Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09122/2017

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 1 April 2019	**On 6 June 2019**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Azmi, Counsel
For the Respondent: Mr D Mills, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me after a hearing on 18 January 2018 following which I decided that the decision of the First-tier Tribunal ("FtT") was to be set aside for error of law and for the decision to be re-made in the Upper Tribunal. The appellant had appealed to the FtT against a decision to refuse his human rights claim within the context of a decision by the respondent to make a deportation order against him. The decision I made following the hearing on 18 January 2018 entitled "Decision and Directions" (the error of law decision) is attached as an annex to this

decision and reference should be made to it for the full context of this, the re-making of the decision. For immediate context however, I set out some of the paragraphs of that decision as follows:

> "14. By way of background, it is to be noted that the appellant has a number of convictions. These are for driving offences, offences of violence, and sexual assault in relation to one of his daughters. The offences occurred between 2004 and 2015. In respect of the most recent offence, that relates to a conviction in the Magistrates' Court on 21 July 2015 whereby he was convicted of four counts of battery and sexual assault and commission of a further offence during the operational period of a suspended sentence order. The suspended sentence was imposed on 23 September 2013 in the Magistrates' Court for an offence of battery. The court on 21 July 2015 imposed a restraining order prohibiting him from contacting his wife and three children or going to their address, with the order lasting until 20 July 2017.
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> 15. Mr Bramble clarified that the decision to make a deportation order on the basis that his deportation was conducive to the public good was explained in the decision letter as being on the basis that he was a persistent offender (per para 398(c) of the Rules).
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> 16. The FtJ heard evidence from the appellant, his wife MD, and his daughters HS and JD. He noted that the appellant and his wife have five children, the eldest who is 26 years of age and the youngest being 18 years of age. The eldest, SD, has severe autism and he lives in the family home where his mother cares for him. The evidence before the FtJ was that as SD had matured physically it had become necessary for a male "to administer to his more personal needs", which it is said is a role that had fallen to the appellant. Other children assist however.
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> 17. He referred to the appellant, and the family as a whole, being reliant exclusively on state benefits. The appellant is in receipt of employment support allowance, having suffered a heart attack in 2000. At the time of the hearing before the FtJ, the youngest child was at school in the sixth form, two of the children were at university and the eldest works part-time as a support worker. The appellant is in receipt of medication to suppress his alcoholism and manage his blood pressure.
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> 18. There was evidence to the effect that since the expiry of the restraining order in July 2017 the appellant had visited the family home daily to assist in relation to SD.
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> 19. At [23] the FtJ concluded that the appellant and his wife do have a commitment towards one other and he accepted that the appellant was unable to work following his heart attack. He found that being unable to provide for his family he took to alcohol and thereafter began to amass "his unenviable list of previous convictions". At [24] he recorded the evidence that the children are still committed to their father and he noted in particular the evidence of HS.
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> 20. He found that it would be unduly harsh for the appellant's wife to remain in the UK without the appellant, having referred to the provisions of para 399(b) and para EX.2 of Appendix FM.

21. Nevertheless, at [27] he concluded that the appellant had been an intermittent figure in the life of his wife and children since he was imprisoned for the first time in May 2008. He accepted that his offending was related entirely to his alcoholism but that he had failed to address that issue for 15 years until the sexual assault on his daughter. It was the nature and gravity of that offence, he found, that had caused him to seek the help that he now receives.

22. However, at [28] he said that the evidence he had heard left him in no doubt that the reality of the family has been that they have struggled on in spite of the appellant, rather than with him. His wife takes the lion's share of caring for their son and has done so exclusively while her husband has been in prison. He found that such assistance as he affords her has in the past been limited due to his alcoholism that was unmanaged at that time. Although he had sought to address those issues, the FtJ found that that was at a time after his children had attained their majority. He concluded that given the limited help the appellant had offered his wife since 2000, he was not satisfied that it would be unduly harsh for her to remain in the UK without him. Thus, he did not meet the requirements of para 399(b)."

2. At the resumed hearing, oral evidence was given by the appellant, his wife and their three children. The following is a summary of their evidence.

The Oral Evidence

3. The appellant adopted his witness statements in examination-in-chief. In cross-examination he said that he lived at home with his wife and children, having moved in with them on 7 December 2017. His three daughters and son also live there.

4. His wife does not work and receives state benefits for looking after their son. Their daughter H is the eldest and works. Their daughter J is married.

5. Their son's condition is still the same. He gets angry a lot but when they take him out he is happy. He is unable to be left on his own as he does not understand where he is. He agreed that one of the reasons that he was saying that he should not be deported was that his wife is unable to cope on her own because he needs to help care for their son. As to whether other family members would be able to step in and help, they would not because they are doing their own things. His married daughter and son-in-law do not visit regularly. Although his daughters live at home they go to university and the other one works. Either he or his wife takes their son out and looks after him. J lives near Tipton which is quite far from them.

