoke the deportation order against him. The Secretary of State now appeals against that decision.

Background and Matters in Issue

3. MR came to the United Kingdom in 2002 in possession of a valid student visa. He thereafter varied his leave so as to extend it on several occasions. His last grant of leave expired in 2010 and in 2011 the Secretary of State refused to grant any further leave. MR became an overstayer in October 2011. At that point he had accrued no fewer than seven convictions: for use of a false instrument, not having a driving test certificate, resisting a constable, driving whilst under the influence of alcohol and on three separate occasions, driving without insurance. MR has admitted that during the currency of his student leave he worked in excess of the hours permitted to him and that he did not manage to complete the courses that he had been given leave to study. On the 30 July 2012 MR was convicted at Manchester Crown Court of fraud by abuse of position and was sentenced to 15 months in prison. It was this final conviction which led the Secretary of State to sign a deportation order against him, on the 16th January 2013[1].

4. MR appealed against that decision to the First-tier Tribunal. In a determination promulgated on the 4th March 2013 a panel comprising Judge Nicholson and lay member Mr M. James dismissed his appeal. The Tribunal accepted that MR was having a relationship with British woman and that Article 8 was engaged; the panel was not however satisfied that the relationship was anything other than tenuous. The decision to deport was found not to be disproportionate and the appeal was dismissed with reference to the Immigration Rules on deportation. An attempt to appeal that decision failed.

[1] A deportation order had in fact been signed on the 11th September 2012 but was later withdrawn due to procedural irregularities

5. On the 11th November 2013 MR was detained. He applied for a revocation of the deportation order on the grounds that his situation had changed. He had married his British partner and they had now had a British child. That application was rejected and MR appealed. The appeal was dismissed by the First-tier Tribunal (Judge Lloyd-Smith) on the ground that MR could be accompanied back to Pakistan by his wife and child. That decision was set aside by Upper Tribunal Judge C. Lane on the 4th August 2015. The First-tier Tribunal was found to have erred in law by going behind the concession made by the Secretary of State that it would be unduly harsh for the appellant's British family to have to go and live in Pakistan with him. The matter was remitted to the First-tier Tribunal.

6. So it was that the appeal came before Judge Chambers on the 23rd February 2016. By the time that the appeal was listed MR could rely on his relationship with his British wife and two children. His case was that it would be unduly harsh for his wife and children to be left in the UK without him. His wife was suffering from various mental health problems and could not care for the couple's two children, and her own elderly parents, without the support of MR. The determination begins by setting out the case for the Secretary of State, and having taken those matters into account the Tribunal made the following findings:

   - That MR had committed a series of criminal offences and the Secretary of State had been right as a matter of law to sign a deportation order against him [paras 15-17]

   - The First-tier Tribunal (Judge Nicholson and Mr James) had given valid reasons for dismissing his appeal against the decision to deport [18]

   - The appeal depended on whether there had been a change in circumstances since that time [18]. These changes were identified as his marriage and the birth of his two children [19]

   - When MR was in prison his wife experienced extreme stress. She was suffering from tension headaches, heart palpitations and depression. Her GP opined that she would suffer a deterioration in her mental health should her husband be removed. There is no doubt that he helps her to cope [22]

   - She had been referred to a cardiologist as a child because of her heart palpitations. The Tribunal accepted that the stress of the present proceedings and MR's behaviour had exacerbated her heart palpitations. She had been prescribed anti-depressants [24]

- If MR is removed his wife will have difficulty in coping without him. When he was in detention she could not manage. That will in turn impact on the children. MR's removal "will impact adversely on them all" [24]

- The situation had "fundamentally changed" since the appeal was dismissed by Judge Nicholson and Mr James in 2013 [26]

7. Having made those findings the Tribunal further noted that MR had not re-offended and that this added weight to the assessment made by the Tribunal in 2013 that he presented a low risk of reoffending. Unusually the day to day circumstances of this family had not been affected by the deportation order because MR had not been removed. These composite findings amounted to a change in circumstances capable of justifying revocation. From here the determination proceeds to apply these facts as found to the Article 8 *Razgar* framework.

8. In its assessment of proportionality the Tribunal reminded itself of MR's conviction and the public interest in his removal. His appeal had been dismissed by the First-tier Tribunal. Due consideration and appropriate weight had to be given to those factors, however:

> "as in all these cases, in the absence of removal, life tends to go on. Circumstances change and the rules recognise this. Little in life is unchangeable" [at 35]

9. The Tribunal found that events of the past indicate what may happen were MR to be removed. "Very serious fears arise" as to whether his wife would be able to cope, given the impact that his imprisonment had on her mental health and physical well being. Although his criminality and resulting incarceration were clearly not matters that established him as a good role model for his children, there is no suggestion that MR is anything other than a good father when he is present. Because of the particular problems of the children's mother this is a family who require the full-time support of two parents rather than just one. On this basis, and making it clear that the decision was entirely swayed by the potential impact on MR's wife and children, the First-tier Tribunal allowed his appeal.

