Upper Tribunal
(Immigration and Asylum Chamber)

THE IMMIGRATION ACTS

Heard at Field House **Decision Promulgated**

On 11 January 2017

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Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

KEVIN CHRISTOPHER SMITH

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A. Mahmood,Counsel instructed by Gulbenkian Andonian Solicitors

For the Respondent: Mr N. Bramble,Senior Home Office Presenting Officer

(i) In cases involving convictions for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, the Secretary of State's policy, as expressed in paragraph 391(a) of the Immigration Rules, is that the public interest does not require continuation of a deportation order after a period of ten years has elapsed.

(ii) However, paragraph 391(a) allows the Secretary of State to consider on a case by case basis whether a deportation order should be maintained. The mere fact of past convictions is unlikely to be sufficient to maintain an order if the 'prescribed period' has elapsed. Strong public policy reasons would be needed to justify continuing an order in such circumstances.

(iii) Paragraph 391(a) will only be engaged in a 'post-deportation' case if the person is applying for revocation of the order from outside the UK. Nothing in the strict wording of the rule requires the ten-year period to be spent outside the UK. However, the main purpose of deportation is to exclude a person from the UK. Any breach of the deportation order is likely to be a strong public policy ground for maintaining the order even though a period of ten years has elapsed since it was made.

(iv) In 'post-deportation' applications involving sentences of less than four years made before the end of the ten-year period, and 'post-deportation' applications involving sentences of four years or more,

appropriate weight should be given to the Secretary of State's policy as expressed in the 'Conventions exception' and 'sweep-up exception' with reference to paragraphs 398-399A and 390A of the Immigration Rules.

DECISION AND REASONS

1. The appeal raises questions regarding the assessment of applications to revoke a deportation order made from outside the UK.

Background

2. The appellant appealed the respondent's decision to refuse a human rights claim in the context of an application to revoke a deportation order made by the appellant while outside the UK i.e. a post-deportation application.

3. The appellant is a Jamaican citizen who entered the UK in 1999 and was granted leave to enter as a visitor for a period of six months. He was granted further leave to remain as a student until 31 January 2001 but overstayed when the visa expired. On 02 October 2000 he was convicted of supplying a class A drug. He was sentenced to a period of 32 months' imprisonment and recommended for deportation. A deportation order was signed on 11 October 2001. On 24 October 2001 he was deported to Jamaica.

4. The appellant re-entered the UK in breach of the deportation order on 18 March 2002. The breach was compounded by the fact that he entered in a false identity. He was granted leave to enter as a visitor for six months. Further leave to remain was granted as a student and then subsequently as the spouse of a work permit holder. His leave was extended until 05 December 2004 in line with the sponsor's leave to remain. The appellant's first child was born on 11 December 2004.

5. On 18 November 2004 the appellant was arrested. Checks revealed his true identity and that he had returned to the UK in breach of a deportation order. The appellant made submissions relating to his right to family life with his wife and child but these were refused with a right of appeal. He did not exercise the right of appeal. It is unclear from the evidence whether the appellant absconded after release from detention but it seems that no further action was taken to remove him despite the fact that he was arrested on two occasions in 2006. The respondent states that by September 2007 he was recorded as an absconder for non-compliance with reporting restrictions.

6. On 01 August 2008 the appellant was convicted of assaulting a police officer and sentenced to a period of imprisonment of two months and nine days. The respondent made arrangements to remove him from the UK. At the end of 2008 and early 2009 the appellant made a number of human rights submissions and an application for judicial review; all were rejected or refused. Further submissions were made on 30 January 2009 stating that the appellant had three children from a previous relationship. The further submissions were rejected and the appellant was removed to Jamaica on 11 February 2009.

