IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Appeal No: UI-2022-004018
HU/51336/2021; IA/05707/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6th March 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ERIKA KAPP
(NO ANONYMITY DIRECTION)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Presenting Officer
For the Respondent: Mr P Turner, Counsel, instructed by Direct Access

Heard at Field House on 23 January 2024

DECISION AND REASONS

Introduction

1. The parties are referred to in this decision as they were before the First-tier Tribunal. Ms Kapp is the 'appellant', and the Secretary of State is the 'respondent'.

2. The respondent challenges a decision of Judge of the First-tier Tribunal Veloso ('the Judge') sent to the parties on 27 May 2022. The Judge allowed the appellant's appeal on human rights (article 8 ECHR) grounds against the respondent's decision to refuse to revoke a deportation order. Permission to appeal was granted by Upper Tribunal Judge Hanson on 31 October 2022.

3. The hearing proceeded with the representatives in attendance at Field House, and both the appellant and her son attending remotely, the former from South Africa. The appellant had previously been permitted to attend her First-tier Tribunal hearing remotely following confirmation by Mr Boates, Chief Directorate, International Legal Relations, Department of Justice and Constitutional Development that there was no legal or diplomatic objection to evidence being given from South Africa to a tribunal in the United Kingdom via an online portal. Confirmation from the South African authorities was in accordance with the guidance provided in *Agbabiaka (evidence from abroad; Nare guidance)* [2021] UKUT 00286 (IAC), [2022] Imm. A.R. 207.

4. Three issues arise in this matter:

    i. Can the appellant properly demonstrate that the decision not to revoke the extant deportation order has interfered with her rights under article 8?

    ii. Was the finding that the appellant enjoyed a family life protected by article 8 ECHR with her son, daughter-in-law and grandchildren in the United Kingdom irrational?

    iii. Did the First-tier Tribunal apply the correct test?

5. The deportation order in this matter pre-dates the coming into force of section 32 of the UK Borders Act 2007.

6. I am grateful to Mr Turner and Mr Melvin for their written and oral submissions.

Brief History

7. The appellant is a national of South Africa and presently aged 68. She is a widow. Her son, Courtnall, is a British citizen. He resides in the United Kingdom with his wife and children. Medical evidence filed with the Tribunal confirms that several members of the family have been diagnosed with mental disorders including autism spectrum disorder ('ASD').

8. In January 2002, the appellant was stopped by the authorities at Heathrow airport and found to be in possession of 31.4 kgs of herbal cannabis concealed in a suitcase. The street value was estimated to be £92,000. I take judicial note that the equivalent value in 2024 is £162,000. The following day the respondent served her with notice of liability to deportation. She was convicted of importing a controlled drug into the United Kingdom and on 22 March 2002 was sentenced at Isleworth Crown Court to 12 months' imprisonment, with a recommendation for deportation. The respondent signed a deportation order on 15 May 2002 and the order was enforced on 13 July 2002.

9. Following his mother's arrest, Courtnall travelled to the United Kingdom to be near her and he resided in this country during her time in custody. Upon her release and deportation from this country he returned with her to South Africa.

10. Courtnall later married and has two minor children. All five members of the family resided together in South Africa, with one of the children being home schooled. Courtnall, his wife and the appellant's grandchildren relocated to the United Kingdom in 2019 following the grandchildren being diagnosed with ASD. The family considered there to be no adequate facilities in South Africa to address the grandchildren's significant ASD concerns. The Judge concluded at [76] of her decision that the decision to relocate was not one of choice, rather "it was a decision based on [the grandchildren's] welfare."

11. The appellant applied for the revocation of her deportation order on 27 May 2020. Various documents and letters accompanied the application including a letter from Courtnall, dated 27 May 2020, detailing, *inter alia*:

> 'My children have a strong bond with my mother and miss her sorely. They persistently ask when their granny would visit. We have always been a tight knit family and the deportation order is causing much pain and sorrow for everyone.
>
> …
>
> I appeal to the court and its power of compassion to do what is right and good. My children and I ask the court to have mercy on an aged lady. Please revoke the deportation order which bars my mother's entry to the UK.'