6. He and his wife do have other family members but none of them come to visit and none are willing to help. He had asked them and they said that they could not. All five of his sisters have their own lives and they do not visit each other. One brother has kidney problems and they have to go and see him in hospital. The older one had a heart attack and passed away. There is another brother who lived in India but he also passed away.

7. He has no family in India. It is true that their daughter R is engaged and went to India. She stayed with some relatives there. His wife's family home is there. His wife has a brother and sister-in-law. Her parents are here in the UK. The house in India is where his wife's brother lives. They had asked if he would be able to stay with them if he was deported but they said that there was no room for him. He thinks they have two daughters and two sons. To the suggestion that the house would be large enough to accommodate him, given that his wife and daughter went there last July, he knows that they could not have him there. Nobody would be willing to help in any event.

8. He has cut down on his drinking drastically and at the weekends he only has just two cans of light beer.

9. In relation to Reach Out Recovery, he had attended the course twice. The classes were at the library. He completed the course. Although the course consisted of an initial assessment and six sessions, they told him that his drinking was quite normal and that there were other people attending the course whose drinking was much worse than his. They did not provide a report or letter in that respect.

10. Referred to the letter stating that the initial assessment was to the effect that he drank about 15 units a week, it has been about three or four months now that he has cut down from that amount to two cans of weak beer at weekends and nothing else. It was true that until two or three months ago he was still drinking quite a lot more.

11. In re-examination he said that in relation to his wife's family he only sees her mother and father who live in the UK. They are like his own parents.

12. MD, the appellant's wife, adopted her witness statements in examination-in-chief. In cross-examination she said that the appellant only drinks one can of light beer at the weekend. The alcohol clinic was at the library. He went there twice. The reason he only went for two visits was that they said that there are people who are a lot worse than he is and that he was not an alcoholic. That was all they said.

13. Since August of last year he had only been having one can of light beer at the weekend. As to the appellant having said that he has about two cans and that it was up until about three months ago that he was drinking quite a lot more, she said that he was not drinking that much except maybe at a wedding or some other occasion. He had been drinking an average of about one can at the weekend for the past several months.

14. She is the main carer for their son. As she had said in her witness statement, she needs her husband's help to cope with him. As to how she coped for the quite long period when the appellant was not living at home, her daughters helped her. If her husband was deported they would not be able to help because they are independent now and will be working. She would be the only one to look after him.

15. Her husband does not have any family in India. She has a brother who lives there. Her husband could not live with her brother. They had been asked and had refused.

She had asked them when they were talking about deporting him. In their culture a son-in-law would not have her husband living with them and they had refused once. The appellant was their son-in-law and brother-in-law. It is her father's house that they live in.

16. In re-examination she said that the reason that they could not have him stay with them in India was because they are just about managing themselves.

17. She provides the money for the alcohol that her husband consumes. She knows that he only has one can because he consumes it in front of her. She does not give him more than £3 or £4 at the weekend. She does not drink alcohol herself.

18. H adopted her witness statements in examination-in-chief. In relation to the Reach Out Recovery letter dated 23 August 2018 (the assessment and course), they went there for triage. They did an assessment in terms of what help he needs. They were told that local communities could help with his situation. They gave them a contact at the library. They said that he was not an alcoholic and that there was a long waiting list. They did not find that social or weekend drinking was serious and they therefore did not attend the workshops any further.

19. In cross-examination she said that she had graduated from university and had moved back to her parents' address. She gave details of her employment.

20. Her brother has quite a lot of care needs. Right now she is not able to help with those because of the hours that she works, sometimes going out at 3 a.m. and then sleeping in the day. She normally works between 3 a.m. and 11.30 a.m. However, she does shift work so her hours change.

21. She was able to help in the past when her father was not around. She used to come around at weekends from Coventry, although it was mostly just meeting them and going out shopping with them. She is quite close to her brother.

22. As to whether she would be able to help with her brother if her father was deported, what she wants to do is focus on her career and make her hours full-time. Helping with her brother would block a lot of options for her.

23. In answer to my questions she said that her brother does not have a normal chronological mental age. Her niece is 8 and he bonds more with her. He does not speak at all, only simple words like "ma". He can say easy names. As to what he does all day, he watches YouTube and listens to music. He spends time with his nieces and nephews or goes for a walk with someone. They have tried to get him some basic training in terms of, for example, washing but they say that because he cannot speak that is not possible.

24. When he watches YouTube, they put it on for him and he will click on a letter or scroll down. He recognises the pictures and sometimes he understands if they say something to him. She thinks he understands Makaton sign language which was used at his school. They are trying to learn it.

25. He cannot bathe himself and needs support to do so. He would not, for example, brush his teeth properly and if he was washing he would just drop water on himself and come out of the bathroom. He can toilet himself. At the moment her father helps him shower or bath as it is better if he does it.

