Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17005/2017

THE IMMIGRATION ACTS

Heard at Field House, London	**Determination Promulgated**
On Wednesday 29 January 2020	**On Friday 28 February 2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR RANJEET SINGH

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Singh, Counsel instructed on a direct access basis
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

BACKGROUND

1. By a decision promulgated on 28 November 2019, I found an error of law in the decision of First-tier Tribunal Judge Colvin allowing the Appellant's appeal. I therefore set aside that decision and gave directions for a resumed hearing of the appeal. My error of law decision is annexed to this decision for ease of reference.

2. The facts of the Appellant's case are set out at [2] to [5] of my error of law decision and I do not need to repeat those matters. I emphasise five factors at the outset. First, this is an appeal against the revocation of a deportation order which was made on 31 June 2007 and therefore over twelve years ago. Second, the revocation decision in this appeal was made on 23 November 2017. Third, although the appeal against deportation was dismissed at the time when the deportation order was made, the Appellant's appeal against an earlier decision refusing entry clearance was allowed, although I accept only to the extent of requiring the Respondent to consider whether to revoke the deportation order. Fourth, the Appellant returned to India voluntarily in May 2013. He has therefore been outside the UK and separated from his family for over six years. Fifth, although [H] was originally thought to be the Appellant's stepson, a DNA test following the Appellant's return to India has established that the Appellant is [H]'s biological father.

3. The directions given in my error of law decision permitted the Appellant to adduce further evidence. The Appellant's appeal is, to all intents and purposes, managed by his wife. She is unrepresented although the Appellant has instructed Counsel for the hearing. She submitted additional evidence on 27 January 2020 which was itself outside the period provided for filing. Furthermore, she submitted a social worker's report only on the day immediately prior to the hearing. That report was signed on 13 January 2020 and there was no explanation why it was not filed earlier. However, Ms Everett accepted that the evidence was relevant to my consideration (particularly the social worker's report) and did not object to it being adduced late. She has had the opportunity to read and consider the evidence.

THE ISSUES AND LEGAL FRAMEWORK

4. As this is an appeal against a decision to revoke a deportation order, paragraphs 390 and 391 of the Immigration Rules ("the Rules") apply. Those paragraphs read as follows so far as relevant:

> **Revocation of deportation order**
> 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

…

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."

5. As paragraph 390A makes clear, in circumstances where paragraph 398 applies, the usual considerations in relation to the making of a deportation order are applicable. At [23] of my error of law decision, I accepted the Respondent's submission that paragraph 398(b) of the Rules applies in a deportation case. In fact, the paragraph is A398(b). The relevant paragraphs of the Rules which therefore apply read as follows:

"A398. These rules apply where:

…;

(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

…; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm …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.

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

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

…; and in either case

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

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

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

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

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

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

6. I am also required to have regard to the factors in Section 117A-D Nationality, Immigration and Asylum Act 2002 ("Section 117"). Section 117C is of particular relevance and reads as follows (again so far as relevant):

> "117CArticle 8: additional considerations in cases involving foreign criminals
> (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.
>
> …
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualifying child and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal 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.
>
> …"

Although the main focus in deportation cases is Section 117C, the factors set out in Section 117B are also relevant (so far as those are not expressly excluded in deportation cases). I refer to those as necessary when reaching my assessment.

7. It is appropriate to note that, although the Appellant was sentenced to a term of imprisonment of under twelve months, and that the deportation decision pre-dated the coming into force of the provisions in the Rules at paragraphs 398 onwards, he is nonetheless a person to whom paragraph 398 applies as the Tribunal in his appeal in 2016 found that the offence was one which caused "serious harm". There was a challenge to that finding but permission to appeal was refused. That finding therefore stands. That is also relevant to the applicability of Section 117C.

8. The Rules and Section 117C are in materially the same terms. Where, as here, a person is sentenced to a term of imprisonment of under four years to which paragraph 398 applies, the Tribunal is required to consider whether either of the

two exceptions at rule 399/exception 2 ("Exception 2") or rule 399A/exception 1 ("Exception 1") are met. If they are not, the Tribunal is required to consider whether there are very compelling circumstances over and above those exceptions. Although, as appears at Section 117C (6) (and the corresponding provision in the Rules) on the face of the legislation this provision applies only to those sentenced to at least four years, the Court of Appeal held at [24] to [27] of its judgment in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 that this was an unintentional drafting error. Accordingly, that same "fall-back" protection applies equally to those in the position of the Appellant.

9. I note that there is no issue as to Exception 1. The Appellant resided in the UK between August 2003 and May 2013. None of his residence was lawful. It is not submitted that he was ever socially and culturally integrated in the UK. Nor can it be suggested that there are very significant obstacles to his integration in India. He has been back there now for over six years. The focus is rather on the impact of separation on his wife, his stepson and, most importantly, his biological son [H]. Rule 399 and Exception 2 are therefore the relevant provisions.

10. As to the meaning of unduly harsh within those provisions, the Supreme Court gave guidance at [23] of its judgment in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 ("KO (Nigeria)") as follows:

> "On the other hand the expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' under section 117B (6), taking account of the public interest in the deportation of foreign criminals. Further the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C (1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent…"

11. At [27] of the judgment in KO (Nigeria), the Court expanded upon what is meant by "unduly harsh" by reference to what was said by this Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) as follows:

> "…'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

12. If I am not satisfied that Exception 2 is met in this case, I need to go on to consider whether there are nonetheless very compelling circumstances over and above the exceptions, in practice here, Exception 2. That requires me to consider all

factors, including the weight to be given to the public interest. That is important in this case, not only because I can there consider the nature and seriousness of the offence which led to the Appellant's deportation but also the passage of time since that offence was committed and the deportation order made and the length of the separation of the family members.

13. In relation to the passage of time since the making of the deportation order, I refer to what I said at [15] to [24] of my error of law decision and the cases to which I there have regard. I do not need to repeat any of that. I simply observe that the relevant period for these purposes is the twelve years since the deportation order was made. Nonetheless, and although it is the case that this exceeds the ten years mentioned in paragraph 391(a) (cited above), there is no presumption that this leads to the revocation of the deportation order. The materiality of this factor is one to be taken into account, but it does not necessarily lead to revocation.

14. In Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60, the Supreme Court advocated a "balance sheet approach" when considering the Article 8 issue more widely; in other words, setting out on the one side the nature and level of the interference with private and family life and on the other the nature and extent of the public interest.

15. In short summary, therefore the issues to be determined are:

    (a) Is it unduly harsh for [H] to go to India to be with the Appellant or to continue to live in the UK without him?

    (b) Is it unduly harsh for the Appellant's wife to go to India to be with him or to continue to live in the UK without him?

    (c) If the answer to either or both of those questions is "yes", the Appellant is entitled to succeed.

    (d) If the answer to both of those questions is "no", I have to go on to consider whether there are very compelling circumstances over and above Exception 2. That does not preclude me factoring into that assessment, considerations which arise also within that exception.

EVIDENCE

16. I have before me the Appellant's bundle of evidence which was before the First-tier Tribunal to which I refer as [AB/xx]. I also have supplementary evidence to which I have referred at [3] above. I also have the Respondent's bundle of evidence to which I refer as [RB/xx]. I have read and considered all the evidence but need only refer to that which is relevant to the issues I have to decide.