12. A letter from the appellant of the same date primarily addresses the reasons for her criminal action.

13. By a decision dated 1 April 2021, the respondent refused the application under the Immigration Rules. The decision runs to eight pages, with the

respondent concluding that the public interest requires the deportation order to be maintained. The respondent noted that the appellant had not claimed to have a family life with persons in the United Kingdom and additionally it was not accepted that she had a private life in this country for the purpose of article 8.

14. The appellant filed an in-time human rights appeal on 19 April 2021. She subsequently filed and served a bundle running to two hundred and twenty-two pages on 8 October 2021. Included in this bundle was the appellant's witness statement dated 1 September 2021, detailing her health concerns and confirming that she wishes to join her family in the United Kingdom. By his statement Courtnall addressed the intended means of housing the appellant in this country.

15. Having considered the new evidence, the respondent issued a supplementary decision dated 8 December 2021. This document runs to eleven pages. Again, the respondent did not accept that the appellant had a family or private life in the United Kingdom for the purpose of article 8. No very compelling circumstances were found to exist to justify revocation of the deportation order.

Law

16. Section 82 of the Nationality, Immigration and Asylum 2002 ("the 2002 Act"):

> '(1) A person ("P") may appeal to the Tribunal where—
>
> ...
>
> (b) the Secretary of State has decided to refuse a human rights claim made by P, ...'

17. Section 84(2)(b):

> '(b) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.'

18. A right of appeal against a decision not to revoke a deportation order exists only on human rights grounds; such decision not being concerned with a protection claim or the revocation of protection states: section 82(1)(a) and (c) of the 2002 Act.

19. A 'human rights claim' is defined at section 113 of the 2002 Act:

> '... a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from

or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998.'

20. Consideration of an application to revoke a deportation order falls to be assessed under the Rules, which at the relevant time detailed:

> "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) ...
>
> 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.
>
> ...

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.

...

A398. These rules apply where:

(a) ...

(b) a foreign criminal applies for a deportation order made against him to be revoked.

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

(a) ...

(b) The deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment for less than 4 years but at least 12 months

(c) ...

The Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

21. Paragraph 391 applies to post-deportation applications for revocation: *ZP (India) v. Secretary of State for the Home Department* [2015] EWCA Civ 1197, at [23].

22. As to article 8, consideration is to be given to the public interest under section 117C of the 2002 Act:

"117C

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more,

> the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) ...
>
> (5) ...
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

23. The appellant accepts that section 117C(4) and (5), as replicated by paragraphs 399(a), (b) and 339A of the Rules, provide no benefit to her.

Decision of the First-tier Tribunal

24. The appeal came before the Judge sitting at Hatton Cross on 29 April 2022. The decision of 27 May 2022 runs to twenty-one pages. The Judge records at [9] of her decision the agreed position of the parties as to the issues in the appeal:

> (i) Whether the appellant's continued exclusion from the United Kingdom would amount to a breach of paragraph 398 of the Rules based on the appellant's private life, and
>
> (ii) Whether the appellant succeeds under article 8.

25. In addition to various witness statements filed with the First-tier Tribunal, the Judge considered several medical reports and letters, including:

- Dr Peter Swanepoel, psychiatrist, letter, 9 September 2019
- Wilien Strydon, physiotherapist, letter, 28 July 2020
- Tracy-Lee Waullenbach, clinical psychologist, report, 25 August 2020
- Dr Simon Pickstone Taylor, psychiatrist, report, 7 September 2020

- Dr Cobus van der Walt, specialist general psychiatrist, report, 2 November 2020

- Dr Owen Roberts, consultant psychiatrist, report, 2 April 2021

- Dr Oscar D'Agnone, consultant psychiatrist, report, 19 May 2021

26. The appellant is unable to work consequent to physical and psychiatric disabilities. She is identified as relating well to her close immediate family in the United Kingdom but struggling to relate to an external circle and lives in complete isolation with no friends or other relationships.

27. The close nature of the appellant's relationship with her son, daughter-in-law and grandchildren is addressed in various medical reports.

28. The Judge considered various medical diagnosis of all members of the appellant's family at [48] to [51], [77] to [78] and [86] of her decision as well as two education, health and care plan annual reviews prepared in relation to the grandchildren at [52] to [55]. One of the grandchildren has complex social communication difficulties, delayed expressive and receptive language skills, and difficulties with cognitive and learning skills, social interaction, emotional regulation, and self-care skills. They have complex sensory needs. The second grandchild has considerable identified challenges.