7. On 25 September 2013 the appellant applied for revocation of the deportation order made on 11 October 2001. The respondent treated it as a human rights claim and refused the application in a decision dated 10 August 2015 without a right of appeal. A second decision was made on 12 October 2015. Although the reasons for making a second decision are not explained, it seems apparent that a right of appeal was not granted in relation to the first decision. I find that it is reasonable to infer that the respondent may have had to reissue the decision to refuse a human rights claim because it should have attracted a right of appeal. In the second decision the respondent considered the family life

issues raised by the appellant with reference to paragraphs 398-399A of the Immigration Rules but concluded that the public interest in maintaining his exclusion from the UK was not outweighed by his family circumstances.

8. First-tier Tribunal Judge Hussain ("the judge") dismissed the appeal in a decision promulgated on 01 August 2016. The judge considered the terms of paragraph 391 of the Immigration Rules, as well as the particular circumstances of the case, including the family life issues raised by the appellant, before concluding that his family life did not outweigh the public interest in his continued exclusion from the UK.

9. The appellant seeks to appeal the First-tier Tribunal decision on the following grounds:

(i)
The First-tier Tribunal misunderstood and misapplied the test set out in paragraph 391 of the Immigration Rules. In particular, the judge erred in apparently requiring the appellant to have spent ten years outside the UK before the provision contained in paragraph 391(a) could apply.

(ii)
The First-tier Tribunal took into account irrelevant considerations relating to the appellant's relationships with several women, rather than concentrating on the material issue, which was the strength of his relationship with the four children he has in the UK.

Legal framework

10. Section 32 of the UK Borders Act 2007 states:

32. Automatic deportation

(1) In this section "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who is convicted in the United Kingdom of an offence, and

(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that—

(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and

(b) the person is sentenced to a period of imprisonment.

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).

(6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless—

(a) he thinks that an exception under section 33 applies,

(b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or

(c) section 34(4) applies.

(7) Subsection (5) does not create a private right of action in respect of consequences of non-compliance by the Secretary of State.

11. Following changes to the appeal regime made by the Immigration Act 2014, for the purpose of most appeals, the relevant exceptions will be section 33(2) (removal in pursuance of a deportation order would breach the European Convention on Human Rights or obligations under the Refugee Convention) and section 33(4) (removal in pursuance of a deportation order would breach rights under the EU treaties).

12. Paragraphs 390-392 of the Immigration Rules make provision for revocation of a 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)
on 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 the person who has been deported following conviction for a criminal offence, the continuation of the deportation order against that person will be the proper course:

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

(b)
in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least four years, at any time,

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

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

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

13. In SSHD v ZP (India) [2015] EWCA Civ 1197 the Court of Appeal considered the legal framework relating to revocation of deportation orders. Lord Justice Underhill noted that paragraph 391 provided for a "prescribed period" of time before an application for leave to enter will be entertained. In cases involving less than four years' imprisonment the prescribed period is ten years. However, the policy is expressly stated not to apply in two distinct circumstances (i) where continuation of the deportation order would be contrary to the ECHR or the Refugee Convention ("the Conventions exception") or (ii) where "there are other exceptional circumstances that mean the continuation is outweighed by compelling factors" ("the sweep-up exception"). He went on to make the following findings:

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

25. Mr Biggs argued that a fundamental difference between the decision whether to make a deportation order in the first place and the decision whether to revoke a subsisting order short of the prescribed period – and, particularly where, as here, the applicant has been deported – is that in the latter case the public interest in maintaining the order will generally diminish with the passage of time and that that must be borne in mind in striking the proportionality balance. I would accept that up to a point. Where there are compelling factors in favour of revocation the applicant's case is – other things being equal – bound to be stronger if they have already been excluded for a long period. But I would not accept that the passage of time can by itself be relied on as constituting a compelling

reason for early revocation. It is inherent in the making of a deportation order that there must be a period before the deportee becomes eligible for re-admission: otherwise it would be a mere revolving-door. Mr Biggs did not contend that the ten-year prescribed period applicable to foreign criminals sentenced to between one and four years' imprisonment was itself irrational or that it inherently involved any breach of article 8. That being so, the default position must be that deportees should "serve" the entirety of the prescribed period in the absence of specific compelling reasons to the contrary.