17. I heard oral evidence from the Appellant's wife, [MK]. The Appellant's son, [H], also attended the hearing. Ms Everett indicated that she had no need to cross-examine [H] but I was told that he wished to address me, and I agreed that he could do so. It was though clear when he started to give evidence that he was too nervous and distressed to do so and therefore his evidence was brought to an end. I make clear, particularly in relation to [H] that I have read his statement very carefully before making my decision and I have also played close attention to what is said in the social worker's report about the impact on him of separation from his father.

18. I have an undated, signed witness statement from the Appellant at [AB/22-32] which is detailed. There was no application for the Appellant to give video evidence from India. However, none of what he says is contentious. The statement provides a detailed history of his time in the UK and since.

19. In relation to the offence of which the Appellant was convicted, he was sentenced in the Croydon Crown Court on 15 June 2007. The conviction was for the possession of a false identity document (a counterfeit ARC card). He was sentenced to and served four months in prison. The sentencing remarks appear at [RB/C1-3]. The Judge gave a lesser sentence because of the Appellant's age. The Appellant was said to be eighteen at the time although I note that his marriage certificate at [AB/53] (issued in India) shows that he was born in 1982 and not 1988 as given in the sentencing remarks. It appears therefore that he lied about his age (probably to the authorities in the UK). The Judge recommended the Appellant for deportation. As the Judge noted, the Appellant was in the UK illegally and had been using the false document to work illegally. The Judge said that "the only purpose of your being here was to try and get round the immigration laws for economic motives".

20. The Appellant accepts that he "did wrong" but points out that his "offence was at the lower end of the scale". He believes "the punishment [his] family has suffered goes way beyond [his] offence". At [17] of the statement he says this:

> "I did not kill or hurt anyone. I did it to get by but since I did it and was charged I accepted I was wrong and is sorry for it. I know this. That's why I left the United Kingdom, as I wanted to be a good person and do everything properly."

21. The Appellant reports that he is living in a village in India with his parents which he says "is not ideal at all".

22. Dealing with his family life, the Appellant met [MK] in 2004 and they became friends. She had been married before and suffered an abusive relationship. As a result, she took time to trust anyone else. They entered into a relationship in 2005 and started living together in 2010. They married in India in June 2013. I note from the marriage certificate that [MK] was born in India.

23. [MK] has two sons, both of whom were thought to be from her previous relationship. However, a DNA test conducted in July 2017 established that [H]

is the Appellant's son. I note incidentally that this also gives the Appellant's date of birth as 1982 and not 1988. [H] was born in June 2006. [MK]'s other son was born in May 2000 and is now an adult.

24. [MK] has provided a statement at [AB/33-42] which is unsigned and undated. However, she adopted its contents as true when giving oral evidence. She explained that some of it was put in legal language which she did not entirely understand and therefore had also handwritten a letter which was submitted as part of the additional evidence. The statement at [AB/33-42] largely replicates the Appellant's witness statement. That does not mean I give it any less weight, but I pay more attention to her handwritten statement as that gives her evidence in her own words.

25. [MK] confirms what is said by the Appellant about their relationship and her previous marriage. She says she did not know of the Appellant's unlawful immigration status when she entered into the relationship and when [H] was born. She did not know until he was arrested for illegal working. She says that although the Home Office wanted to remove the Appellant to India at the time, they could not do so as they could not get documents for him. He was therefore released on reporting conditions (although detained periodically for removal).

26. [MK] also says in her handwritten statement, that the Home Office muddled her husband's case with another person and tried to deport him under a different name. This is not particularly relevant but is possibly explained by the fact that the Appellant was using false documents to work illegally and that the Home Office was unable to establish his real identity. It appears from her handwritten statement that this is probably the case as she says that she had to go back to India at the time to get her husband's birth certificate so that he could apply for a passport. Whatever the position, the Appellant was able to continue to live in the UK with her and the children for a further five years whilst the Home Office tried to deport him. When he obtained his passport, the Appellant left voluntarily.

27. In terms of the impact of deportation on [MK] herself, she says that she is very depressed, has anxiety and trouble sleeping. She has been referred for counselling. She says her mental health is starting to be affected.

28. The impact on [MK]'s health is borne out to some limited extent by a letter from Shereen Everett, a Trainee Psychological Wellbeing Practitioner with West London NHS Trust dated 23 December 2019. That letter follows an initial triage assessment appointment on 17 December 2019. [MK] reported to the practitioner that she was "feeling lonely and low in mood" due to the separation from her husband. She said that this was impacting "several areas of her life" but that, nonetheless, she remained able to care for [H].

29. The practitioner reported, based on completion of a questionnaire, that [MK] is "experiencing moderately-severe symptoms of low mood" and "severe

symptoms of anxiety". [MK] was not considered to be a suicide risk or a risk to others or herself. A risk management plan was agreed. [MK] elected to receive "telephoned guided self-help" and has been referred for that. There is no evidence about any past contact with mental health professionals during the period of her separation from the Appellant nor that [MK] is being treated with any medication for her condition.

30. [MK] is in full-time, permanent employment. She owns her own house.

31. [H] has provided a statement at [AB/47-52] which he signed at the hearing before me and is therefore dated 29 January 2020. Again, this largely replicates the statement of his parents and cannot have been written by him. For that reason, I do not need to set out much of what is in this statement.

32. [H] describes the continuing contact between him (and his half-brother [M]) and the Appellant (which is as also said in the Appellant's and [MK]'s statement). They contact each other regularly using Videocall, Whatsapp and Skype. [H] and [M] have been to India twice, in January 2014 and late 2015. They did not like India. [H] says that he could not live there. He says this:

> "India is not the same as the United Kingdom. The United Kingdom is developed and India still has a long way to go before it becomes anything like the level of development in the United Kingdom. In the United Kingdom, there are lanes, law and order etc but in India it is chaos."

I express some doubt about whether those words were written or spoken by a child of [H]'s age. Nevertheless, I accept that the point that there is a very different culture and way of life in India to which he would not be accustomed.

33. The better evidence of [H]'s feelings about separation from his father is to be found in the Independent Social Work Report of Sarah Edwards, dated as signed on 13 January 2020 ("the Report"). I note and accept Ms Edwards' professional qualifications and experience. I did not find helpful what she says about the impact of separation or a move to India being "unduly harsh" for [H]. That is a matter for my assessment and not for her to decide. I accept however as Mr Singh submitted, that she may have carried out the assessment as if this were an appraisal of the situation for a Family Court case rather than applying the test set out in the Rules and Section 117C.

34. Before I set out what is in the Report, I have regard to a letter from [H]'s school, undated, and written by Ms Lallian, Business Studies and Psychology Teacher, Head of Year 9. She there describes [H] as being, in the past, "a positive and hard working student". However, in the current year the school has noticed "a big change in his emotional state as well as his attitude towards learning". The school is understandably concerned about what is happening in his life outside school. The school has noticed that [H] is withdrawn, does not engage with adults as he used to, looks constantly tired and "not as smart" and is becoming emotional in school. Although he now has 91% attendance, the school

considers him to be a persistent absentee. Ms Lallian also points out that this is a critical year for [H] as he has to choose his GCSE options.

35. Although the letter is undated, I assume that the reference to "this year" is to the academic year 2019-2020 given when the letter was produced and that [H] is shortly to select his GCSEs (as [MK] said in oral evidence). It appears from the letter and from [MK]'s oral evidence that [H] is getting help with his problems. [MK] said he is being given special classes and counselling, particularly from his head of year (I assume Ms Lallian) and other teachers. The school is referring [H] for counselling but talking to him and giving him special care in the meanwhile. [MK] said that [H] was "doing OK" with this additional help.