29. The Judge found at [65] that the appellant had established a family life with her grandchildren with whom she lived until their leaving South Africa in 2019. It was noted that in his December 2021 decision the respondent accepted the appellant had a strong emotional bond with her grandchildren.

30. It was further accepted by the Judge at [66] that the appellant and Courtnall had developed and maintained a strong family life, each depending on the other on account of their respective mental health and other symptoms: "they need and support each other."

31. The Judge found article 8 to be engaged, concluding that the appellant's relationship with Courtnall amounts to much more than a mere 'normal' emotional mother-adult son relationship: "the support they provide each other is 'real', 'committed' and 'effective'. I find that the same applies in connection with her relationship with her daughter-in-law, with whom she has been and remains very close", at [69].

32. When considering the public interest, the Judge held at [81]-[82]:

> ‘81. With regards to Section 117B, I have regard and give weight to the fact that maintenance of immigration control is in the public interest. With regards to Section 117B(1) and (2) … [the appellant] is currently being financially supported by the money her son left her from the proceeds of the sale of the family home. I have regard to the fact that evidence of knowledge of the English language and maintenance without recourse to public funds are merely neutral factors in the balance.
>
> 82. Considering Section 117C, I take into account the fact that deportation of foreign criminals is in the public interest and that the more serious the offence the greater the public interest in deportation. The appellant’s conviction was of a serious nature, involving the importation of drugs of an estimated street value of £92,000 and I take into account the consequential interests of the community in maintaining exclusion in the face of such offending.
>
> …
>
> 85. It is in the best interest of the grandchildren that she joins them in the United Kingdom. They are and will remain affected by their separation from her. They cannot relocate to nor even visit South Africa on account of their respective behavioural and other challenges, which also affect their ability to continue their family relationship with the appellant through modern means of communication.’

33. The Judge concluded, at [91] to [93]:

> ‘91. Having carefully weighed all the evidence in the round including the Immigration Rules, Section 55, Section 117B and 117C and the relevant public interest considerations, particularly relevant as a revocation of deportation case, I fund the respondent’s decision to not revoke the Deportation Order not proportionate and that the public interest in continuing to exclude the appellant is overtaken by very compelling circumstances. The appellant’s conviction, of a serious nature, took place some 20 years ago. She changed her pattern of behaviour upon her deportation to South Africa, that same year, including from refraining from engaging with others socially and has not re-offended since. It is only in the recent years that she was diagnosed with ASD, which would have affected her from birth, which provides some context to her offending. There is no risk of re-offending and no risk to public harm.
>
> 92. She has and remains extremely close to her son, with whom she lived until he and his family left South Africa in 2019. Once he married, they were joined by her daughter-in-law and in time by both grandchildren. They were all 5 together one close and

strong family unit, with the appellant fully part of the family and helping bring up her 2 grandchildren, until their behavioural and other challenges became such that they moved to the United Kingdom. Whilst the grandchildren have since settled here, having found an educational establishment assisting them with their respective behavioural and other challenges, they miss the appellant and are affected by this separation. It will be unduly harsh to expect them to return to South Africa and even travel there to visit the appellant and equally unduly harsh to expect them to remain here without the appellant. The appellant's son misses the appellant greatly, whom he relies on and whom she supports in ways his wife does not and the appellant greatly misses her family. Her son and daughter-in-law do not have reasonably available to them the option of taking turns to visit her leaving the other with the children given their mental health-related and other behavioural symptoms.

93. The appellant's appeal consequently succeeds because she has shown that the refusal to revoke the Deportation Order breaches her, her son, her daughter-in-law and grandchildren's rights under Art. 8 ECHR.'

Discussion and Reasons

34. An issue of potential complexity appeared initially to arise in this matter, but upon examination, it does not on the particular facts.

35. An application for revocation of a deportation order can be made either to an entry clearance officer to the Home Office. Previously, a right of appeal existed against a refusal to revoke a deportation order, but by application of the Immigration Act 2014 this has not been the case since 6 April 2015. As many applications to revoke raise human rights issues, the Rules make provision for the application of article 8 where a foreign criminal contends that the maintenance of the deportation order will constitute a disproportionate interference with the right to respect for family or private life. If article 8 is raised for the first time, appeal rights are established by section 82 of the 2002 Act (as amended).

