



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/10163/2019

THE IMMIGRATION ACTS

Heard at Field House
On 17 March 2020

Decision & Reasons Promulgated
On 27 April 2020

Before

MR JUSTICE JOHNSON
(sitting as a judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE A.M. KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KAMBER SINAJ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr R Roberts, Cromwell Wilkes Solicitors

DECISION AND REASONS

1. This is a decision to which both judges have contributed.
2. The Secretary of State appeals against a decision of First-tier Tribunal Judge Malone by which he allowed Mr Sinaj's appeal against the Secretary of State's refusal to revoke a deportation order.

The facts

3. Mr Sinaj is a citizen of Albania, born on 27 June 1983.
4. The lengthy immigration history is summarised in an earlier decision of the First-tier Tribunal (and adopted in a previous decision of the Upper Tribunal) as follows:

“2. ... he first entered the UK unlawfully in about 2000 and claimed asylum. His asylum claim was refused but on 30 November 2001 he was granted exceptional leave to remain until 18 January 2003.

3. In July 2003 the Appellant’s appeal against the refusal of his asylum claim was refused on asylum and human rights grounds and his appeal rights were exhausted on 14 August 2003.

4. On 8 August 2007 the Appellant was convicted at Maidstone Crown Court of possession of an identity document belonging to someone else. He was sentenced to 11 months’ imprisonment and deportation was recommended.

5. On 8 November 2007 the Appellant was removed from the UK under the Facilitated Returns Scheme.

6. On 11 August 2008 the Appellant attempted to enter the UK using a false name and on 26 August 2008 he was convicted at Luton Crown Court of possession of a false identity document. He was sentenced to 15 months’ imprisonment and deportation was recommended.

7. On 4 December 2008 the Respondent signed a deportation order and on 18 December 2008 the Appellant was removed to Albania.

8. On 4 February 2011 or at some earlier date the Appellant returned to the UK unlawfully and in breach of the deportation order. He admitted that he had entered the UK in a lorry in August 2010. On 17 February 2011 the Appellant was again returned to Albania.

9. At some time before 2015 the Appellant returned to the UK unlawfully. On 31 December 2014 he met Ms Meena [K] at a New Year’s Eve party.

10. In May 2015 Ms [K] purchased a flat and began living there with the Appellant. On 6 October 2016 he then returned voluntarily to Albania and in April 2017 he married Ms [K] in a civil [ceremony] in Albania.

11. The Appellant then applied for the deportation to be revoked on human rights grounds. He also applied for entry clearance as a spouse. The revocation application was made in the UK whereas the entry clearance application was made to the local Entry Clearance Officer.

12. On 14 March 2017 the application to revoke the deportation order was refused by the Respondent.”

5. Thereafter, Mr Sinaj appealed against the refusal to revoke the deportation order. He relied on his relationship with Ms [K]. She is based in the UK. She has a high powered job. She has caring responsibilities in the UK for her elderly parents. She wishes to start a family with Mr Sinaj. The couple hope to undergo IVF treatment in the UK for that purpose.
6. The appeal succeeded before the First-tier Tribunal but this was reversed by the Upper Tribunal. Swift J, sitting as a judge of the Upper Tribunal, said this:

“24. The matters that are relevant and which weigh in the balance relating to Ms [K]’s personal circumstances comprised the following. Firstly, her working life in the United Kingdom. Ms [K] has a skilled and well-paid job in IT. It is not a job that would be transferable were she to leave the United Kingdom to live in Albania. Second, there is reference in the decision to Ms [K]’s financial commitments. Yet, as we understand it, those primarily arise from a property purchased in May 2015 after her relationship with Mr Sinaj had commenced but of course at a time that Mr Sinaj’s presence in the UK was unlawful. They must have been commitments taken on by reference to her own income and resources. If Ms [K] decided to leave the UK to live in Albania with Mr Sinaj, it would be a matter for her whether to retain the property or sell it. Next, there is reliance on the assistance that she provides to her elderly parents. The evidence before the First-tier Tribunal was that Ms [K] lives nearby her parents and assists them with certain day-to-day matters such as attending doctor’s appointments. Lastly, two matters relating to fertility treatment: the likely success of such treatment were it to be undertaken in the United Kingdom when Mr Sinaj was out of the United Kingdom; and the likely availability of such treatment for Ms [K] in Albania.