36. As Ms Everett pointed out in submissions, the problems which the school identifies could be a matter of [H]'s age. He is now aged thirteen. However, the Report records that [MK]'s view is that these are caused by the "impact of the immigration case". As was put to me by Mr Singh, it is the ups and downs of appeals being allowed and then decisions reversed.

37. Ms Edwards spoke to [H] about school. He told her he "enjoys it". He has support from three teachers in particular. What is said at [8.7.4] to [8.7.6] of the Report paints a picture of a child who is relatively well-adjusted. However, when Ms Edwards discussed with [H] his wishes and feelings, he said that he is "scared" that [MK] will stop trying to get his father to the UK and that this Tribunal will reject his father's case. That does indicate a preoccupation with the appeal proceedings. He does however identify a support network of people who he goes to and that he has outlets when he feels upset of going to the temple or listening to music. When asked what he would wish for if he had three wishes, the first is "for his Dad to come back".

38. What is said by Ms Edwards at [9.1.2] and [9.1.3] of the Report is particularly telling. She points out that the current contact via social media "limits his ability in having a proper meaningful relationship with his father". Although she notes the stability and security which [MK] is able to offer [H] she says that "[MK] and [H] advise that they do not feel that the current situation is something they can cope with for much longer, and they both suffer a high level of anxiety and pressure concerning the continued legal process in respect of Mr Singh." At [9.1.3] she records [H] as saying that "things seem 'weird and confusing' explaining that a couple of months ago 'it was good and I was happy' with the previous court decision but then the latest court decision changed this". All of that points to it being the uncertainty caused by the ongoing separation and appeal proceedings which is adversely affecting [H].

39. Ms Edwards very helpfully sets out in tabular form the pros and cons of [H] remaining in the UK without his father, having his father return to the UK to be with him, and of the family moving to India. Although Ms Everett did not press the option of the family relocating to India (although did not concede that

it would be unduly harsh for them to do so), I record in summary form what Ms Edwards says about all three options.

40. If [H] remains separated from his father, he would continue to have the support of [MK] and others from which he currently benefits but it would be contrary to his wishes. He would also continue to have regular contact but limited as it is now. His emotional wellbeing may continue to be impacted as it is now by the uncertainty and that may also impact his educational attainment, although [H] is now receiving support from the school. [H]'s "identity" would also be impacted by the separation from one of his parents. He would however continue to benefit from the stability and security that [MK] offers him. [H] is fully integrated within the UK. There are no health needs identified. The impact in relation to [H] for the Appellant is that he would not be able to parent him. [MK] could continue to do so although without the benefit of shared parenting.

41. If the Appellant were allowed to return to the UK, this would accord with [H]'s wishes. The Appellant would be able to care for [H] and parent him. [H] would have the support of his father which would remove the "current triggers for his negative feelings". [H]'s education and integration in the UK would not be adversely affected. [H]'s identity would be informed by his father and they would be able to develop a father-son relationship. Stability and safety would be provided by both parents.

42. If the family were to relocate to India, [H] would be able to live with both parents. However, this would sever his integrative links with the UK and also his sibling relationship with his elder half-brother ([M] is now a police officer and has said that he would not leave the UK). [H] knows nothing about India. That is likely to impact on his emotional wellbeing. [H] would also lose his friends in the UK and his support network here. The educational system in India is likely to be different and a move there is therefore likely to negatively impact on [H]'s education. [H] would lose his home, community and identity as a British citizen. Stability and safety would also be impacted. [MK] says she has no home or employment in India.

43. Little is said about the Appellant's stepson, [M]. The Report indicates that he would be unlikely to go to India were the family to move there. [MK] said in her oral evidence that [M] and [H] have a good relationship. However, when asked whether [M] helps [H] with his homework and the such like, she said "not much" as [M] is nineteen and has his own life. [MK] also says in her handwritten statement that [H] becomes upset because [M] has a relationship with his own father (I assume [MK]'s previous husband).

SUBMISSIONS

44. Ms Everett relied on the Respondent's decision under appeal. She also relied on my error of law decision in relation to the approach to be taken. No issue is taken with my decision as to the way in which the law is to be applied. Ms Everett

accepted that the public interest is lessened by the passing of time, but it does not evaporate entirely. It is not a "neutral square one".

45. Although Ms Everett did not concede that it would be unduly harsh for [MK] and [H] to go to live in India, she focussed her attention on the option of them staying in the UK and remaining separated from the Appellant. She made clear that none of the facts as set out in the evidence were disputed. She also acknowledged that [H] wishes to have his father in the UK.

46. However, she also pointed out that the evidence in relation to [H] as contained in the letter from the school and the Report is "not straightforward". She submitted that at the age he is, [H] may have problems in any event. The teenage years can be difficult ones. The evidence was that [H] is "doing OK" with the help from the school.

47. Ms Everett accepted that the family wish to be together. However, she said that the effects of deportation are "routinely upsetting and challenging" and the upset caused by deportation could not of itself be unduly harsh. She submitted that the test was not met on the evidence here.

48. When looking beyond Exception 2, Ms Everett submitted that I should take into account that the decision to deport was upheld. That was a factor of some weight. The nature and seriousness of the underlying offence was a further relevant factor. She accepted that weight had to be attached to family life but submitted that this could be continued as it is now even if that is not the way in which the family wishes to conduct it. I should not ignore that family life is able to be maintained.

49. Mr Singh adopted his skeleton argument before the First-tier Tribunal. I do not need to set out what is there contained as most is directed at the legal provisions as to which there is no dispute. Mr Singh accepted that the approach was as set out in my error of law decision. The relevant approach, Rules, statute and caselaw are as set out at [4] to [15] above.

50. Mr Singh's oral submissions were largely directed at the option of [MK] and [H] going to live in India even though Ms Everett did not press that option. I have taken note of what he said in that regard which I consider below but, in my view, the more pertinent parts of his submissions relate to the option of the "status quo", in other words, the Appellant remaining in India and [MK] and [H] remaining in the UK.

51. In relation to Exception 2 and whether the impact is "unduly harsh", Mr Singh relied on the Report. He emphasised in particular that, although [H] has been separated from the Appellant for about six years, he has only become aware in that time and more recently that the Appellant is his biological father. That has intensified the impact of separation. That separation has prevented [H] from being able to form the bond with his biological father in the way that his elder brother is able to do with his father. Mr Singh submitted that the effect of

continued separation is "bleak", particularly taking into account the effects on [H]'s education.

52. Mr Singh also urged on me that [H] should not be blamed for the offence committed by his father. As I pointed out, however, that is not the issue. Section 117C sets out the test to which I am bound to have regard which applies equally to a child impacted by deportation. I accept that punishment of the Appellant by deportation has an impact on the child, but that is provided for by the law. This is not a case where the child himself is threatened with removal.

53. When assessing whether there are very compelling circumstances above Exception 2, Mr Singh urged me to take into account the wishes and feelings of [H] as well as his emotional needs and the impact on his education, particularly at such a crucial time. His best interests are, I accept, a relevant factor in that assessment.

54. As to the passage of time, Mr Singh pointed to the reference to ten years in paragraph 391. He said that this was an indication of a proportionate period to maintain deportation in a "normal case". There was a lessening of the public interest.