36. However, a question may arise as to the nature and substance of the human rights assessment. The mere existence, or otherwise, of a deportation order cannot constitute mere breach of the respondent's obligations under the Human Rights Act 1998.

37. The appellant's initial application to revoke did not accompany an application for entry clearance. Nor did the appellant claim to have a

family life with persons in the United Kingdom. Rather, the application was couched in simple terms of mercy with the raising of a vague possibility that the appellant may wish to visit the United Kingdom at some future point of time.

38. The revocation of a deportation order regime is established by consideration of application through the prism of article 8. However, for some applicants the intention is not to seek to re-enter the United Kingdom but to divest themselves of the burden of the order, whether to provide themselves with personal peace or to facilitate entry to another country.

39. In such circumstances, observing the terms of the application advanced which was not accompanied by an application for entry clearance, a difficulty for the appellant may have been that she could not demonstrate that the decision not to revoke the extant deportation order interfered with her rights under article 8. Her day-to-day life in South Africa would not be affected by the continued existence of the order. Whilst she may have wished at some point in time to visit her son or other family members in this country, no application to visit them accompanied the application to revoke the deportation order. The aim of revoking the deportation order alone was to be no longer burdened by the restrictions of the deportation order, thereby permitting her to be eligible to apply for admission to this country under the Rules at some future date. In accordance with paragraph 392 of the Rules, revocation would not establish an entitlement to re-enter the United Kingdom. The decision to revoke would have done no more than establish eligibility to apply for admission under the Immigration Rules.

40. The Strasbourg Court recognised in *Al-Skeini v United Kingdom* (2011) 53 E.H.R.R. 18, at [132]-[150], that in exceptional cases the exercise of jurisdiction under article 1 by a Contracting State outside its own territorial boundaries. It has been established that where a person outside a Contracting State is prevented from joining an immediate family member, this may raise an issue under article 8: *Abdulaziz, Cabales and Balkandali v. United Kingdom* (1985) 7 EHRR 471, at [59]-[60]. However, the positive obligation rests, in large part, on the fact that a family member is already in the Contracting State and is being prevented from enjoying their family life with their relative because that relative has been denied entry. As the appellant did not seek entry to visit her family in this country, the decision not to revoke the deportation order potentially did not prevent family members from enjoying family life with the appellant. It retained the *status quo* as to family life, which the respondent at the time denied existed but has since been found by Judge Veloso to exist.

41. The appropriate remedy for the appellant may at the time of the original decision have been judicial review. A public law challenge may have enjoyed merits on the face of the decision.

42. However, as properly observed by Mr Turner, further consideration of this potential issue is not required in this matter, as the respondent issued a supplementary decision letter in December 2021 expressly addressing the appellant's case that her "continued separation from her family in the United Kingdom is detrimental to well-being" and that "all of the family members' conditions are likely to deteriorate seriously as a result of continued situation". It is implicit that the Judge considered the supplementary decision as addressing a new human rights matter, namely the proportionality of separating the appellant from her family members in the United Kingdom and this permitted consideration of the family lives of all members of the family. I agree with Mr Turner, the Judge was permitted to consider the new matters raised and considered in the supplementary decision.

Irrational finding that there exists family life protected by article 8.

43. It is appropriate to note the Judge's findings as to dependency:

> "64. In their supplementary decision, the respondent accepts that the appellant used to live with her son, daughter-in-law and the grandchildren as one family unit and was involved in the grandchildren's upbringing up until the moment the family moved to the United Kingdom in pursuit of better educational and overall support for the grandchildren.
>
> 65. I find that the appellant has established a family life with her grandchildren, with whom she lived and took care of on a daily basis from their birth until they left South Africa in 2019. In their supplementary decision the respondent accepts that she has a strong emotional bond with them.
>
> 66. With regards to her relationship with her son, I take into account the fact that they lived together, initially with his biological father, then the 2 of them following her divorce. Her son sold all their belongings and joined her in the United Kingdom when she was arrested and did the same again to join her in South Africa when she was deported. They resumed their life and remained together, including after he got married and he and his wife gave birth to their 2 children. They remained as one family unit until her son, daughter-in-law and 2 grandchildren moved to the United Kingdom. They have developed and maintained a strong family life, each depending on the other on account of their respective mental health and other symptoms, even though only later diagnosed. They need and support each other.