26. Paragraph 391A . The phrase "in other cases" at the beginning of paragraph 391A must at least exclude the cases covered by the immediately preceding paragraph, i.e. paragraph 391, so that it certainly has no application in the present case. It is not necessary for us to decide whether its effect is to exclude also cases covered by paragraph 390A – so that in practice it means "in cases other than those of foreign criminals" – but the Government Legal Department submitted that that was plainly the intention, and I am inclined to agree."

14. In IT (Jamaica) v SSHD [2016] EWCA Civ 932 the Court of Appeal sought to apply the principles outlined in ZP (India) in the context of a 'post-deportation' application for revocation of a deportation order before the expiry of the 'prescribed period'. Lady Justice Arden observed, on the face of section 32(6), that the Secretary of State has discretion to revoke a deportation order without reference to the exceptions contained in section 33 but concluded, when considering revocation, that the weight to be given to the public interest in deportation could not in practice be any less than when the original deportation order was made. She referred to Lord Justice Underhill's observation at [15] in ZP (India) where he stated that the public interest in deportation did not cease the moment a foreign criminal leaves the country.

Decision and reasons

Analysis of the legal framework

15. The Immigration Rules outline several types of decisions relating to deportation.

(i) Initial deportation decisions involving human rights issues under Article 8 ECHR (paragraphs 398-399A);

(ii) 'Pre-deportation' revocation decisions (paragraphs 390-390A);

(iii) 'Post-deportation' revocation decisions (paragraphs 390 & 391); and

(iv) 'Other' applications for revocation (paragraph 390 & 391A).

16. In cases involving representations made on human rights grounds under Article 8 of the European Convention, the heart of the assessment is whether the deportation decision strikes a fair balance between the due weight to be given to the strength of the public interest in deportation and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance a court or tribunal should give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest in the deportation of foreign offenders as expressed in the relevant rules and statutes: see Hesham Ali v SSHD [2016] UKSC 60. The decision in ZP (India) makes clear that differences in the wording of the provisions do not require a different approach as a matter of substance. The exercise is broadly the same in cases falling under paragraphs 398, 390A and 391.

17. In ZP (India) the Court of Appeal considered a ‘post-deportation’ application to revoke a deportation order made under paragraph 391. The application was made before the end of the ten-year ‘prescribed period’. For this reason, the court concluded that the ‘Conventions exception’ or the ‘sweep-up exception’ applied. It was not necessary for the court to conduct a detailed analysis of the effect of paragraph 391(a) in circumstances where the ‘prescribed period’ had not elapsed since the making of the deportation order. However, the court observed that deportees should “serve” the entirety of the prescribed period in the absence of compelling circumstances to the contrary.

18. Since the decision in ZP (India) the relevant paragraph was amended by way of the Statement of Changes in Immigration Rules HC 693, which came into effect on 20 October 2014.

“391. In the case of the person who has been deported following conviction for a criminal offence, the continuation of the 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 …” [italicised words added by HC 693]

19. Prior to the amendment, the plain wording of paragraph 391(a) stated that continuation of a deportation order would be the proper course in cases involving periods of imprisonment of less than four years unless the ‘prescribed period’ of ten years had elapsed. The wording of paragraph 391(a) provides an additional exception to the ‘Conventions exception’ and the ‘sweep-up exception’ i.e. a ‘ten-year exception’. As paragraph 391(a) stood prior to amendment, the wording was unqualified and gave rise to a presumption that the deportation order would be revoked if ten years had elapsed since the making of the deportation order.