DISCUSSION AND CONCLUSIONS

Exception 2: Unduly Harsh

55. I begin with the impact of deportation on [H] as he is the focus of the Exception 2 case. I accept that it would be difficult for him to relocate to India. He has only ever known UK culture. He has grown up here, has undergone all his education here and has friends here. He is clearly fully integrated in the UK. He has visited India twice but did not like it. That is not however determinative. He has two parents who both come originally from that country and who could no doubt help him to adapt to life in India. I recognise that [MK] has been in the UK for many years but there is no evidence to suggest that she is not still familiar with life in India, having been born and having grown up there.

56. I accept that a move to India would have a negative impact on [H]'s education. That is particularly so given the stage he has reached in his education. He is about to embark on his GCSE courses. However, the Appellant has produced no evidence about the education system in India. There is therefore limited information as to the differences which enable any detailed assessment of the extent of any impact. There are no health concerns. I do accept however that the impact is negative and comes at a particularly important time in [H]'s life.

57. I accept that the impact on [H] of such a significant move is likely to be greater given his age. He is not a very young child who would be expected to adapt more quickly. I also accept that [H] would be upset by separation from his half-brother, [M], who is likely to stay in the UK. However, I have little information about [M] or the closeness of the relationship between them.

58. Most of the impacts I have identified are ones which are an anticipated consequence of deportation. However, based on the combined effect of [H]'s age, his lack of knowledge of Indian culture, his assimilation to British culture, his separation from his elder brother and, most importantly, the adverse effect on his education at a crucial point in that education, I accept that it would be unduly harsh for [H] to go to India.

59. That is, however, not the end of the matter. I have to consider whether it would be unduly harsh for [H] to remain in the UK whilst the Appellant remains in India.

60. The high point of the Appellant's case in that regard is contained within the evidence from the social worker and the letter from the school. Unusually, in this case, however, I have the benefit of hindsight as [H] has been separated from the Appellant for nearly half his life. The evidence from the school in particular suggests that it is only recently that [H] has been adversely affected by the separation in terms of his behaviour. I accept Mr Singh's submission that this may be in part due to the discovery that the Appellant is his biological father although that is not strongly supported by the evidence (and that discovery was made as long ago as July 2017). I also accept as Ms Everett says that this may be due to [H]'s age. It may well be a combination of those factors.

61. However, the evidence points to the more significant cause of the recent downturn being the appeal proceedings themselves. One can readily understand that a child of [H]'s age, having learned that his father may now be in a position to apply to come back to the UK and having been excited by that prospect would suffer the disappointment of a reversal of that decision more acutely. That does not however indicate that the impact of the deportation itself is unduly harsh.

62. I have carefully considered all the evidence about [H] and the impact on him over the time since the Appellant was deported. I accept that he has found the separation very difficult and the consequences are undoubtedly harsh, even very harsh, but the evidence does not show that those are of the elevated level required to establish that the impact is unduly harsh.

63. I can deal with the impact on [MK] more swiftly. I accept that she has a genuine and subsisting relationship with the Appellant notwithstanding the lengthy separation. [MK] cannot meet the test in paragraph 399(b) as her relationship with the Appellant was formed when the Appellant was in the UK unlawfully. That does not however prevent her meeting the test under Section 117C (5) (Exception 2) if it would be unduly harsh for her to go to live in India with the Appellant or to remain in the UK without him.

64. In terms of living in India, [MK] was herself born there. She has been in the UK for over twenty years. According to her statement she moved here in 1997. Although she is now British, she therefore lived in India for over twenty years also (she was born in 1972). She grew up there. I have no information about any family remaining there apart from the Appellant, but she will at least be

familiar with the culture. She has been to visit the Appellant in India. There is evidence that she is content to travel there alone as she did when she needed to get the Appellant's birth certificate. Whilst she would be leaving behind her home and job that is no different to any other deportation case. Indeed, it is not any different to a removals case where the test is one of whether there are any insurmountable obstacles to family life being continued in another country. Here, that test is not met on the evidence in relation to [MK] (leaving aside the position of [H] who I have accepted cannot be expected to go to India). It follows that it is not unduly harsh for her to go to live in India.

65. As to [MK] remaining in the UK, leaving aside for a moment the position of [H], I do not accept that the evidence shows that it is unduly harsh for her to continue as she has done for the past six years or so. She is said to have some problems with low mood and anxiety but there is limited evidence about this, such as how long the condition has lasted, and no evidence that she has been receiving treatment for it until very recently. It may well be as is said in relation to [H] that it is the "ups and downs" of the appeal process and the uncertainty which has had the greater effect, particularly given the timing. In any event, the evidence shows that she remains able to parent [H] and to continue to work. The evidence does not show that the high threshold in Exception 2 is met so far as the impact relates to [MK] alone.

Very Compelling Circumstances

66. For those reasons, the Appellant cannot show that Exception 2 is satisfied. I therefore turn to consider whether there are very compelling circumstances above Exception 2. In so doing, I take into account what I have already said about the impacts on [MK] and [H]. I have accepted that it would be unduly harsh to expect [H] to go to India to live with the Appellant. I have also accepted that the impact of continued separation is very harsh but not unduly so. Although I have concluded that the impact of continued deportation on [MK] is not unduly harsh, nonetheless, I have accepted that she is in a genuine and subsisting relationship with the Appellant and that she is finding the continued separation difficult.

67. I have regard to [H]'s best interests. In this regard, I have no hesitation in accepting the social worker's evidence that it is in his best interests to remain in the UK living with and with the support of both parents. Although I do not accept the point made about the loss of his father's identity if separation continues as [MK] herself originates from India and therefore can assist in that regard, I accept that it is [H]'s very strong wish for his father to come to the UK and I can readily accept that it is generally in a child's best interest to have both parents with him.

68. I am bound to apply Section 117 which includes not only Section 117C but also Section 117B. In particular, when considering the weight to be given to the Appellant's family life (and that of his family members in the UK), I am required to give little weight to a family life which was formed whilst here

unlawfully. I accept that the Appellant's family life with [MK] falls into that category as does his life with [H]. However, this is an unusual case. Although the Appellant's stay in the UK was wholly unlawful, his relationship with [MK] and [H] (and to the extent relevant [M]) has been developed and strengthened when he has been outside the UK and therefore not in the UK unlawfully. That is particularly relevant in this case as the Appellant and [H] have discovered since the Appellant left the UK that they are father and son. I also give more weight to family life in this case because the family has maintained a strong relationship notwithstanding the geographical separation and infrequent direct contact. There is very clearly a strong family bond.

69. Balanced against that family life, I have to set the public interest. I recognise that Section 117B has application here also due to the Appellant's prior unlawful residence in the UK. The maintenance of effective immigration control is relevant not simply based on the unlawful residence but also the fact of using a false document in order to work illegally when the Appellant had no right to do so. That is undermining of the immigration system.

70. I also accept that Section 117C is relevant. In this regard, I do have some concerns about whether it can really be said that the offence committed was one which caused serious harm. That is the only basis on which it can be said that the Appellant is a foreign criminal within the definition in Section 117D. However, that was a finding made by an earlier Tribunal and the Appellant was refused permission to appeal that finding. It is also a relevant factor when looking at revocation of the deportation order as it is part of the circumstances of the initial deportation.