26. R adopted her witness statements in examination-in-chief. In cross-examination she said that she was engaged last July and went to India with her mother, her brother and her other sister P. She is not yet married. They stayed at her uncle's house, her mother's brother.

27. She had been there about four or five times. Her uncle has three children at home and one who is married lives away. They only have three rooms in total in the whole house. They all slept together in one big room when she was there. Her uncle is not on good terms with her father. They have not communicated much for quite a few years; since they were little.

28. She does not think that even though her father has changed and is not drinking like he was before, her uncle would see him differently. The situation between them has been long standing and her father does not really have contact with her mother's side of the family. It is a two-way thing.

29. She is planning to get married in 2020 in India, probably in February. She intends her husband to come to the UK. He is Indian.

30. She is going to be at home next year. As to whether she would be able to help with her brother's care, in relation to bathing he needs a male and the only one who can do that is her father. She could not help in that respect. Whilst her father was away for a long period her mother took care of him. However, he has now become attached to their father. In addition, because of his age it is better if his physical needs are met by a male.

31. In answer to my questions she said that she is studying biomedical sciences at university.

32. P adopted her witness statements in examination-in-chief. In cross-examination she said that she is studying international business management at university and is in year 1. She lives at home.

33. Now she does not do much in terms of caring for her brother because her parents do it. Before she just used to go with them when they went out. She had never previously had a bigger role because it was mainly her mother and older sisters who are involved. If her father was deported she could try and help but she has her course and also needs to go on an international placement in the third year. That is not sorted out yet.

Submissions

34. In his submissions Mr Mills conceded that none of the offences for which the appellant was convicted resulted in a sentence of over 12 months' imprisonment. However, the appellant was a persistent offender and there was no dispute on his behalf but that he was therefore a 'foreign criminal'.

35. So far as s. 117C(4) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") is concerned, that was a matter that was open to be argued on behalf of the appellant in terms of the length of time he has been here.

36. As regards the issue of undue harshness, there is not much dispute about the facts. The appellant has a son who has autism and a learning disability and needs physical assistance. The appellant provides a significant amount of care, including intimate care in particular. It was not disputed on behalf of the respondent that he has taken on a greater role than before in terms of care for their son. His wife is the primary carer and receives benefits for him. She has been present throughout his life. Nevertheless, it was accepted that to remove the appellant would have a significant impact on his wife.

37. However, in a way the appellant's wife has proved herself to be very capable and the children have done very well. Because of their strengths they would be able to cope in future without the appellant. It was true that his daughters are now in higher education or working and one is married. Nevertheless, he has three adult daughters at home who can assist with the support of his son in his absence. It was relevant that he was able to toilet himself and there is no suggestion that he is not able to move around by himself. Although therefore it would be preferable to have the appellant there, his absence would not be unduly harsh on his wife. As was established in *KO (Nigeria) v Secretary of State for the Home Department* [2019] UKSC 53, the threshold for undue harshness is high. It was submitted that the meaning of unduly harsh is the same for a spouse or a child and that it must be more than the normal trauma of separation.

38. As regards s. 117C(4), it was accepted that the appellant had been lawfully resident for most of his life. It was also accepted under s. 117C(4)(b) that the appellant is socially and culturally integrated in the UK. Although he used the interpreter during the course of the hearing, he does speak English and he has five children who have grown up in the UK and been to university and so forth.

39. As regards the issue of very significant obstacles to integration in India (s. 117C(4)(c)), Mr Mills referred to the decision in *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813, submitting that the appellant would be enough of an insider in society in India, for example in terms of language and culture. It would be hard to argue that he could not integrate. Even if one took his case at its highest in terms of there being no-one there to support him, he speaks the language, and he arrived in the UK as an adult. He has cultural ties there.

40. So far as his health is concerned, he does have heart disease and receives medication for it. However, that medication would be available in India which has relatively good health care. The fact that there would be no-one there to support him is not sufficient. In actual fact, he probably does have greater support than has been suggested. It may not culturally be the done thing for his wife's brother to support him or for him to move in with them but those considerations do not mean that that would not be possible. If the appellant returned to India they would not leave him homeless and on the street. It is likely that family would rally round. In those circumstances, the requirements of s. 117C(4) are not met.

41. Following *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, the appellant was entitled to argue that there were very compelling circumstances over and above Exceptions 1 and 2, that consideration being required to be read into s. 117C(4). In those circumstances everything would have to be taken into account including the impact on the children who are committed to the appellant and who clearly do not want him to be deported. The largest impact would be on his son who has a childlike understanding of the world and in terms of what it would be like for him without the appellant there.

42. It is true that his son would not grow up to understand his absence as a child would ordinarily grow up. The impact on their son is part of the cumulative impact.