25. We accept that taken together, those matters are consistent with a conclusion that the effect on Ms [K] of Mr Sinaj’s continued absence from the United Kingdom by reason of the deportation order made in 2008, would be harsh. But those matters are no more harsh than what might be described as the normal consequences of a deportation order when that order involves splitting a family. We are entirely satisfied that those matters, taken together, do not reach the level of undue harshness in the sense that has been described by this Tribunal in MK (Sierra Leone) and accepted by the Supreme Court in KO (Nigeria).

26. For these reasons we consider that this appeal should be allowed. Once matters that are irrelevant to the section 117C enquiry are removed from paragraph 124 of the Tribunal’s decision, the matters that remain are on a correct application of the law, incapable of supporting a conclusion that section 117C(5) applies in the circumstances of this case. It follows that the only possible lawful conclusion available is that the Secretary of State’s decision to maintain the deportation order was the only lawful option available. It follows that the decision of the Secretary of State must be restored.”

7. The Upper Tribunal drew attention to the fact that, by the time of its decision, more than 10 years had passed since the making of the deportation order. Accordingly, any further application to revoke the order:

“would fall to be considered by reference to Paragraph 391A of the Immigration Rules. Different considerations would therefore apply to the determination of any such application. There can be no certainty as to the outcome of any further application, but were such an application to be made it would have to be considered on its own merits and without regard to the particular considerations that did apply when the Secretary of State reached his decision on the application that was the subject of the appeal before us today.”

8. In February 2019 Mr Sinaj made further representations that the deportation order should be revoked by reason of Article 8 of the European Convention on Human Rights. He relied on his family life with Ms [K], their wish to commence fertility treatment in the UK, the impact of the order on Ms [K], and the fact that 10 years had passed since the making of the deportation order. On 4 June 2019 the Secretary of State refused to revoke the deportation order. Mr Sinaj appealed. He contended that the refusal to revoke the order was an unjustified interference with his right to respect for family life.

Legal framework

9. The principle established in Devaseelan [2002] UKIAT 00702 required that the First-tier Tribunal should take the findings of fact made by Swift J as its “starting point.”
10. The test to be applied when considering whether to revoke a deportation order is set out in paragraphs 390-392 of the Immigration Rules HC 395 (as amended), read with paragraphs 398-399A. These provisions state:

“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 of 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 as to whether the deportation order should be maintained

...

Unless... 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.

Deportation and Article 8

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

...

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

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)... applies if-

...

- (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.

399A This paragraph applies where paragraph 398(b)... applies if-

- (a) the person has been lawfully resident in the UK for most of his life; and
- (b) he is socially and culturally integrated in the UK; and
- (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

11. Where a Tribunal is considering, in a case concerning the deportation of a foreign criminal, whether deportation can be justified under Article 8(2) of the Human Rights Convention, the Tribunal must have regard to the considerations listed in sections 117B and 117C of the Nationality, Immigration and Asylum Act 2002. By section 117B(4) little weight should be given to a relationship that is established when the person is in the UK unlawfully. Section 117C is reflected by paragraphs 399 and 399A of the Immigration Rules.

First-tier Tribunal decision

12. Judge Malone, in setting out what he considered to be "the applicable law", referenced (aside from paragraph 390 of the Immigration Rules), paragraphs 390A, 391, 398, 399 and 399A (but not 391A). He considered that the test to be applied was that prescribed by paragraph 390A, namely that "it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors."
13. Judge Malone recognised that the Devaseelan principle required that he should take the findings of fact made by Swift J as the starting point. Judge Malone added:

"However, the situation has changed since it was looked at by Swift J. For example, time has passed and, as at the date of the Appellant's application to revoke his deportation order, namely 8 February 2019, more than ten years had passed since it was made."

14. He drew attention to the observation of Swift J which is quoted at paragraph 7 above. He recognised that Swift J had found that the consequences of the deportation order being continued would be harsh for Ms [K], but not unduly harsh. Judge Malone considered that “the situation has become far more serious for Ms [K]” such that it was now unduly harsh, that the particular circumstances were exceptional, and that they outweighed the public interest in maintaining the deportation order against Mr Sinaj – that “would take too heavy a toll on Ms [K]. It would be disproportionate.”
15. In reaching this conclusion the First-tier Tribunal had regard to the impact on the couple’s plans to pursue IVF, the impact on Ms [K]’s employment, and the impact on her ability to care for her parents (who Ms [K] “would have to abandon”). As to IVF, Judge Malone found that the “chances of a successful treatment would be greatly reduced in Albania.” As to her employment he found that she was currently an “accomplished businesswoman” who was not only the Technical Director for Boeing Aerospace but also in charge of diversity and inclusion, and “the only woman of colour working for Boeing UK in Aerospace technology.” There was no chance of her securing a remotely similar job in Albania. The couple “would be living in very real poverty.”