71. Serious harm does not in any event denote only harm in the sense of violence but also societal harm. It could not sensibly be said, for example, that the supply of Class A drugs is not an offence involving serious harm (although in practice that is unlikely to be relevant as the sentence is likely to exceed the minimum). It can therefore be said that an offence which has an impact on the UK economy by illegal working using false documents is one which causes serious harm. I also note that the sentence was reduced as a result of the Appellant's age and that he lied about his age. He was in fact over 18 at the time of the offence and may well have been sentenced to 12 months in prison had his true age been known. For the reasons I have given in relation to Section 117B, the offence of which the Appellant was convicted is one which did cause harm to the immigration system, whether or not that could be described as serious. It was not in any event suggested to me that Section 117C should not be applied. Mr Singh's submissions proceeded on the basis that it applies.

72. The nature of the offence is however a relevant consideration when it comes to considering whether it is proportionate to refuse to revoke the deportation order. The more serious the offence committed by the foreign criminal, the greater the public interest in deportation. Whilst, for the reasons I have explained, the offence is one which is undermining of immigration control and

to that extent serious, it does not fall at the higher end of the spectrum of seriousness, as is reflected by the sentence which was imposed.

73. Moreover, the offence was committed in 2007 and therefore over twelve years ago. It is the Appellant's only offence (other than to remain in the UK without leave). For the reasons I gave in my error of law decision, the passage of time does not create any presumption that the time has come to revoke the deportation order. However, it is relevant that the Respondent indicates that ten years is an appropriate starting point for consideration whether to revoke the deportation order in circumstances where the sentence is under four years.

74. As the Rules now provide, after the period of ten years, each case has to be considered on its own facts. I have regard in this context to what is said in the Rules about the relevant factors. Those include the grounds on which the order was made to which I have already made reference, and the maintenance of effective immigration control to which I have also had regard. Balanced against those considerations are the representations in favour of revocation and the interests of the Appellant including any compassionate circumstances. When the Respondent is carrying out the exercise of considering revocation, she does so based on paragraphs 399 and 399A of the Rules which largely replicate the exceptions in Section 117C. As is made clear at paragraph 390A, if those exceptions do not apply, it will only be "in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other considerations". That in essence mirrors the assessment whether there are very compelling circumstances over and above the exceptions in Section 117C.

75. As such, the balance which I have to carry out remains between the circumstances over and above the exceptions (in this case Exception 2) as against the public interest.

76. In favour of the Appellant, I take into account in particular the adverse impact on [H] of continued separation, that he cannot be expected to go to live in India and also, to a lesser extent, the continued effect of separation on [MK]. I balance what are undoubtedly harsh or very harsh consequences for [H] against the nature and seriousness of the offence of which the Appellant was convicted now over twelve years ago. Although I also give weight to the maintenance of effective immigration control and the impact of the Appellant's offence in that regard (as well as his unlawful presence in the UK), the weight to be given to the public interest is reduced by the passage of time, the fact that the Appellant has committed no further offences and left the UK voluntarily. I also take into account the length of separation of the family to date and the strong family life which has continued and developed in that time, as well as the intensification of family life based on the discovery that [H] is the Appellant's biological son.

77. When the factors for and against are balanced, I am satisfied that there are very compelling circumstances over and above the exceptions which render the decision to maintain the deportation order disproportionate.

78. The consequence of my decision is that I consider that continued separation enforced by the deportation order is disproportionate. I emphasise however, particularly for the benefit of [H] and [MK] that the effect of my decision is only that to refuse to revoke the deportation order is disproportionate. It will be open to the Appellant thereafter to apply to join his family in the UK and my findings as to the proportionality of continued separation will obviously have a bearing but the issue of entry clearance is a matter which will be for the Respondent to consider when that application is made.

CONCLUSION

79. For the above reasons, I conclude that the Respondent's decision refusing to revoke the deportation order is disproportionate and therefore unlawful under the Human Rights Act 1998.

DECISION

The Appellant's appeal is allowed on the basis that the refusal of the Appellant's human rights claim made in the context of the decision refusing to revoke the deportation order is unlawful under Section 6 Human Rights Act 1998 (Article 8 ECHR).

Signed Dated: 12 February 2020

Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17005/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice, London
On Monday 25 November 2019

Determination Promulgated

…28 November 2019……

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR RANJEET SINGH

Respondent

Representation:
For the Appellants: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr B Singh, Counsel instructed on a direct access basis

ERROR OF LAW DECISION AND DIRECTIONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal even though the Secretary of State is strictly the Appellant at this juncture. The Respondent appeals against a decision of First-tier Tribunal Judge Colvin promulgated on 30 August 2019 ("the Decision")

allowing the Appellant's appeal against the Respondent's decision dated 22 November 2017 refusing his human rights claim made in the context of a decision maintaining a deportation order against him. The deportation order was made on 2 April 2008.

2. The Appellant is an Indian national. He first came to the attention of the UK authorities when he was arrested in August 2003 whereupon he claimed asylum. He was placed in the care of Social Services as he claimed to be aged only fourteen years. The asylum claim was later refused on non-compliance grounds, the Appellant having gone missing from the care of Social Services. The Appellant was arrested on 15 April 2005 for assaulting his landlord and again placed in care, but he failed to report. He was again arrested on 25 April 2007 and a counterfeit ARC card was found during a search of his home. He was convicted of possession of a false identity document and sentenced to four months' detention. He was also recommended for deportation. The Respondent gave the Appellant notice of her intention to deport him on 31 June 2007. His appeal was dismissed by the Tribunal by a decision promulgated on 7 January 2008.

3. In January 2011, the Appellant again claimed asylum which was refused in June 2011. He voluntarily returned to India on 13 May 2013. In July 2013, the Appellant's wife, who is a British citizen, sought revocation of the deportation order and in December 2013, the Appellant applied for entry clearance as a spouse of a British citizen. That application was refused but a subsequent appeal was allowed on human rights grounds in December 2014. On challenge of that decision by the Respondent, the appeal was allowed in October 2015 to the extent of requiring the Respondent to deal with the issue of revocation of the deportation order prior to dealing with the settlement application.

4. On 27 February 2016, the Respondent refused to revoke the deportation order. The Appellant's appeal against that decision was dismissed. A further application to revoke the deportation order on 29 August 2017 was refused on 23 November 2017.

5. The Appellant met his wife in 2004. She was at that time married but separated in 2008 and later divorced. The Appellant married his wife in India on 26 May 2013. His wife has two children, [M] born in May 2000 and [H] born in June 2006 who are both British nationals. Following DNA tests, the Appellant has now established that he is the biological father of [H]. The Appellant's wife was born in India but came to the UK in 1997 and was granted indefinite leave to remain based on her previous marriage in 1998. She became a British citizen in 2010. The Appellant's wife, stepchild and child have visited the Appellant in India. The children did not like India.

6. The Judge took into account the findings of the previous Tribunal in 2016 which included that the Appellant is in a genuine and subsisting relationship with his wife, his stepson and his own child (at that time believed to be his stepchild) and that it would be unduly harsh for the children to move to India. The eldest child (the Appellant's stepson) is no longer a minor. The previous Tribunal concluded,

however, that it was not unduly harsh for the children to remain in the UK without the Appellant. Judge Colvin adopted the previous Tribunal's finding that the Appellant falls within the definition of "foreign criminal" in Section 117D Nationality, Immigration and Asylum Act 2002 for the purposes of Section 117C of that Act ("Section 117C") because the Appellant had been convicted of an offence which causes serious harm.