Grounds of Appeal and Response

10. Although the grounds are detailed Mr Harrison confirmed that the Secretary of State in essence submits that the First-tier Tribunal has erred in approach in two related material respects:

i) Failing to consider paragraphs 398-399A of the Immigration Rules and the relevant parts of s117 of the Nationality, Immigration and Asylum Act 2002;

ii) Failing to identify what circumstances would render MR's deportation "unduly harsh" upon his children, and specifically failing to weigh in the balance MR's criminality: KMO (s117 unduly harsh) [2015] UKUT 543 (IAC)

11. Although Mr Harrison did not abandon the remaining grounds he made no further submissions other than to rely upon them.

12. Mr Nicholson submitted that the grounds were misconceived. The determination contained clear findings as to the impact on the children and it was a matter of semantics whether the words "unduly harsh" found their way into the reasoning. The Tribunal had expressly considered the public interest but had found the adverse impact on the children to outweigh it on the particular facts of his case. That was the KMO-compliant *ratio* of the determination. As for the legal framework Mr Nicholson pointed out that the test was that contained not in paragraphs 398-399A, but in paragraph 391. This was a revocation and as such the Tribunal had been correct to look to whether there had been a change in circumstance.

My Findings

Preliminary Discussion

13. At the hearing there was some debate about the legal framework relating to revocation. The relevant provisions are found in Part 13 of the Immigration Rules, which is concerned with deportation. The entire section is prefaced by paragraph A362:

> A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.

14. This provision is concerned not only with ensuring that the Rules are applied retrospectively, but to emphasising that Part 13 is a 'complete code' as far as deportation and Article 8 is concerned: MF (Nigeria) [2013] EWCA Civ 1192.

15. The specific provisions on revocation are found between paragraph 390 and 392:

> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

(i) the grounds on which the order was made;
(ii) any representations made in support of revocation;
(iii) the interests of the community, including the maintenance of an effective immigration control;
(iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

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

> (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or
>
> (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,

Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

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

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

16. The first question raised by this appeal was which rule or rules should apply to MR, a person subject to a Deportation Order but never actually deported. Mr Nicholson submitted that paragraph 391 was not applicable because it opens with the words: "In the case of a person who has been deported…". He submitted that the operative provision must be 391A because this begins with the catch-all: "In other cases…". I am not persuaded that this is so. That is because the terms of paragraph 391A make it clear that it is *also* directed at persons who have physically left the UK:

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> the appellate authorities or the Secretary of State. The passage of time *since the person was deported* may also in itself amount to such a change of circumstances as to warrant revocation of the order.

17. Mr Harrison pointed out that there is no provision in Part 13 concerned with deportees who have not actually left the UK. In those circumstances the paragraphs on revocation must be read to include persons such as MR, overlooking the fact that he has not actually been removed. He submitted that the Rules should be read as a composite whole. I agree. Paragraph 391A must be read in line with paragraph 391.

18. This then raises the second, more troublesome question. Do the provisions on revocation invite the decision maker to first consider whether the applicant could succeed with reference to paragraphs 398-399A, or do they invite a more wide ranging Article 8 enquiry? The plain import of paragraph A362 is that the Rules are to be read in light of the 'new Rules' on deportation. Paragraph 390A is even more explicit in connecting revocation to positive decisions to deport:

> 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.

19. Read as a whole the section requires the decision maker to consider whether the applicant for revocation can bring himself within any of the exceptions in 399 or 399A, and if not it will only be in exceptional circumstances that revocation would be authorised. This reading is consistent with Part 13 as a whole and it being read as a *MF* complete code. This analysis forms the basis of the Secretary of State's appeal. It is the Secretary of State's case that the determination must be set aside because the Tribunal has failed to expressly direct itself to paragraphs 398-399A of the Rules and the "unduly harsh" test therein.

20. In response Mr Nicholson contended that the language within the revocation provisions suggests an alternative reading. If an applicant for revocation must bring himself within the 'new' deportation framework (ie paragraphs 398-399A) why do the Rules make direct reference to the ECHR and to factors such as the "passage of time"? He submitted that the direct reference to the Convention invited a wider analysis.