20. The amendment to paragraph 391(a) is drafted in a rather cumbersome way. The explanatory notes to the statutory instrument provide no assistance as to the meaning. Having considered the provision, I find that it provides the Secretary of State with an element of discretion, which enables her to consider each application for revocation on a case by case basis. It withdraws from the previous position, which created an unqualified presumption that a deportation order would be revoked after the ‘prescribed period’ elapsed. When a person who has been sentenced to a period of imprisonment of less than four years makes a ‘post deportation’ application for revocation of the order after the ‘prescribed period’ of ten years the Secretary of State will consider whether the deportation order should be maintained.

21. Whether there are grounds to maintain a deportation order will be driven by public interest considerations. However, there would be no point in providing an exception after a ‘prescribed period’ of ten years if the balancing exercise remained the same. The respondent’s policy, as expressed in paragraph 391(a) of the Immigration Rules, is that the public interest does not require continuation of the order after a period of ten years has elapsed. As the court in ZP (India) recognised, the public interest in maintaining the order will generally diminish with the passage of time. Paragraph 391A also makes clear that the passage of time since the person was deported might amount to a change in circumstances to warrant revocation of the order. The prescribed period would be rendered meaningless if the same public interest considerations that led to the making of the original order were sufficient to continue the order after a period of ten years.

22. The fact that a person was convicted of a very serious crime might justify continuing an order but that is dealt with by way of the distinction between cases involving sentences of imprisonment of less

than and more than four years. In cases involving sentences of imprisonment of four years or more there is no provision for revocation of the order after a ‘prescribed period’. The order will only be revoked if the person can show that the public interest in deportation is outweighed with reference to the ‘Conventions exception’ or the ‘sweep-up exception’. In such cases the passage of time might be relevant to the weight to be placed on the public interest in maintaining the order, but the seriousness of the initial offence will also be taken into account.

23. In contrast, the ‘prescribed period’ contained in paragraph 391(a) only applies to cases where the sentence of imprisonment is less serious. The ‘prescribed period’ recognises that in such cases the passage of time is likely to diminish the weight to be given to the public interest. The fact that a period of ten years has elapsed since the making of the order creates a presumption that the order will be discharged unless, having considered the individual facts of the case, the Secretary of State considers that it continues to be in the public interest to maintain the order. However, the mere fact of past criminal convictions is unlikely to be sufficient without strong public policy reasons to justify maintaining the order. If a person has ‘served’ the ten-year period outside the UK, and there is no evidence of further offending, or behaviour that would be contrary to the public interest, it is difficult to see what justification could be given for refusing to revoke an order. However, if there is evidence to show that a person has committed further offences, and may continue to pose a risk of offending if readmitted to the UK, such circumstances might justify continuing the order even though the ‘prescribed period’ has elapsed.

24. The facts of this case also raise the question of whether the ‘prescribed period’ must be spent outside the UK. Mr Bramble accepted that there was nothing in the strict wording of paragraph 391(a) to suggest that this was a requirement. The only requirement is that the person is outside the UK when they make the application for revocation of the order.

25. However, the whole purpose of a deportation order is to exclude a person from the UK for a specified or indefinite period. Although there is nothing in the wording of paragraph 391(a) to require the ‘prescribed period’ to be spent outside the UK, the fact that a person might return to the UK in breach of the order, and has spent a portion of the ten-year period living in the UK, is a serious matter that should be given significant weight in favour of the public interest. A person should not be able to benefit from a clear breach of the order, which undermines the effectiveness of the system of immigration control. Such actions are likely to provide strong justification for continuing the order even if the ten-year period has elapsed.

26. I draw the following conclusions from the above analysis:

(i) In cases involving convictions for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, the Secretary of State’s policy, as expressed in paragraph 391(a) of the Immigration Rules, is that the public interest does not require continuation of a deportation order after a period of ten years has elapsed.

(ii) However, paragraph 391(a) allows the Secretary of State to consider on a case by case basis whether a deportation order should be maintained. The mere fact of past convictions is unlikely to be sufficient to maintain an order if the ‘prescribed period’ has elapsed. Strong public policy reasons would be needed to justify continuing an order in such circumstances.