7. The Judge concluded at [31] of the Decision that it would be unduly harsh for [H] to continue to live in the UK without his father, particularly in light of the passage of time since the deportation order was made.

8. The Respondent submits that the Judge has erred in her consideration of the passage of time, since the deportation order has only been enforced for six years (the Appellant having voluntarily departed the UK only in 2013). She places reliance on the Court of Appeal's judgment in Secretary of State for the Home Department v ZP (India) [2015] EWCA Civ 1197 ("ZP (India)") and EYF (Turkey) v Secretary of State for the Home Department [2019] EWCA Civ 592 ("EYF (Turkey)").

9. Permission to appeal was refused by Designated First-tier Tribunal Judge Macdonald on 1 October 2019 in the following terms so far as relevant:

> "... The Judge gave many reasons for concluding that the public interest in continuing the deportation order had significantly lessened (paragraph 25). Ten years had elapsed since the deportation order, the offence was some twelve years ago and it was the sole conviction of the appellant. The four-month detention sentence was at the lowest end of the scale for criminal offences and he had voluntarily returned to India and had not sought to return here unlawfully. The Judge also noted that since the previous appeal decision it has been confirmed that the appellant was indeed the biological father of [H].
> The Judge's reasoning is clear and cogent. Contrary to the grounds the Judge did not find that the signing of the deportation order was a determinative factor.
> The grounds do not disclose any arguable error of law."

10. Permission was granted by Upper Tribunal Judge Kekic on 17 October 2019 in the following terms:

> "The respondent challenges the decision of First-tier Tribunal Judge Colvin allowing this appeal on human rights grounds. The appeal is against the Secretary of State's refusal to revoke a deportation order.
> Arguably the judge failed to appreciate that the deportation order had been enforced six years ago even if it had been signed ten years ago and that, in any case, the passage of time does not diminish the public interest in maintaining deportation (ZP (India) [2015] EWCA Civ 1197 and EYF (Turkey) [2019] EWCA Civ 592).
> The grounds may all be argued."

11. The appeal comes before me to determine whether the Decision contains errors of law and if so whether the Decision should be set aside.

DISCUSSION

12. As Mr Lindsay pointed out, the Judge allowed the appeal on two bases. First, at [22] to [25] of the Decision, the Judge concluded that the "balance had shifted in favour of revocation" because "the public interest in continuing the order is now significantly lessened on the facts and due to the period of time that has elapsed" ([25]). Second, the Judge concluded that "continuation of the deportation order is disproportionate to family life under Article 8 for all the above reasons" ([33]).

13. As Mr Singh submitted and I accept, the Respondent's pleaded grounds are directed only at the first of those bases. However, I also accept Mr Lindsay's submission that, if the Respondent is right in her argument in relation to the first basis, it follows that this infects the second basis because that imports the Judge's reasoning as to the public interest in revocation. For reasons which I also set out below, there is in any event a free-standing error of law in the Judge's consideration of the human rights claim which is an obvious one even though not identified by the Respondent's grounds.

14. The Judges reasoning in relation to the revocation issue appears at [22] to [25] of the Decision as follows:

> "22. Since that appeal Decision [that is to say the appeal Decision in 2016] 10 years has elapsed from when the deportation order was made in May 2008 – indeed it is some 11 years and 3 months at the date of the hearing. In this context I have been referred to the recent case decision in *EYF (Turkey)* cited above which dealt with the proper construction of paragraph 391(a) of the Immigration Rules. It held at paragraph 28:
> *"Within the ten year period, it will be very difficult for other factors to counterbalance the presumptive effect of the Secretary of State's policy. That is consistent with the decision of this court in ZP (India). Once the ten year period has elapsed it becomes easier to argue that the balance has shifted in favour of the revocation on the facts of a particular case because the presumption has fallen away; but that does not mean that revocation thereafter is automatic or presumed. The question of revocation of a deportation order will depend on the circumstances of the individual case."*
> 23. In this case, an issue was raised in the previous appeal Decision as regards the claim that the appellant gave an incorrect age at the time of his conviction in order to gain the advantage of being sentenced as a young person. Ms Darkwah for the respondent raised it again in her submissions before me. However, I have no evidence before me to assess this and, in any event, it is clear from the decision of Immigration Judge Cockrill at paragraph 40 that he took the view that the proper course was "*to note the length of sentence that was imposed and not seek to go behind it in any shape or form or to speculate at all as to what would have happened to the appellant if, indeed, his true date of birth had been disclosed.*" I agree with this statement.
> 24. Another issue has been raised as to whether the appellant's offence is one that causes serious harm. Despite the respondent, as represented by Mr Lowton HOPO at the last appeal hearing, apparently taking the view that it did not do so in order to bring the appellant within the definition of a foreign criminal under section 117D(2(ii), Immigration Judge Cockrill decided otherwise as stated above. Whilst I fully accept that having a false identity document is a serious matter I am doubtful whether it can truly be said to 'cause serious harm'. However, I do not consider

that it is necessary for me to say anything further on this in my view there are weightier matters that need to be taken into account now at this point.

25. The first matter is that over ten years have elapsed since the deportation order. Second, this deportation order was made in respect of an offence committed some 12 years ago and it is the sole conviction of the appellant. Third, I accept the submission that the offence and the 4 month detention sentence received by the appellant is certainly at the lowest end of the scale of criminal offences. Fourth, the appellant voluntarily returned to India in light of the deportation order being made and has not sought to return to the UK unlawfully. In my view when taking all these matters into account I have no doubt in finding that the balance has shifted in favour of revocation on these facts particularly because the presumption for upholding the deportation order has now fallen away. In other words, whilst there was clearly a strong public interest in deporting the appellant as a foreign criminal following his conviction in 2007, the public interest in continuing the order is now significantly lessened on the facts and due to the period of time that has elapsed."

15. The Respondent's point is a short one. She says that, notwithstanding the use of the words "making of the deportation order" at paragraph 391 of the Immigration Rules ("the Rules"), that terminology has to be construed consistently with the interpretation given by the Court of Appeal in ZP (India) and EYF (Turkey). The paragraphs to which my attention was drawn are as follows:

ZP (India)

"25. Mr Biggs argued that a fundamental difference between the decision whether to make a deportation order in the first place and the decision whether to revoke a subsisting order short of the prescribed period – and particularly where, as here, the applicant has been deported – is that in the latter case the public interest in maintaining the order will generally diminish with the passage of time and that that must be borne in mind in striking the proportionality balance. I would accept that up to a point. **Where there are compelling factors in favour of revocation the applicant's case is – other things being equal – bound to be stronger if they have already been excluded for a long period. But I would not accept that the passage of time can by itself be relied on as constituting a compelling reason for early revocation. It is inherent in the making of a deportation order that there must be a period before the deportee becomes eligible for re-admission: otherwise it would be a mere revolving-door**. Mr Biggs did not contend that the ten-year prescribed period applicable to foreign criminals sentenced to between one and four years' imprisonment was itself irrational or that it inherently involved any breach of article 8. That being so, **the default position must be that deportees should "serve" the entirety of the prescribed period in the absence of specific compelling reasons to the contrary."**

[my emphasis]

EYF (Turkey)

"24. In *Smith*, the UT considered that its reasoning was supported by this court in *ZP (India) v Secretary of State for the Home Department* [2015] EWCA Civ 1197. One of the issues in *ZP (India)* was the impact on the proportionality balance of the prescribed period in the circumstance that early revocation within the prescribed

> period was being considered. In that context, it is hardly surprising that at paragraph [25] of the judgment Underhill LJ said that the "default position must be that deportees should 'serve' the entirety of the prescribed period in the absence of specific compelling reasons to the contrary""

My attention was also drawn to [28] of the judgment in EYF (Turkey) which the Judge set out at [22] of the Decision and which is therefore cited above.