43. Nevertheless, the appellant is a persistent offender and there is a clear public interest in the deportation of such offenders. Rehabilitation was relevant but not determinative. Since his release from prison he has not got into any trouble. However, there was a slight issue as to the evidence in terms of alcohol consumption. All the family spoke of him as barely drinking at all, with his wife for example saying that he drank only one can at weekends. However, the letter from Reach Out in terms of the initial assessment was to the effect that he was still drinking about 15 units a week. That is about six or seven pints of beer. The appellant said that it was about three months ago that he was drinking a lot more. There was inconsistency therefore about how much he was drinking and when he cut down. It could not really be said that he was not a problem drinker or that in times of stress he would not revert to drink. In the past year these proceedings had been a protective factor. The balance therefore still falls against the appellant and the public interest is heavily weighted against him.

44. In terms of whether he could be said to be a persistent offender now, I was referred to *SC (Zimbabwe) v Secretary of State for the Home Department* [2018] EWCA Civ 929, in particular at [26]–[27] and *Chege v Secretary of State for the Home Department* [2016] UKUT 00187 (IAC).

45. For his part, Mr Azmi submitted that a persistent offender would not always remain so. One had to look at the circumstances of the offending and the period of time that had elapsed since the offending ([26] of *SC (Zimbabwe)*).

46. The background in this case is the appellant's use of alcohol. However, he had changed his attitude to alcohol having recognised the impact of it on his life and the lives of his family. All of his children had testified to that effect, albeit that J did not give oral evidence. All said that he had dramatically reduced his alcohol intake and changed from the man that he was before. His last major conviction was on 21 July 2015 for battery at Birmingham Magistrates' Court when he received a sentence of 18 weeks' imprisonment. After that, the only other matter was on 18 May 2016 at Birmingham Magistrates' Court where he received a sentence of 14 days' imprisonment for breach of conditions (according to the letter from his solicitors dated 15 July 2016).

47. He now controls his alcohol and his last conviction was some time ago. He could not now be said to be a persistent offender. It was however, agreed that the longer the period of offending the less easy it is to lose the label of persistent offender.

48. In terms of whether there would be very significant obstacles to the appellant's integration in India, in terms of emotional and social issues he has no family or home there and no means of support. Reference was made to J's witness statement at [21]–[22] in that respect. Furthermore, the FtJ found that he was unfit to work. He had suffered two major and one minor heart attacks.

49. His daughter R had said that there was a long standing issue with the relatives in India, leaving aside the cultural and domestic circumstances that would mean that he could not turn to them for assistance. He is dependent on his family and would not be able to obtain employment.

50. The children have real concern for him. H had said in her witness statement that there was concern if he was to return to India in terms of the risk that he would get drunk and kill himself if he were alone. She also referred to the risk that he would be isolated and depressed without having his family around him. As set out in the written submissions before the FtT at [6], he is unable to care for himself. In those circumstances the issue of integration is significant in terms of the obstacles that he would encounter and his ability to participate in society in India.

51. So far as the appellant's wife is concerned, she relies upon him for the support that he provides. It would be unduly harsh for her to be separated from him given the role that he undertakes in relation to their son. The responsibility would all fall upon her. She could not call upon the assistance that she previously had from her daughters because of their own circumstances, including their education.

52. So far as Article 8 outside the Rules is concerned, reference was made to [9] of the written submissions before the FtT to the effect that all the circumstances needed to be taken in account, in particular in relation to their son and his attachment to the appellant. There was evidence in the appellant's most recent witness statement of their son's attachment to him and how upset he becomes when the appellant goes out. To remove the appellant would be disproportionate.

Assessment and Conclusions

53. I take the details of the appellant's offending from the decision of the FtT. On 18 June 2004 for aggravated vehicle taking, driving with excess alcohol and other related motoring offences, the appellant was made the subject of a two year community rehabilitation order. On 12 December 2007 for an offence of battery he was sentenced to a community order involving 18 months' supervision. On 21 February 2008 for another offence of battery he was sentenced to a community order involving 12 months' supervision. On 2 May 2008 and 6 November 2008 for offences of battery and common assault he was sentenced to 20 weeks' and 16 weeks' imprisonment, respectively. A further offence of battery resulted in a sentence on 23 September 2013 of 18 weeks' imprisonment suspended for two years. Then, on 21 July 2015 for four counts of battery and for a sexual assault (on one of his daughters) he received a sentence of 16 weeks' imprisonment. He was made the subject of a restraining order preventing him from contacting his wife and three youngest daughters or going to the family home.

54. According to the letter from his former solicitors dated 15 July 2016, on 18 May 2016 he was convicted of a breach of conditions for which he received 14 days' imprisonment. In that respect, the respondent's decision dated 21 August 2017 states that "Despite being served with warning letters on two occasions you re-offended and on 18 May 2016 you were convicted at Birmingham Magistrates Court of breach of supervision requirements and sentenced to 14 days imprisonment". It is not clear what the breach of supervision requirements refers to but it presumably relates to the requirements imposed on his release from prison for the most recent offence.