21. There is no debate that the revocation provisions at paragraph 390-392 contain some peculiar and potentially ambiguous wording. The references at 390 to "compassionate circumstances", 391 to the ECHR and at 391A to the "passage of time" do suggest an invitation to decision-makers to stray from the strict framework set down in the remainder of Part 13. I am however satisfied that the proper approach would be to read the Rules as a composite whole. That is

the express intention behind paragraph A362 and 390A. The references to matters such as the "passage of time" must be read as relevant factors in the context of the Rules being a 'complete code'. For instance, at paragraph 390 decision-makers are directed to consider matters such as "compassionate circumstances" and "representations made in support of revocation", but these are factors only considered alongside "the grounds *on which the order was made*". Since the grounds on which the order was made directly invoke paragraphs 398-399A, this must be read as consistent with paragraphs A362 and 390A: a clear instruction to consider revocation applications within the Part 13 framework as a whole.

22. Although the parties did not address me on it, this analysis is consistent with the view taken by the Court of Appeal in SSHD v ZP (India) [2015] EWCA Civ 1197. That case concerned an applicant who had been deported and was applying for revocation from outside of the UK. The Court was asked to determine whether there was any difference in approach to those who apply for revocation in country, and those who have already been deported. In its consideration of the revocation provisions the Court held [at 21] that the provisions of paragraph 390 are "at a very general level and for our purposes are in practice superceded by the more specific provisions which follow". The following analysis is then made of the remaining provisions:

> 22. *Paragraph 390A*. **In broad terms the effect of this paragraph is evidently to apply the "deportation and article 8" regime of paragraphs 398-399A** – which is in practice concerned with foreign criminals – not only to the initial decision whether to make a deportation order **but also to a decision whether to revoke such an order once made**. But Mr Biggs submitted that that was only so in a case where the applicant for revocation had not yet been deported. He said that that followed from the initial words of the paragraph – "where paragraph 398 applies" – since paragraph 398 by its own terms only applies "where a person claims that their deportation *would be* contrary to [article 8]", and that language is inapt to a case where they have already been deported; the same is true of the following provisions, which are concerned with whether "deportation" – which would not naturally include the continued exclusion of a deportee – is conducive to the public good. That of course parallels his submissions in relation to section 33 of the 2007 Act, and again it seems to me clearly correct. It is not only the natural reading of the words used, but it makes sense of the existence at paragraph 391 of a separate provision covering "the case of a person who *has been* deported". **In my view the rule-maker has deliberately provided separately for the two separate situations, with paragraph 390A applying to pre-deportation revocation applications and paragraph 391 to post-deportation applications**. (In its post-hearing submissions the Government Legal Department sought to rely on paragraph A398 of the Rules, which was introduced (by Statement of Changes HC 532) with effect from 28 July 2014, to support the contrary conclusion. But, as Mr Biggs submitted, a paragraph which was not in force at the date of the UT's decision can have no bearing on the analysis. I need not in those circumstances set out the terms of paragraph A398, though I should record that at first sight it would not appear to support the Department's submission even if it had been in force.)

23. *Paragraph 391*. It is accordingly paragraph 391, and not paragraph 390A, which applies in the present case. That paragraph states the Secretary of State's policy as to the proper length of time for which a deportation order should "continue" – i.e. in practice the length of time before an application for leave to enter will be entertained. I will refer to this as "the prescribed period". In the present case the prescribed period is ten years from the date of the making of the order, since the Respondent was sentenced to less than four years' imprisonment. However, that policy is expressly stated not to apply in two distinct circumstances – *either* where continuation would be contrary to the ECHR or the Refugee Convention ("the Conventions exception") *or* where "there are other exceptional circumstances that mean the continuation is outweighed by compelling factors" ("the sweep-up exception").

24. It does not, however, in my view follow that paragraph 391 requires a fundamental difference in approach in considering post-deportation revocation applications from that which is followed in considering pre-deportation applications under paragraphs 390A/398-399A. It is true that the structure of paragraphs 398 (at the relevant time) and 391 is different. In the case of the former the Secretary of State has set out herself to formulate the approach required by article 8, whereas in the case of the latter she has stated her policy but acknowledged that it should not apply where that would lead to a breach of the ECHR (in practice, article 8). It is also true that there are some minor differences of wording. **But the difference in drafting structure does not require a different approach as a matter of substance, since we know from *MF* that the exercise required by paragraph 398 is the same as that required by article 8.** Likewise, while the use in the sweep-up exception of the phrase "*other* exceptional circumstances [involving] compelling factors" no doubt implies that it is only in such circumstances that the Secretary of State's general policy will be displaced by article 8, that too is consistent with the approach in *MF*. **As for the differences in wording, they may be vexing to the purist but they are plainly not intended to reflect any difference of substance.** The exercise required in a case falling under paragraph 391 is thus broadly the same as that required in a case falling under paragraph 390A or paragraph 398. **Decision-takers will have to conduct an assessment of the proportionality of maintaining the order in place for the prescribed period, balancing the public interest in continuing it against the interference with the applicant's private and family life; but in striking that balance they should take as a starting-point the Secretary of State's assessment of the public interest reflected in the prescribed periods and should only order revocation after a lesser period if there are compelling reasons to do so**.