16. Mr Lindsay argued that the references to "excluded", "re-admission" and "serve" in ZP (India) (and reference to "serve" in EYF (Turkey)) indicated that the time lapse to be considered was that from the point in time when deportation was enforced. Otherwise, a deportee had suffered no prejudice by the actual signing of the deportation order.

17. Mr Singh submitted that the words in paragraph 391 of the Rules had to be given their plain, ordinary meaning and that "making" in this context clearly means "signing" of the deportation order. He also pointed out that a deportee who continues to live in the UK does suffer some prejudice from the fact of having no leave – he is unable to rent, open bank accounts, travel outside the UK etc. However, that is no different to a person who is unlawfully in the UK and who is not categorised as a "foreign criminal". The additional penalty of a deportation order is that a person is not able to re-enter the UK during the currency of the order. He is, as the Court of Appeal said, "excluded" from the UK. That can occur only when a person is physically deported.

18. I have read very carefully the two judgments on which reliance was placed. Both are concerned with persons who had already been deported. That is important because, as the Court of Appeal noted at [23] of its judgment in ZP (India), it is only in that context that paragraph 391 of the Rules can apply at all. In cases "pre-deportation" it is paragraph 390A of the Rules which applies ([22] of the judgment).

19. However, neither judgment deals with the issue of when the period of exclusion identified in paragraph 391 begins. Perhaps the closest one comes is the comment at [15] of the judgment in ZP (India) where it is said that "[n]o doubt it may be right to put a limit on the period for which the public interest requires their continued **exclusion**, but that is another matter and is addressed in the Immigration Rules…" [my emphasis].

20. Since the Court of Appeal considered that it is the Rules to which one has to turn to interpret what the public interest requires, I also consider the issue raised in this case in that context. Paragraphs 391 and 391A of the Rules currently (and at the date of the Decision) provide as follows:

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

21. In my view, paragraph 391 read in context favours the Appellant's construction. In particular, the words "since the making of the deportation order" in that paragraph are to be contrasted with the words "since the person was deported" in paragraph 391A. The draftsperson can be assumed to have meant two different things in those two paragraphs. For that reason, I conclude that the Respondent's interpretation is incorrect. The "policy" as laid down by paragraph 391 is that ten years must have elapsed since the making ie the signing of the deportation order and not since the order was enforced.

22. However, that is not the end of the issue. The Respondent's grounds are argued on the basis, first, that the Judge materially erred in relation to the period which has elapsed ([3]) and, second, that, by reference to ZP (India) and EYF (Turkey), the Judge erred because the presumption in deportation has not fallen away ([4]). Both of those elements make up the central ground that the Judge has materially erred in finding that the passage of time is a determinative factor.

23. The Judge at [25] of the Decision gives four reasons for concluding that the public interest in upholding the deportation order has fallen away. First, she refers to the fact that ten years have elapsed. As I have concluded, she was entitled to take that into account as a relevant factor. Second, that the offence was committed twelve years ago and is the Appellant's sole conviction. That too is relevant. Third, that the sentence was at the lower end of the scale of criminal offending. The Judge was entitled to factor that into account. I accept Mr Lindsay's point in this regard that the deportation regime laid down in the Rules continues to apply as paragraph 398(b) of the Rules applies that regime to the case of a foreign criminal who applies for revocation of a deportation order. I also accept his point that the Judge at [24] of the Decision has not made a finding either way whether the Appellant's offending could "cause serious harm" but that is immaterial given the content of paragraph 398(b). Finally, the Appellant returned to India voluntarily and has not sought to re-enter unlawfully. I agree with Mr Lindsay that the relevance of this factor is not clear. The Appellant was the subject of a deportation order and should have left in any event. That he did so voluntarily may have saved the Respondent some

expense but can hardly be said to diminish the public interest in deportation. It may explain why the Respondent did not make reference to paragraph 391 when assessing revocation (as it might be said that the Appellant had not been deported as such) but otherwise has no relevance to the public interest. Similarly, that the Appellant has not sought to breach immigration laws by re-entering unlawfully can hardly be a positive factor in his favour or reduce the weight in keeping him excluded from India if circumstances dictate that result.

24. However, the more significant error which appears from the Judge's reasoning at [25] of the Decision is her reference to "the presumption for upholding the deportation order" having fallen away so that the "balance has been shifted in favour of revocation". As the Senior President said at [25] of the judgment in EYF (Turkey), "the proposition that the public interest in maintaining the deportation order would generally diminish over time was only accepted up to a point. That point was the duration of the prescribed period. That says nothing about the asserted existence of a new presumption at the end of the prescribed period. Indeed, it rightly in my judgment leaves the question at large. Furthermore, it is of note that the wording of the Rule changed after the decision in *ZP (India)* to add-in by amendment the words that are critical to the interpretation relied upon by the Secretary of State". I note that the decision under appeal in that case was dated 5 June 2015, long before the Respondent's decision in this case which was made on 22 November 2017. As such, it is the revised wording of paragraph 391 which applies. That includes the word which I have emboldened in the citation at [20] above. There is therefore a misdirection by the Judge when citing paragraph 391 at [15] of the Decision. Even leaving aside the changed wording, the Judge erred when considering that the presumption for maintaining the deportation order had fallen away. Although that is the wording used at [23] of the judgment in EYF (Turkey) (by reference to SU (Pakistan) v Secretary of State for the Home Department [2017] EWCA Civ 1069), that refers only to the "previous presumption" inherent in the prescribed period and does not create any new presumption in favour of revocation, as the Judge appeared to consider existed.

25. I then have to consider whether that error is material. Mr Singh submitted that any error made by the Judge when looking at the public interest in maintaining deportation was not material because there were in any event compelling circumstances justifying revocation of the deportation order. That submission was made to address the Respondent's point that the prescribed period had not elapsed but is equally relevant to the need to assess all the factors set out in paragraph 390 of the Rules and Section 117C. It is also relevant to the amended wording of paragraph 391 which requires a case-by-case consideration.

26. That then brings me on to the second basis on which the appeal was allowed, namely that maintenance of the deportation order is disproportionate under the scheme laid down by the Rules and Section 117C.

27. I begin by making two observations. First, the appeal in this case is against the refusal of a human rights claim. As such, the Judge's assessment of the Article 8

issue is central to the allowing of the appeal; the only basis on which the Judge could allow the appeal is because the Respondent's decision breaches the Appellant's human rights.

28. Second, and flowing from that, the Respondent did not plead any direct challenge to the Judge's Article 8 assessment. Mr Singh objected to any consideration of the Judge's assessment of the Article 8 issues for that reason. However, I reject his submission in that regard for two reasons. First, as Mr Lindsay submitted, the Judge, in particular at [31] of the Decision, brings into the equation her reasoning for reducing the weight to be given to the public interest relying on the passage at [22] to [25] of the Decision. Second, and in reality favouring the Appellant's position, if, as I have concluded is the case, the Judge had to consider all the circumstances of the case (or the compelling circumstances as Mr Singh submitted), then it is relevant to the overall lawfulness of the Decision whether the Judge has approached that task in the correct manner.