67. In relation to closeness, Dr D'Agnone reports the following (at page 38-39 [of a psychiatric report dated 19 May 2021]):

> "Ms Kapp is a 65 year old lady suffering from several mental health conditions that will worsen considerably over the coming years should she remain isolated in South Africa.
>
> Given her autistic condition, she can only relate emotionally to her immediate family. She needs her family to keep her emotional stability.
>
> The [...] family is a very special and vulnerable one, in which all their members also suffer from some form of autism, cognitive and learning disability. They need their grandmother's support the same way she needs them."

68. In oral evidence, the appellant's daughter-in-law indicated that her husband misses the appellant, speaks of her all the time and that she represents a "life-line" for him, lifting him in ways she does not.

69. Applying *Kugathas*, taking into account the unusual history and circumstances in this case, which include significant and enduring mental health symptoms and diagnoses for the whole family, I find on balance that the appellant's relationship with her son amounts to much more than mere 'normal' emotional mother-adult son relationships. The support they provide each other is 'real', 'committed' and 'effective'. I find that the same applies in connection with her relationship with her daughter-in-law, with whom she has been and remains very close.

70. I find in the circumstances that the appellant has established a family life with her son and daughter-in-law given the strong element of interdependency they share.

71. I find that the appellant's son, daughter-in-law and grandchildren have all established a private and family life in the United Kingdom, In their supplementary decision the respondent accepts that they have settled and integrated successfully.

72. I find that article 8 is therefore engaged. I have regard to the law threshold that applies in this regard."

44. Mr Melvin's primary contention was that the Judge failed to provide adequate reasons as to how a dependency continued between family members in different continents with the family having been separated since 2019.

45. In respect of Courtnall and his wife, Mr Melvin submitted that in concluding the test established in *Kugathas v. Secretary of State for the Home Department* [2003] EWCA Civ 31, [2003] INLR 170 was met the Judge failed to give weight to Courtnall having no expectation that his mother would join him when he entered the United Kingdom with his family, and additionally the appellant has not seen her son since 2019. Mr Melvin observed that the appellant has never resided in the United Kingdom; her time in custody not counting as residence.

46. Further, though the Judge accepted the grandchildren's medical conditions, she failed to consider the evidence presented that they were doing well at school. Concern was also placed upon a failure by the Judge to note that the appellant could not be maintained without recourse to public funds because her family in this country are mainly reliant themselves upon public funds.

47. Mr Turner accepted that the Judge's findings as to the existence of family life were generous, but they could not be said to be perverse. The conclusion reached as to the strong, personal nature of the connection and entwined dependency between the appellant and her son was evidenced by expert opinion, and the respondent did not challenge the expert opinion either before the First-tier Tribunal or by his grounds of appeal before this Tribunal.

48. Turning first to the grandchildren. The Judge's finding that they resided with their grandmother until 2019 is not challenged, nor is the finding that the appellant continues to have a strong bond with them.

49. Links between grandparents and grandchildren may vary from family to family, and so each case has properly to be examined on its facts to determine whether sufficient links exist to constitute 'family life' and thereby bring the relationship within the protection of article 8. The conclusion that a family life existed between a grandmother and her grandchildren whilst residing in the same home in South Africa up to 2019 was reasonably open to the Judge. That the children left the home to travel to the United Kingdom does not by itself bring the 'family life' to an end, though it may over time diminish to the point where it does not attract the protection of article 8. The Judge gave cogent reasons for concluding that family life had not diminished, noting the medical issues existing in this matter. The concerns raised by the respondent are not by themselves sufficient to establish irrationality. That the children attend school in this country does not by itself undermine the continuation of the family life originally established in South Africa. The conclusion reached, though accepted by Mr Turner to be generous, was one reasonably open to the Judge.

50. As to the family life being established between the appellant and both her son and daughter-in-law, I observe that in the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of article 8. Family life within the meaning of article 8 either exists or it does not.