Grounds of appeal, permission to appeal, and argument

16. In seeking to challenge the decision of the First-tier Tribunal the Secretary of State argues that:
 - (1) By reason of paragraph 399D of the Immigration Rules it was necessary for “very exceptional circumstances” to apply, but here there were no very exceptional circumstances;
 - (2) In any event, there were no new circumstances to justify departure from the decision of the Upper Tribunal that the impact on Ms [K] of maintaining the deportation order would be harsh, but not unduly harsh.
17. Permission to appeal was granted by First-tier Tribunal Judge O’Brien. Judge O’Brien gave the following reasons:

“It is difficult to see how a couple’s inability to conceive a child if the partner [were to] remain in the United Kingdom whilst the Appellant’s deportation was maintained constituted anything other than the ordinary circumstances of deportation, such as to constitute undue harshness. It is further arguable that the Judge failed to take into account the Appellant’s repeated breach of the deportation order as a matter which might reinforce the public interest against which the couple’s interests must be weighed. These are arguable errors of law.”
18. Mr Whitwell points out that the basic factual matters considered by Judge Malone in December 2019 were the same as those addressed by Swift J in February 2019, namely the impact on Ms [K] by reference to her job, parents and family aspiration. He asks, rhetorically, “what has changed in [less than] a year?” The only change was that Ms [K] was 10 months older. That being the case, Judge Malone had not

identified any new circumstance to justify his conclusion that the maintenance of the deportation order would be “unduly harsh.” In reaching this conclusion Judge Malone did not take into account the fact that the couple had formed their relationship at a point when Mr Sinaj’s presence in the UK was unlawful. Mr Whitwell further argues that Judge Malone did not consider whether the couple could pursue IVF treatment in Europe, and that he rejected the possibility of pursuing treatment in Albania without any evidence. In any event, an inability to pursue IVF treatment in the UK was the natural and ordinary consequence of a deportation order and was not unduly harsh.

19. For his part, Mr Roberts, in helpful and impressive submissions, argued that there was a relevant change in circumstances because it was now 10 years since the making of the order. That impacted on the applicability of rule 391(a). Swift J had explicitly contemplated that fresh consideration of a revocation application would then be required. Mr Roberts accepted that this did not mean that there was a presumption in favour of revocation (see SU v Secretary of State for the Home Department [2017] EWCA Civ 1069 *per* David Richards LJ at [64]) but nevertheless contended that once the 10 year point had been reached an appeal was “easier to argue”. He readily accepted that Mr Sinaj had not been out of the UK for all of that period, but had instead thwarted the order and defied it by returning to the UK twice and spending a significant portion of time unlawfully in the UK. However, the 10 year requirement in paragraph 391(a) ran from the date of the order, whether or not the person left the UK, and it was not interrupted or suspended during periods of unlawful return to the UK. The 10 year period would now have expired even if Mr Sinaj would never have left the UK. The enhanced (“very exceptional circumstances”) test in paragraph 399D did not apply because Mr Sinaj had now left the UK. He contended that Judge Malone had correctly identified the relevant legal framework, applied that framework correctly to the facts, and that he had been entitled to reach the conclusion that the appeal should be allowed on the specifics of this case.
20. Mr Roberts placed particular reliance on Ms [K]’s employment, which he argued was a truly exceptional factor. Both her achievements and her career were exceptional. To lose the one person who has Ms [K]’s characteristics (see paragraph 15 above) would have consequences that go far beyond one woman. It would be regressive for diversity and contrary to the public interest. This was an important factor in Judge Malone’s decision and amply justified his ultimate assessment. The Secretary of State’s grounds of appeal had failed to engage with this important issue and had instead sought to “airbrush it out” from the case.

Discussion

Did paragraph 390A of the Immigration Rules apply?