55. The parties agreed that certain findings made by the FtT could be preserved, as foreshadowed in my written directions dated 4 September 2018. Those preserved findings, with references in square brackets to the decision of the FtT, are as follows:

- The appellant and his wife are committed to each other (as husband and wife) [23].
- Following the appellant's heart attack he was unable to work, took to alcohol and started offending [23].
- The appellant's children are committed to him but none of them are under the age of 18 and thus paragraph 399(a) has no application [24].
- At [27] of the FtT's decision:

> "The appellant has been an intermittent figure in the life of his wife and children since he was first imprisoned in May 2008. I was told and accept that his offending was related entirely to his alcoholism. That being so he failed to address his alcoholism for fifteen years until the sexual assault on his daughter. It seems to be the nature and gravity of that offence that has caused him to seek the help he now receives".

- At [28] of the FtT's decision:

> "... the reality of this family life has been that they have struggled on in spite of the appellant rather than with him. It was apparent that MD [his

> wife] takes the lion's share of caring for their son and has done so exclusively while her husband has been in prison. Such assistance as he affords her I am satisfied has in the past been limited due to his alcoholism that was unmanaged at that time".

- The appellant has sought to address these issues but at a time after his children have attained their majority.

56. In terms of whether the appellant is a foreign criminal because he is a persistent offender, I am satisfied that he is. It seems to me that such is obvious from his repeated offending since 2004 and up to and including 2016. The mere fact that the appellant has not offended since 2016 does not mean that he is not a persistent offender. His offending has endured for significant period of time, and has only abated in a relatively recent period compared to the years of his offending. In his case, given the history of his offending, a very much longer period of no offences would be necessary before he could claim no longer to be a persistent offender.

57. Paragraph 399A was argued on the appellant's behalf and I accept that subparagraphs (a) and (b) are met by the appellant (lawfully resident in the UK for most of his life and socially and culturally integrated in the UK). Those matters were not disputed on behalf of the respondent.

58. I have considered very carefully the respective parties' submissions in terms of whether it could be said that there would be very significant obstacles to the appellant's integration in India. I bear in mind his health and what is said about the lack of family support that would be there for him. I am prepared to accept that his wife's family would not welcome him and are unlikely to offer him any material support. The evidence on this was consistent. As much as anything else, although it was not specifically said, it is likely that the appellant's behaviour in terms of his offending and abuse of alcohol are factors meaning that he would not be a welcome presence in his wife's family's household in India. I doubt whether anyone would find that particularly surprising.

59. It is likely that the appellant would find reintegration in India difficult, bearing in mind the lack of material and emotional support from sources in India. I accept that he would be unable to obtain employment in the light of his health. In my view it is unlikely however, that he would be destitute. Whilst the appellant's wife is dependent on state benefits, at least one of his daughters is in employment. Whilst two other daughters are students, the family collectively are likely to be able to provide him with material financial support. It may not be much, but I am satisfied that it would be sufficient to prevent him from being destitute. They would certainly be willing to provide such support in the light of their commitment to him. The financial support that he is likely to receive from his family would also enable him to obtain the medication that he needs.

60. It is also to be borne in mind that the appellant is familiar with the language and culture of India, having lived there until he was 20 years of age. Whilst not essential

for my conclusions in this respect, it is not the case that he would be considered as an outsider. He would be able to reintegrate.

61. In my judgment therefore, the appellant is not able to meet the requirements of paragraph 399A(c) (very significant obstacles to integration). Likewise, the parallel provision in s. 117C(4)(c) of the 2002 Act.

62. The appellant arrived in the UK in 1989 as a visitor. He married in August 1990. He obtained indefinite leave to remain on 18 October 1994. Accordingly, their relationship was formed at a time when the appellant's immigration status was precarious. For that reason alone he is not able to meet the requirements of paragraph 399(b).

63. It seems to me that the only basis upon which the appellant is able to succeed in his Article 8 appeal is if he can show that there are very compelling circumstances over and above those described in paragraph 399 or 399A. The extent to which he meets those requirements, or put another way, the extent to which he falls short of them, is relevant to the question of whether there are very compelling circumstances. Likewise, in terms of the extent to which his appeal could succeed outside the Article 8 Rules.

64. A major factor in the consideration of whether there are very compelling circumstances over and above those described in paragraphs 399 or 399A is the situation with regard to his son SD. He suffers from severe learning disability, according to the most recent medical report which is dated as long ago as 2 March 2015. Although the FtJ said that he suffers from autism, I cannot see medical evidence to that effect. The medical report refers to severe learning disability with significant impairment in behaviour requiring attention or treatment, as well as epilepsy which at that time was in remission. Whether or not he does actually suffer from autism, I am satisfied that the evidence demonstrates that he has a profound disability.

65. There was consistent evidence about his need for constant care and supervision. I accept the evidence of the care that the appellant provides for him and the extent of SD's attachment to the appellant. None of that evidence was challenged and it was consistent. There is also evidence of SD's distress when the appellant was absent in prison or otherwise away from the family, and indeed currently when the appellant leaves the home. There was also consistent evidence of the appellant being the one who provides for his daily care in terms of washing and bathing. As SD has become older that assistance has fallen more and more to the appellant, although it cannot be said that that has always been the case since SD was born in 1992 and the appellant only came back to the family home relatively recently.