51. As confirmed by the Court of Appeal in *Kugathas* the test for the establishment of family life between adult relatives for the purposes of article 8 is one of effective, real or committed support. The established test requires proof that something more exists between adult family members than "normal emotional ties". Dependency in that sense is a question of fact; a matter of substance not form. In simple terms, it all depends upon the facts. There is no requirement to prove exceptional dependency: *AU v. Secretary of State for the Home Department* [2020] EWCA Civ 338, [2020] 1 WLR 1562.

52. The complex medical needs of both the appellant and Courtnall are addressed in various psychiatric reports. Several psychiatrists identify the appellant as being emotionally dependent upon her son because of her struggles to function with others, leading her to decline outside engagement and to suffer loneliness and isolation. She is overwhelmed with anxiety and possesses superficial insight into her condition and the support she requires. Her personal engagement is through her family in the United Kingdom. Courtnall has various complex diagnosis. The finding of fact as to mother and son providing each other real, committed and effective support, is not undermined by the fact that they reside apart from each other. The Judge could properly conclude that inter-dependent and committed support was ongoing for many years following their return to South Africa. Courtnall and his family left the appellant solely to secure better educational and medical care for the grandchildren once their own complex needs were identified. It was reasonably open to the Judge to conclude, having considered the evidence placed before her, including the unchallenged expert medical evidence, that real and committed support continued upon Courtnall’s relocation to the United Kingdom and continues to exist. The medical evidence strongly suggests that the appellant’s mental health has deteriorated even further following Courtnall’s relocation, to the point of isolating herself, and she has become even more reliant on the love and support provided by her son. The respondent has come nowhere close to establishing that the Judge acted irrationally in concluding that the *Kugathas* test was met, and that family life continues to exist between the appellant and Courtnall such as to enjoy the protection of article 8.

53. The respondent’s contention as to likely reliance upon public funds may be a factor to be placed in a proportionality assessment if the appellant

applies to enter the United Kingdom but is not relevant to the factual assessment as to whether 'family life' exists for the purpose of article 8.

54. In the circumstances, I am not required to consider the Judge's conclusion as to the existence of family life between the appellant and her daughter-in-law.

Application of correct test

55. I note the respondent's original ground of appeal in respect of this issue, as identified in the application for permission to appeal to this Tribunal from the First-tier Tribunal, dated 15 June 2022

> 'Given that the application was made to revoke a deportation order the relevant tests are whether the immigration rules apply and if not, whether there are **very compelling circumstances** over and above the exceptions to deportation. The FTT has not addressed whether the immigration rules are met or applied the test of very compelling circumstances. It has been considered only under article 8 outside of the rules/ proportionality. It is submitted that this amounts to a material error of law.'
>
> [Emphasis added]

56. It is appropriate to observe that the Judge referenced, and applied, the very compelling circumstances test at [91] of her decision.

57. By renewed grounds of appeal filed with this Tribunal, dated 8 August 2022, the respondent maintained that the Judge failed to apply the correct test - this time identified as 'exceptional circumstances' - and only considered the matter by means of an article 8 proportionality test.

58. The present deportation regime was described by the Lord Reed in *HA (Iraq) v. Secretary of State for the Home Department* [2016] UKSC 60, [2016] 1 WLR 4799, at [46], *inter alia* as placing upon appellate tribunals, as independent judicial bodies, a duty to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the fact and their understanding of the relevant law being mindful of the weight to place upon the respondent's general assessment of proportionality.

59. Consideration of an application to revoke a deportation order falls within the present deportation regime.

60. Paragraph 391 of the Rules is concerned with applications to revoke a deportation order made by people who have been deported following conviction for a criminal offence. The rule establishes the continuation of a deportation order will be the proper course for the appellant, who was

sentenced to less than four years imprisonment, unless ten 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. Consideration is to be given to whether continuation would be contrary to the Human Rights Convention or there are other exceptional circumstances that mean continuation is outweighed by compelling factors.

61. Whilst paragraph 391 establishes a presumption against revocation within the ten-year period, it does not establish any presumption in favour of revocation after the passing of ten years. The question of revocation remains one dependant on the circumstances of an individual case: *EYF (Turkey) v. Secretary of State for the Home Department* [2019] EWCA Civ 592, [2019] Imm. A.R. 1117.