21. Before turning to the grounds of appeal it is necessary to clarify the legal framework that here applied.

22. Judge Malone proceeded on the basis that the test to be applied was that prescribed by paragraph 390A of the Immigration Rules. It may well be that this was common ground at the hearing before him. But it was incorrect.
23. Paragraphs 390-392 set out the test to be applied when considering revocation of a deportation order. Paragraph 390 is of general application (and paragraph 392 sets out, generally, the effect of revocation of a deportation order). Paragraphs 390A-391A then deal with different situations. Paragraph 391 deals with the case of a person who has been deported. This is explicit in paragraph 391 (see the opening words “[i]n the case of a person who has been deported”). Paragraph 390A, by contrast, deals with the case of a person who is subject to a deportation order but who has not yet been deported. That is not explicitly stated in paragraph 390A, but it is implicit. That is because paragraph 390A is triggered where paragraph 398 applies, and paragraph 398 applies where a person claims that their deportation “would be” contrary to Article 8 ECHR. The use of the future conditional form indicates that the paragraph is concerned with the situation before deportation has taken place. The Court of Appeal has confirmed that this is so – see ZP (India) v Secretary of State for the Home Department [2015] EWCA Civ 1197 [2016] 4 WLR 35 *per* Underhill LJ at [18]-[27].
24. In this case, Mr Sinaj has been deported. Paragraph 390A does not therefore apply. Instead, it is necessary to work through paragraphs 391-391A. There is, however, no principled reason why the approach should be significantly different. The Court of Appeal has confirmed that there is no fundamental difference between the practical application of the rules in these two different categories of case – see *per* Underhill LJ at [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 (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192, [2014] 1 WLR 544] 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."

Application of paragraphs 391 and 391A of the Immigration Rules

25. By contrast with paragraph 390A, paragraph 391 is concerned with cases where (as here) deportation has taken place. Subject to the stated exceptions, it provides that the continuation of the deportation order will be the proper course where:
 - (a) (as here) the person has been sentenced to a period of imprisonment of less than 4 years, and
 - (b) 10 years have not yet elapsed since the making of the deportation order.

26. Mr Sinaj has not yet been absent from the UK, pursuant to the deportation order, for 10 years. He was deported on 8 November 2007, but he returned (unlawfully) on 11 August 2008. He was removed on 18 December 2008 (by which time he had spent 13 months in the United Kingdom). He was again unlawfully in the United Kingdom between August 2010 and February 2011 (a period of six months), and he returned again at some time before 2015 and remained until October 2016 (a period of at least 22 months). He was therefore in the United Kingdom for approximately 3½ years of the 10 years since he was first deported. However, paragraph 391 is not concerned with the period of time that has passed since deportation. Nor is it concerned with the period of time for which the deported person has remained out of the UK. It is concerned only with the period of time since the deportation order was made. That period is not interrupted or stopped if the person returns to the United Kingdom. Here, the deportation order was made more than 10 years ago: "10 years have elapsed since the making of the deportation order". It follows that the stipulation in paragraph 391 that continuation of the deportation order will be the "proper course" does not apply, and that, instead, consideration should be given to whether the deportation order should be maintained "on a case by case basis".

27. In considering whether the deportation order should be maintained on a case by case basis it is necessary to have regard to the general factors in paragraph 390. It is necessary also to apply paragraph 391A. That applies to "other cases", that is cases other than the cases prescribed by paragraph 391(a) and (b). That is why Swift J observed that any further application that Mr Sinaj might make would fall to be considered by reference to paragraph 391A. This requires that revocation of the order will not normally be authorised unless the situation has materially altered (but the passage of time can itself amount to a change of circumstances).

Error of law by reference to paragraph 399D of the Immigration Rules?

28. The Secretary of State relied on paragraph 399D which states:

“Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances.”

29. The Secretary of State argues that this is what happened here. Mr Sinaj has been deported. He re-entered the United Kingdom in breach of the deportation order. Accordingly, by paragraph 399D enforcement of the deportation order is to be regarded as being in the public interest, and it must be implemented unless there are very exceptional circumstances.

30. We do not consider that paragraph 399D directly applies in the circumstances of the present case. It does not appear in the section of the Immigration Rules that deal with revocation of a deportation order (paragraphs 390-392). It appears in the section of the Rules that deals with “Deportation and Article 8”. It contemplates a case where a person is seeking to challenge their removal pursuant to a deportation order (the “enforcement” and “implement[ation]”) of the order, rather than a case where a person is seeking to revoke the order. This no doubt explains why Mr Sinaj was advised to leave the United Kingdom and to seek to enter from abroad when, in breach of the deportation order, he had entered the United Kingdom and had established a relationship with Ms [K]. The position as it stands now, and as it stood at the time of the application to revoke, is that Mr Sinaj is not in the United Kingdom in breach of a deportation order.