66. If the appellant was to be removed from the UK I am satisfied that the bulk of the caring responsibilities would fall to the appellant's wife. Whilst there are children living at home at the moment they are not likely to be living there for very much longer than the relatively short term. One of his daughters is in employment and

seeking to further her career, and the other two are at university. In the natural order of things they would be expected to leave home and to pursue their own lives and careers.

67. Nevertheless, I am satisfied that the appellant's removal would have a significant impact on not only the appellant's wife, but on SD himself who is clearly very attached to the appellant.

68. There is plainly a significant public interest factor to be taken into account in terms of the appellant's repeated offending, and of the same type, despite warnings. It is however accepted on behalf of the respondent that there has been no offending since May 2016; three years now.

69. The evidence of the extent of the appellant's alcohol consumption was in my view inconsistent in that *his* evidence was that he had stopped consuming so much alcohol within the last three months, although that was not his wife's evidence. Furthermore, the evidence from his GP dated 14 August 2018 at page 15 of the supplementary bundle is that he is heavily dependent on alcohol. However, the 23 August 2018 Reach Out Recovery letter states that in the light of the answers given by the appellant he was deemed as not being alcohol dependent. On that basis, the treatment programme appears to have been devolved to the local area.

70. Nevertheless, the evidence does seem to me to have been mostly consistent in terms of *the fact* of his having reduced his alcohol intake and in terms of his no longer getting drunk. Regardless of whether he has either one or two cans of alcohol at the weekends, the evidence clearly indicates that he has made efforts to reduce his alcohol intake to the point where it no longer involves his committing offences whilst in drink.

71. When all these factors are considered, I am satisfied that there are very compelling circumstances over and above those described in paragraphs 399 and 399A, in particular taking into account the circumstances of his son, SD, his relationship with the appellant and the appellant's close involvement with his day-to-day care. Thus, the 'very compelling circumstances' criteria being contained within the Rules, I am satisfied that the appellant meets the requirements of the Rules and that his appeal should accordingly be allowed.

72. A consideration of Article 8 outside the Rules would result in the same outcome, those considerations not involving anything different from the matters to which I have referred.

73. Whilst I have decided that the appellant's appeal should be allowed under Article 8, in particular with reference to his son's circumstances, that is not to say that it would always be disproportionate to remove the appellant notwithstanding any further offending. Society could not be expected to tolerate a situation of reoffending and thus further persistence in offending, with the appellant being shielded from removal because of his son's condition, or in combination with other circumstances. Those matters are likely in the future to have to give way to the public interest in removal.

Decision

74. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision having been set aside, I re-make the decision, allowing the appeal under Article 8 of the ECHR.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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. Failure to comply with this direction could lead to contempt of court proceedings.

Upper Tribunal Judge Kopieczek 4/06/19

ANNEX

IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09122/2017

THE IMMIGRATION ACTS

Heard at Field House
On 18 January 2018

Promulgated

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Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M J Azmi, Counsel
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a citizen of India, born in 1969. He is said to have arrived in the UK in 1989 as a visitor. He was granted indefinite leave to remain on 18 October 1994.

2. Because of his criminal offending, a decision was made to make a deportation order against him pursuant to section 5(1) of the Immigration Act 1971. The respondent's decision is categorised as a decision to refuse a human rights claim.

3. The appellant appealed against that decision and his appeal came before First-tier Tribunal Judge Howard ("the FtJ") at a hearing on 5 October 2017 whereby he dismissed the appeal.

4. The grounds of appeal in relation to the FtJ's decision, to summarise, contend that given that the FtJ concluded that there were compelling circumstances over and above those described in paragraph EX.2. of Appendix FM (insurmountable obstacles to family life outside the UK), he should have allowed the appeal "on that issue alone". He should similarly, according to the grounds, have found that it would be unduly harsh for the appellant's wife to remain in the UK if the appellant were to be removed.

5. With reference to the appellant's particular circumstances, and the evidence provided by family members, it is contended that it would be unduly harsh to return the appellant to India. It is contended that the FtJ "ignored the statements" of family members.

6. In submissions, Mr Azmi argued that there was inconsistency in the FtJ's decision as between [33] and [34], in that in the latter he said that Article 8 was not engaged whereas in [33] the opposite is implied.

7. More significantly, for reasons which I explain below, it was submitted that the FtJ had failed to consider the appellant's private life, having failed to consider paragraph 399A of the Rules. That is so notwithstanding the fact that the respondent had considered para 399A in her decision.

8. Furthermore, it was submitted that where at [33] the FtJ had said that the appellant had not been lawfully resident for most of his "adult" life, after a consideration of s.117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), the FtJ had added a requirement that is not in the statutory provision. The appellant did not need to establish that he had been lawfully resident in the UK for most of his "adult" life.