(iii) Paragraph 391(a) will only be engaged in a ‘post-deportation’ case if the person is applying for revocation of the order from outside the UK. Nothing in the strict wording of the rule requires the ten-year period to be spent outside the UK. However, the main purpose of deportation is to exclude a

person from the UK. Any breach of the deportation order is likely to be a strong public policy ground for maintaining the order even though a period of ten years has elapsed since it was made.

(iv) In 'post-deportation' applications involving sentences of less than four years made before the end of the ten-year period, and 'post-deportation' applications involving sentences of four years or more, appropriate weight should be given to the Secretary of State's policy as expressed in the 'Conventions exception' and 'sweep-up exception' with reference to paragraphs 398-399A and 390A of the Immigration Rules.

The First-tier Tribunal decision

27. I bear in mind the above principles in assessing whether the First-tier Tribunal decision involved the making of an error of law. The judge correctly identified that the appellant made a 'post-deportation' application for revocation of the order and that paragraph 391 applied [38]. He accepted that a ten-year period elapsed since the making of the deportation order in October 2001 and the application for revocation in September 2013. However, he considered the passage of time was insufficient reason to revoke the order given the appellant's immigration history. He took into account the fact that the appellant re-entered the UK in breach of the order and in an assumed identity in March 2002. He remained in the UK for a large part of the ten-year period until he was removed for the second time in February 2009 [41].

28. The judge considered the fact that the appellant entered relationships with several women and had children with them at a time when he was living in the UK in breach of the deportation order. The judge also noted that there were several incidents recorded during that time "suggesting criminality" [43]. The appellant was arrested on suspicion of possession with intent to supply crack cocaine in December 2006 albeit there was no subsequent conviction. Although the judge noted the suggestion of criminality, in fact, the appellant was convicted of assaulting a police officer in August 2008 and sentenced to a period of nine weeks' imprisonment. This omission was unlikely to make any material difference to the decision, and if anything, supported the judge's overall conclusion.

29. On behalf of the appellant it is argued that the judge erred in apparently requiring him to have spent ten years outside the UK before paragraph 391 could apply. It is also said that he summarised the legal framework incorrectly by conflating the 'prescribed period' and the discretion to consider each application on a case by case basis with the 'Conventions exception' and the 'sweep-up exception'. The judge made the following finding [39]:

"What appears to be the scheme of this rule is that if a person has been deported on the grounds that he has convicted of an offence and sentenced to imprisonment for less than four years, then provided ten years has lapsed since the making of the deportation order, consideration will be given as to whether the order should be maintained, unless the decision to maintain the order is contrary to the appellant's human rights or there are other exceptional reasons that outweigh the continuation."

30. This summary of the scheme of paragraph 391 includes the three exceptions, but does appear to conflate them with one another. The first exception is the 'ten-year exception'. However, it is not a prerequisite that an applicant also needs to meet the 'Conventions' and 'sweep-up' exceptions in order to meet the requirements of paragraph 391(a). Those act as alternative provisions in cases where an applicant has not completed the 'prescribed period'.

31. It is also argued that the judge required the appellant to have completed the full ten-year period outside the UK. The only place where he mentions this is at [41] where he observed that the appellant

had not lived outside the UK for a period of ten years “which is what must have been in the mind of those who drafted paragraph 391”.

32. Having read the decision as a whole I find that there is no error of law. It was open to the judge to observe that the intention of paragraph 391 was to exclude a person from the UK for a period of ten years. There is nothing in his decision to suggest that he considered it an absolute requirement that the whole period needed to be spent outside the UK.