25. Mr Biggs argued that a fundamental difference between the decision whether to make a deportation order in the first place and the decision whether to revoke a subsisting order short of the prescribed period – and, particularly where, as here, the applicant has been deported – is that in the latter case the public interest in maintaining the order will generally diminish with the passage of time and that that must be borne in mind in striking the proportionality balance. I would accept that up to a point. Where there are compelling factors in favour of revocation the applicant's case is – other things being equal – bound to be stronger if they have already been excluded for a long period. But I would not accept that the passage of time can by itself be relied on as constituting a compelling reason for early revocation. It is inherent in the making of a deportation order that there must be a period before the deportee becomes eligible for re-admission: otherwise it would be a mere revolving-door. Mr Biggs did not contend that the ten-year prescribed period applicable to foreign criminals sentenced to between one and four years'

> imprisonment was itself irrational or that it inherently involved any breach of article 8. That being so, the default position must be that deportees should "serve" the entirety of the prescribed period in the absence of specific compelling reasons to the contrary.

[emphasis added]

Findings on Error of Law

23. The composite question raised by the Secretary of State's appeal is then whether the First-tier Tribunal in this case took the approach outlined above, and if not, whether such an error in legal direction was material, having particular regard to the question of whether MR's removal would have an "unduly harsh" impact upon his children. MR was sentenced to 15 months in prison and as such fell within sub-paragraph 398(b) of the Rules. One of the matters relevant to consideration of his application for revocation was therefore whether he could bring himself within one of the exceptions set out at paragraphs 399 and/or 399A.

24. It is correct to say that this determination does not contain a methodical analysis of MR's Article 8 claim viewed through the prism of Part 13 of the Rules. Under the heading "Findings" the Tribunal makes a series of clear and well-reasoned findings as to the offending behaviour and circumstances of MR, his wife and children, but it does not do so explicitly following that framework. I am not however persuaded that this structure amounts to a legal defect such that the determination must be set aside. It is clear from the determination read as a whole that the Tribunal has the 'complete code' as it relates to deportation in mind. Paragraphs 2-9 contain a detailed summary of the Secretary of State's case, wherein the Tribunal specifically notes the references to paragraphs 399 and 399A in the refusal letter. Paragraph 10 records the case for MR that he intends to show that his removal would be "unduly harsh" for his children: "reliance is placed on 399(a) and section 55 of the 2009 Act". These are the legal directions in the determination. In the context of its findings the determination makes reference again to 399 and 399A [at 25]. Whilst there is also express reference to 'classic' Article 8 principles it cannot sensibly be suggested that the Tribunal was not alert to the proper legal framework.

25. As to whether the Tribunal addressed the key question of whether it would be unduly harsh for these children to grow up without their father, it is again correct to say that the term is not expressly used in the findings (albeit it that it is set out earlier in the determination). I am not however satisfied that this was material, since it is apparent from the findings overall that the Tribunal understood this question to be at the heart of its enquiry. The Tribunal accepted the medical and other evidence that MR's wife was suffering from heart palpitations and mental health problems such that her ability to look after

the children alone was seriously compromised. She was unable to cope without her husband when he was in prison: "his removal will impact adversely on them all" [at 24]. Whilst the separation of a child from his father might ordinarily be described as "harsh" for this family, in its particular circumstances, it was unduly so. The criticism that the Tribunal failed to weigh in the criminality of MR cannot be made out. The determination makes repeated reference to his behaviour, the conviction and sentence and to the public interest in his deportation [eg paras 1, 5, 6, 7, 15, 16, 17, 27, 35, 37, 39].

26. I am satisfied that the First-tier Tribunal understood the tests to be applied and that the determination read as a whole is sufficiently well reasoned that the parties are able to understand the ratio of the decision. That was that in the particular circumstances of this case, the deportation of MR would have unduly harsh consequences for his children. His deportation was in the public interest but his wife's illness was such that she would be unable to cope without him and this would have adverse consequences for his children such that his removal would be contrary to their best interests.

Decisions

27. The decision of the First-tier Tribunal does not contain an error such that it should be set aside. The decision is upheld.

28. An anonymity order is made.

Upper Tribunal Judge Bruce
27th June 2016