9. On the facts, it was submitted that from the year 2000 onwards, excepting limited periods of imprisonment and the restraining order, the appellant had lived within the family home and provided care and support for their son SD, born on 3 August 1992, who suffers from autism.

10. In submissions, Mr Bramble relied on the 'Rule 24' response, although accepted that to some degree it was rather generic.

11. In relation to the private life argument, it was accepted that the FtJ did not deal with para 399A, but he submitted that that was not material. The appellant had arrived in the UK on 20 May 1989 when he was aged 20. He was born in 1969. It could not be said that he had been in the UK for "most of his life" with reference to para 399A. As I understood Mr Bramble's submissions, they were to the effect that the phrase "most of his life" was not to be taken literally in the sense that it means 'more than half' of a person's life.

12. It was accepted that if I was against him in relation to that submission, there was an error of law on the part of the FtJ. However, it was nevertheless contended that any such error would not be material because the FtJ had considered matters overall. I was referred to various aspects of the FtJ's analysis in terms of undue harshness in relation to his removal.

13. In response to my question as to whether a private life ground would inevitably be weaker than a family life ground, Mr Bramble quite properly pointed out that the Rules do contemplate a circumstance whereby a person could succeed on private life grounds under the Rules where they could not succeed in terms of family life.

Assessment

14. By way of background, it is to be noted that the appellant has a number of convictions. These are for driving offences, offences of violence, and sexual assault in relation to one of his daughters. The offences occurred between 2004 and 2015. In respect of the most recent offence, that relates to a conviction in the Magistrates' Court on 21 July 2015 whereby he was convicted of four counts of battery and sexual assault and commission of a further offence during the operational period of a suspended sentence order. The suspended sentence was imposed on 23 September 2013 in the Magistrates' Court for an offence of battery. The court on 21 July 2015 imposed a restraining order prohibiting him from contacting his wife and three children or going to their address, with the order lasting until 20 July 2017.

15. Mr Bramble clarified that the decision to make a deportation order on the basis that his deportation was conducive to the public good was explained in the decision letter as being on the basis that he was a persistent offender (per para 398(c) of the Rules).

16. The FtJ heard evidence from the appellant, his wife MD, and his daughters HS and JD. He noted that the appellant and his wife have five children, the eldest who is 26 years of age and the youngest being 18 years of age. The eldest, SD, has severe autism and he lives in the family home where his mother cares for him. The evidence before the FtJ was that as SD had matured physically it had become necessary for a male "to administer to his more personal needs", which it is said is a role that had fallen to the appellant. Other children assist however.

17. He referred to the appellant, and the family as a whole, being reliant exclusively on state benefits. The appellant is in receipt of employment support allowance, having suffered a heart attack in 2000. At the time of the hearing before the FtJ, the youngest child was at school in the sixth form, two of the children were at university and the eldest works part-time as a support worker. The appellant is in receipt of medication to suppress his alcoholism and manage his blood pressure.

18. There was evidence to the effect that since the expiry of the restraining order in July 2017 the appellant had visited the family home daily to assist in relation to SD.

19. At [23] the FtJ concluded that the appellant and his wife do have a commitment towards one other and he accepted that the appellant was unable to work following

his heart attack. He found that being unable to provide for his family he took to alcohol and thereafter began to amass "his unenviable list of previous convictions". At [24] he recorded the evidence that the children are still committed to their father and he noted in particular the evidence of HS.

20. He found that it would be unduly harsh for the appellant's wife to remain in the UK without the appellant, having referred to the provisions of para 399(b) and para EX.2 of Appendix FM.

21. Nevertheless, at [27] he concluded that the appellant had been an intermittent figure in the life of his wife and children since he was imprisoned for the first time in May 2008. He accepted that his offending was related entirely to his alcoholism but that he had failed to address that issue for 15 years until the sexual assault on his daughter. It was the nature and gravity of that offence, he found, that had caused him to seek the help that he now receives.

22. However, at [28] he said that the evidence he had heard left him in no doubt that the reality of the family has been that they have struggled on in spite of the appellant, rather than with him. His wife takes the lion's share of caring for their son and has done so exclusively while her husband has been in prison. He found that such assistance as he affords her has in the past been limited due to his alcoholism that was unmanaged at that time. Although he had sought to address those issues, the FtJ found that that was at a time after his children had attained their majority. He concluded that given the limited help the appellant had offered his wife since 2000, he was not satisfied that it would be unduly harsh for her to remain in the UK without him. Thus, he did not meet the requirements of para 399(b).

23. At [33] after setting out the requirements of s.117C of the 2002 Act, he found that the appellant "has not been lawfully resident for most of his *adult* life" (my emphasis).