62. In appeals brought from outside of the United Kingdom, the approach established by section 117C of the 2002 Act continues to apply: *IT (Jamaica) v. Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240. The appellant remains 'liable to deportation' within the meaning of section 117B(6) of the 2002 Act notwithstanding that deportation has already taken place.

63. As recently confirmed by the Court of Appeal in *Yalcin v. Secretary of State for the Home Department* [2024] EWCA Civ 74, *per* Underhill LJ at [29], it is good practice for a tribunal judge to refer to the statutory provisions of Part 5A of the 2002 Act, since that entails a specific recognition that the principles stated in the deportation section of the Rules are not merely a matter of policy but are mandated by Parliament. Since Part 5A is to identical effect it is not an error of law to refer only its provisions, and not expressly reference the related Rules.

64. The appellant accepted before the First-tier Tribunal that she could not secure any benefit from paragraphs 399 and 399A (section 117C(4) and (5) of the 2002 Act). In. The circumstances there was no requirement for the Judge to laboriously address these statutory provisions and Rules simply for the sake of explaining why the appellant was correct as to her concession.

65. So what test is to be applied when assessing the weight to be given to the public interest when balanced against the interests of the person seeking revocation and their family? The approach to the question was addressed in *IT (Jamaica)* where the Court of Appeal considered various judgments, including *ZP (India),* in which the challenged decision pre-dated the coming into force of Part 5A of the 2002 Act. It should be noted that *IT* was sentenced to 42 months' imprisonment and asserted reliance upon section 117C of the 2002 Act consequent to family life

with a wife and son. Thus, the focus of the Court of Appeal was, in part, directed to the 'unduly harsh' test in section 117C, which is not applicable to the appellant's matter.

66. The Court of Appeal confirmed at [3] that when considering an application to revoke a deportation order, section 117C is to be read in the context of the Immigration Rules, and so 'the undue harshness standard in section 117C of the 2002 Act means that the deportee must demonstrate that there are very compelling circumstances for revoking the deportation order ...' This is consistent with 'exceptional circumstances' in paragraph 391 of the Rules being defined by reference to 'compelling factors'.

67. Mr Melvin relied upon *ZP (India)*, at [24]:

> "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."

68. Paragraph 24 of *ZP (India)* must properly be together with the next paragraph:

> ‘25. ... Where there are compelling favours 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 readmission: otherwise it would be a mere revolving door. ...”

69. In *IT (Jamaica)*, at [38], Arden LJ (as she then was) noted Underhill LJ as identifying in *ZP (India)* that in post-deportation revocation cases very compelling reasons for revocation were required: “It is only where the tribunal is persuaded that, exceptionally, there are very compelling reasons which outweigh the public interest in the order continuing for the full prescribed term that such revocation may be allowed.” As confirmed in *EYF (Turkey)* the test is not altered upon the ten-year restriction passing in time. This is supported by *IT (Jamaica)*, at [56].

70. Whilst the Judge did not refer to exceptionality, it is clear that the test she applied was ‘very compelling circumstances’, see [91]. The respondent’s case is not that the Judge gave lip-service to the test. The case advanced is a full-bloodied challenge to the Judge materially erring in considering whether very compelling circumstances existed in this matter. For the reasons detailed above, the test applied was in accordance with precedent authority. Materially, it was the correct test. Consequently, this challenge to the Judge’s decision must fail. The respondent’s appeal is dismissed.

71. Mr Turner properly accepted, and both the appellant and Courtnell should be aware, that the appellant is successful only in respect of her application to revoke the existing deportation order. Paragraph 392 of the Rules confirms that revocation of a deportation order does not entitle the person concerned to re-enter the United Kingdom. It simply renders the appellant eligible for admission under the Rules.

Rule 15(2A)

72. The appellant filed a rule 15(2A) application to adduce further evidence. As the respondent’s appeal has been dismissed, there is no requirement that I consider the application, save that I observe medical evidence has been filed confirming a deterioration in Courtnall’s physical health which is unlikely to improve.

Notice of Decision

73. The decision of the First-tier Tribunal dated 27 May 2022 did not involve the making of an error on a point of law. The decision therefore stands.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber **6 March 2024**