29. The Judge's assessment of the Article 8 issue appears at [30] to [32] of the Decision as follows:

> "30. In this case the child [H] has lived without his father for some 6 years already and has only seen him on two visits during this period. He only found out that the appellant is his biological father a couple of years ago and has now asked questions why, if this is accepted, his father is still not allowed to return. In many ways it can be said that [H] has already been through and perhaps to a certain extent got used to the degree of hardship that necessarily comes with the deportation of a parent. And it is this that the respondent seems to be relying upon – namely that the present arrangements of separation can continue as the family members are dealing with this situation. In other words the respondent is relying upon the status quo.
> 31. It is submitted on behalf of the appellant that this is somewhat of a Catch 22 with the respondent unfairly using the lengthening time of separation as a factor against the appellant. I consider that there is substance to this submission particularly as the respondent has not, in my view, adequately addressed the situation from the opposite perspective of the family. That is, that together with the appellant, they have managed the period of the deportation order which has now gone beyond the ten-year period when the public interest in continuing the deportation order on the facts of the case is significantly lessened as stated above. It is in looking at it from this other perspective that I have reached the conclusion, on a balance of probabilities, that it is unduly harsh on this child to be separated from his father for any longer period particularly at this time of his early teenage development. It is noted that he has made it clear in his written statement that he is unable to maintain a relationship with his father through phone calls alone.
> 32. In relation to the appellant's wife it is accepted that the relationship with the appellant was formed at a time when the appellant was not in the UK lawfully and therefore the exception under paragraph 399(b) of the Immigration Rules cannot apply. However, she is a qualifying person for the purposes of s.117C of the 2002 Act and I am satisfied for similar reasons as stated above that any longer period of separation from the appellant amounts to being unduly harsh in all the circumstances of the case."

That passage follows the Judge's self-direction that, based on the finding in the previous appeal, she should conclude that it would be unduly harsh for [H] to join his father in India and that therefore the issue in relation to [H] was whether it was unduly harsh for him to remain in the UK with his mother whilst the Appellant remains in India. It also follows the Judge's reference to KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 and citation from that case at [28] and [29] of the Decision.

30. As appears from those citations and as the Judge appears to have understood, the issue whether it would be unduly harsh for [H] to remain with his mother in the UK and separated from his father is one which must be assessed on the basis of the threshold which applies. There is no balance to be carried out at that stage between the impact on the child and the seriousness of the offence or the public interest. That is inherent in the threshold within the exception. However, at [31] of the Decision, that is precisely the approach which the Judge adopted. In so concluding, I also take account of Mr Lindsay's criticism of the "Catch 22" point made by the Judge. As he put it, if the effect of the separation of the family is that family life no longer exists or is significantly reduced in weight, then that is a factor which should be weighed in the balance. If the public interest too is significantly reduced, it may be that the Appellant's family life still outweighs the public interest. That has nothing to do with fairness or unfairness.

31. I asked Mr Singh to direct my attention to the evidence on which the Judge might be said to be relying when reaching the finding that it would be unduly harsh for [H] (and the Appellant's wife) to remain in the UK whilst the Appellant continues to live in India. He pointed to the witness statements of [H], the Appellant's wife and the Appellant's stepson. I have read those carefully.

32. I make the initial observation that all three of those statements are in essentially the same form. I also note that the content of those statements for the most part reads as legal submissions and not evidence. It is readily apparent that those statements were drafted by a legal representative and therefore the effect of separation does not come through clearly. The salient part of [H]'s statement appears at [17] to [21]. That evidence reads (so far as relevant):

> "17. My father is living in a village in India with my grandparents, but this is not ideal at all. We call my father using Videocall, Whatsapp and Skype. However, that can never replicate him being here. It breaks me inside being away from my father every day. We need to do this because if we do not the court will say we do not care and if we do they will say we can accept it. This is very hard for me, my brother and mother.
> 18. …
> 19. What was really hard and has hit me hard since finding out my father is my real father is the Judge made some good points but for some reason believed he should have been deported because his offence caused serious harm [this comment relating back to the finding in the earlier appeal] …
> 20. The separation of all of us is ruining our family life. I believe it would be unfair for my father to have to continue to wait in India and somehow accept the

> relationship is carrying on. …The passage of time with these cruel time processing and bad decisions has meant it is favouring him being away from the family forever.
>
> 21. I am not able to maintain a relationship with my father over the phone, as we have been doing simply because we have been left with no choice. This is horrible and if the Judge could feel any of the pain inside me and my mother are feeling especially knowing how the law has been in cases where offences like my father's were done and the fact these cases now being fought in the United Kingdom are being won has only hardened our resolve to make sure my father gets justice and is allowed to rejoin us in the United Kingdom."

33. Whilst I recognise that the impact as there described by [H] shows that he finds it difficult to be separated from his father and might well be described as harsh, I can find nothing in the description which suggests that it is unduly harsh. It describes the impact which one would expect on a parent and child separated by the act of deportation. That is simply not enough. It may well be relevant to an assessment of Article 8 outside the assessment when the impact is balanced against the offending, but the evidence does not show that the very high threshold for unduly harsh is reached. For that reason, I am unable to conclude that the error made by the Judge when setting out her approach to the Article 8 issue (to which I refer at [30] above) is immaterial.

34. I make clear that I am not saying that the outcome of the appeal would necessarily be different to that reached by Judge Colvin. However, I am unable to reach the conclusion that the errors make no difference and therefore they are material.

35. As I have concluded above, the period prescribed in paragraph 391 of the Rules has expired. That may well reduce the weight to be given to the public interest. However, that outcome requires an assessment of all the circumstances of the case which includes the factors set out at paragraph 390 of the Rules namely:

> "(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."

It also requires consideration of the provisions of Section 117C including not only the exceptions but whether there can be said to be "very compelling circumstances over and above" the exceptions (Section 117C (6)). That latter provision requires a balanced assessment of the interference with the Appellant's family and private life against the extent of the public interest.

36. In light of my conclusions that the Decision contains errors of law which are material for the reasons I have given, I set aside the Decision. Mr Singh submitted that if I were to take this course, the appeal should be remitted for re-determination. I do not consider this to be necessary as the reconsideration of the decision is a

matter of assessment with little fact finding to be carried out. There are no issues of credibility. It is accepted that [H] is the Appellant's biological son and that, notwithstanding the physical separation, the Appellant has a genuine and subsisting relationship with his wife, his son and his stepson. Mr Singh also asked that, if I were to set aside the Decision, the Appellant should be given time to produce more evidence. Although there is no application to adduce further evidence, I am content to give more time for evidence to be provided and for oral evidence to be called if the Appellant's wife and children wish to give such evidence.

CONCLUSION

37. For the above reasons, I conclude that the decision of First-tier Tribunal Judge Colvin promulgated on 30 August 2019 contains errors of law. I set that aside. I give directions below for the re-making of the decision.

DECISION

The decision of First-tier Tribunal Judge Colvin promulgated on 30 August 2019 contains errors of law. I set that decision aside. I make the following directions for the re-making of the decision:

1. **Within 8 weeks from the date when this decision is sent, the Appellant is to file with the Tribunal and serve on the Respondent any further evidence on which he relies.**
2. **The resumed hearing will be relisted on the first available date after 8 weeks from the date when this decision is sent with a time estimate of ½ day.**

Signed Dated: 27 November 2019

Upper Tribunal Judge Smith