24. He went on to state that in the light of his earlier findings at [27] and [28] and the extent to which the appellant had played a meaningful role in the family lives of his wife and children since 2000, the decision of the respondent was proportionate. He concluded that the limited help he offers now that the restraining order had expired, was not sufficient to render the decision disproportionate. He concluded at [34] by stating that Article 8 was not engaged.

25. I am satisfied that the FtJ's decision does contain errors of law such as to require that decision to be set aside. The most significant of the errors of law is the failure to consider para 399A of the Rules, in terms of the appellant's private life. Para 399A, to summarise, applies where para 398(b) or (c) applies. The latter of those provisions applies because the respondent has made a decision to deport the appellant on the basis that his deportation is conducive to the public good. Thus, the FtJ should have considered the requirements of para 399A, namely whether he has been lawfully resident in the UK "for most of his life", and whether he is socially and culturally integrated in the UK, and whether there would be very significant obstacles to his

integration into the country to which it is proposed he be deported. There is no such consideration in the FtJ's decision.

26. He did refer to the identical provisions in s.117C(4), or at least he set them out. However, he imported a requirement that is neither in the Rules nor in that provision of the 2002 Act by stating that the appellant had not been lawfully resident for *most* of his adult life.

27. It is not the case therefore, that there was *no* consideration of the appellant's private life, but that consideration was not made within the context of the Rules, and was otherwise in error in terms of its understanding of what the statutory provisions require.

28. Although Mr Bramble submitted that the phrase "most of his life" does not mean more than half of a person's life spent in the UK, as I indicated at the hearing I do not agree with that contention. It seems to me that the meaning of the phrase is plain. In addition, although neither I nor the parties were aware of it at the time of the hearing, this phrase was considered by the Court of Appeal in *Secretary of State for the Home Department v SC (Jamaica)* [2017] EWCA Civ 2112, where it was said at [53] that the meaning of 'most of his life' for the purposes of the Rules has to be 'more than half'. It was a quantitative not a qualitative concept.

29. It was not contended on behalf of the respondent, nor it seems to me could it have been, that the appellant had not been "lawfully" resident for the requisite period. According to his immigration history he arrived on 2 May 1989 as a visitor, and at least from 19 November 1990 he has had lawful residence. At the time of the hearing before the FtJ he had been in the UK for 28 years, but had spent only twenty years in India. Thus, he is able to establish, and was before the FtJ, that he had been lawfully resident in the UK for most of his life in accordance with para 399A(a). The other requirements of para 399A (social and cultural integration and very significant obstacles to integration on return) also need to be established, but that does not alter the fact that the FtJ failed to consider para 399A and wrongly assessed the parallel provision in this regard under s.117C(4)(a).

30. In my judgement that is a sufficient basis from which to conclude that the FtJ's decision must be set aside for error of law. There was no lawful assessment of the appellant's claim to remain on the grounds of private life.

31. I do not consider that there is any merit in the argument in relation to para 399(b) and the FtJ's assessment of the extent to which the appellant met the requirements of that aspect of the Rules. Apart from his reasoned conclusion that it would not be unduly harsh for the appellant's wife to remain in the UK without the appellant, it seems to me that the appellant does not even require a consideration of that issue, within the Rules at least, given that para 399(b)(i) requires that the relationship was not formed at a time when the appellant's immigration status was precarious. The FtJ concluded that it was but nevertheless went on to consider the further requirements of that aspect of the Rules. He need not have done so. At the time he

formed his relationship with his wife he had no settled status, having married on 10 August 1990 he was granted leave to remain until 6 December 1992. It was not until 1994 that he was granted indefinite leave to remain.

32. It is not necessary for me to express a concluded view on other aspects of the arguments advanced on behalf of the appellant in terms of the FtJ's assessment of the facts. However, in the light of the fact that it is now said that the appellant has moved back into the family home and the contention that there will need to be a reappraisal of his family and private life circumstances, consideration will need to be given to the extent to which any findings made by the FtJ, now that the decision has been set aside, ought to be allowed to stand.

33. I have reflected on the submission on behalf of the appellant to the effect that it was appropriate for the appeal to be remitted to the First-tier Tribunal for a further hearing, given the further evidence that it is proposed to adduce. Having considered the senior president's Practice Statement at paragraph 7.2, I do not consider that that is an appropriate course. It may be, subject to submissions, that some findings made by the FtJ can stand. Accordingly, the re-making of the decision will take place in the Upper Tribunal. In that context, the parties are to have careful regard to the directions set out below.

DIRECTIONS

(a) In relation to any further evidence relied on by either party, there is to be a further paginated and indexed supplementary bundle of documents to be filed and served no later than seven days before the next date of hearing.

(b) In relation to any witness whom it is proposed should give oral evidence, there must be a witness statement drawn in sufficient detail such as to stand as evidence-in-chief such that there is no need for any further examination-in-chief.

(c) At the next hearing the parties must be in a position to make submissions as to what findings of fact, if any, made by the FtJ can be preserved.

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Upper Tribunal Judge Kopieczek 6/03/18