33. The plain wording of paragraph 391(a) does not import a strict requirement that a person has spent the whole ten-year period outside the UK. However, it is inherent in the underlying purpose of deportation that the person is excluded from the UK. The judge was entitled to take into account the fact that the appellant returned to the UK in breach of the order and used deception to enter and remain in the UK. Despite the slightly inaccurate summary of the exceptions contained in paragraph 391 it seems clear to me, as a matter of fact, that the judge applied the correct test. The fact that the appellant breached the order, entered illegally and committed a further offence were sufficiently strong public policy reasons to justify maintaining the order. The judge concluded [44]:

“When the appellant’s character and conduct is fully taken into account the impression is inescapable that this is a man who has very little regard either for the law or the feelings and emotions of other people. In my view if the question of revocation had to be considered, as paragraph 391 requires, on a case by case basis, the Secretary of State’s decision not to revoke the deportation order in this case is a sustainable one.”

34. The judge was entitled to conclude that there were several strong public policy reasons to support the respondent’s decision to maintain the order. There is nothing to suggest that the judge sought to apply the ‘Conventions exception’ or the ‘sweep-up exception’ at this stage of his assessment. Even though a period of ten years elapsed since the deportation order was made, it was open to the judge to conclude that there were strong public policy reasons to justify the respondent’s decision to maintain the order.

35. The second ground of appeal argues that the judge failed to give sufficient consideration to the best interests of the children, and instead, focussed on immaterial considerations relating to the way in which he pursued his relationships in the UK.

36. After having made clear findings relating to the application of paragraph 391(a) the judge turned to make separate findings relating to the ‘Conventions exception’ with reference to Article 8 of the European Convention. He accepted that the appellant had a family life with the three children he had with Ms X and that the children made regular trips to Jamaica until 2013 [47]. In assessing the proportionality of continued exclusion the judge said that he made a holistic assessment taking into account the appellant’s immigration history as well as the adverse impact the decision had on the appellant and other members of his family [49]. The judge acknowledged that the children’s mother wanted them to have a relationship with their father. He stated that he did not underestimate the difficulty that she has had in raising three children with varying degrees of behavioural issues. In particular, he took into account the fact that one child suffered from Cerebral Palsy [50].

37. In assessing the extent and quality of the relationship that the appellant had with his children, which was relevant to the question of whether it would be unduly harsh for the children to continue to be separated from their father, it was open to the judge to consider the way in which he appeared to have conducted his family life while in the UK. He took into account the fact that the appellant fathered three children with Ms X at a time when he knew he was living in the UK in breach of a

deportation order. The judge summarised the appellant's relationship with Ms X as one conducted by way of "intermittent visits". At the same time the appellant was trying to regularise his status in the UK under a false name by relying on his marriage to Ms Y. He noted that Ms X appeared to be unaware of the fact. He concluded:

"52. …The appellant could not have practically been able to do all the things he was up to including keeping his association with other women with one of whom fathered a child as well as devoting enough time to Ms Y and her children and playing an active role in their life.

53. In my assessment whilst the appellant may have a loving attitude towards his children, I do not find that their welfare would be served by this particular appellant's involvement in their life. In fact he could present a role model of the wrong kind that could harm their future.

54. Taking into account the appellant's criminal conviction, conduct in the United Kingdom and his seriously adverse immigration history; and balancing that against the adverse impact on him and the hurt to the children's emotion by not being able to be with their father, the conclusion to which I have come is that the appellant's continued exclusion from the United Kingdom is proportionate."

38. It seems clear to me that any findings he made about the appellant's relationships in the UK were made by way of assessing the strength of his parental ties with the children. While the judge did not doubt that there was a family life, it was open to him to question how strong those ties were and the extent of the appellant's commitment to that family life in circumstances where Ms X is, and always has been, the primary carer. The judge was required to consider whether the decision struck a fair balance between the due weight that was to be given to the public interest in maintaining the deportation order and the circumstances of the appellant and his children. It is understandable that the appellant disagrees with the decision but the judge's findings were within a range of reasonable responses to the evidence.

39. For the reasons given above I conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law. The decision shall stand.

DECISION

The First-tier Tribunal decision did not involve the making of an error of law

Signed

Upper Tribunal Judge Canavan Date 16 March 2017