31. Paragraph 399D does not therefore apply to the case. It was not necessary for Mr Sinaj to establish the high test of “very exceptional circumstances” in order to revoke the deportation order. We therefore dismiss the Secretary of State’s grounds of appeal insofar as they are based on paragraph 399D of the Immigration Rules.

Error of law by reference to change in circumstances?

32. It remains to be considered whether there had been any relevant change in circumstances as required by paragraph 391A.

33. Further time had passed. This is in itself capable of amounting to a change in circumstances. Moreover, the further passage of time meant that the 10 year point had been reached so as to trigger the application of paragraph 391A rather than 391(a). However, the further passage of time did not impact on the underlying evidence (save to the extent that he and his wife are older, and that the prospects of successful IVF diminish with age). It did not change (for better or worse) the nature and quality of the private and family life on which Mr Sinaj and Ms [K] relied. There was no new feature to that private and family life. None of the factual points on which Mr Sinaj relied in relation to the impact of the deportation order (and particularly the impact on Ms [K]) arose out of events that had taken place since the

decision of Swift J. The impact on Ms [K] of a refusal to revoke the deportation order was no different in principle at the time of Judge Malone's decision compared to the time of the decision of Swift J. There was no significant additional impact on her as a result of the passage of that period of time. Swift J had found that the impact was "harsh" but not "unduly harsh". Judge Malone found that the consequences were "extreme" and "unduly harsh" and that it "would take too heavy a toll" and "would be disproportionate." However, Judge Malone did not identify any new feature in the case that would justify a change in the assessment of the impact on Ms [K] from that undertaken by Swift J. There was no new significant new feature. The underlying facts were the same, save for the age of Mr Sinaj and Ms [K] and any impact that had on the prospects for IVF.

34. We therefore consider that Judge Malone erred in law in finding that there had been a relevant change in circumstances such that it would be unduly harsh to maintain the deportation order. That is sufficient to require a reappraisal of Mr Sinaj's appeal against the Secretary of State's decision. There are, however, additional linked problems with the conclusion that maintaining the deportation order would be a disproportionate interference with the private and family life rights of Mr Sinaj and Ms [K].
35. First, Mr Sinaj and Ms [K] had established their relationship life at a time when Mr Sinaj was in the UK unlawfully. It followed that little weight should be given to their relationship when analysing whether any interference with the relationship could be justified – see section 117B(4)(b) of the 2002 Act. The same applies in relation to the appellant's private life by virtue of sections s.117B(4)(a) and s.117B(5). Judge Malone did not take into account the fact of the relationship having been established when the appellant was in the UK unlawfully at the point at which he found that the impact on Ms [K] would be unduly harsh (albeit he did later refer to the point – see paragraph 39 below).
36. Second, although paragraph 399D of the Immigration Rules did not directly apply, that rule reflects and "encapsulates the public interest in ensuring that a deportation order is not only implemented but fully effective. It is not effective if the deportee unlawfully returns to the UK while the order remains in force" – see SU at [41]. Here, Judge Malone did not fully take into account Mr Sinaj's defiance of the deportation order by returning to the UK and the need to vindicate the public interest in the full efficacy of the order. This was relevant to the balance to be struck under Article 8.
37. Third, Mr Sinaj had spent a substantial proportion of the 10 year period identified in paragraph 391(a) unlawfully in the UK. That did not, for the reasons we have given, stop the 10 year period from running. It did, however, mean that the order had not run its intended course and its effect had been attenuated. This was a further factor that was relevant to the balance to be struck.
38. Fourth, in considering the impact of the deportation order on the couple's wish to pursue IVF, Judge Malone effectively ruled out the possibility of pursuing IVF in Albania. There was, however, no evidence as to the availability and efficacy of IVF in

Albania. The burden was on Mr Sinaj to establish the nature of the impact. Evidence on the issue was likely to be readily available. Mr Roberts candidly accepted that a conscious decision had been made not to adduce evidence. In those circumstances it does not seem to us that it was open to the Judge to draw inferences in Mr Sinaj's favour in the absence of any evidence. Moreover no consideration was given to the possibility of pursuing fertility treatment in Europe (the couple had spent time together in Paris and Mr Sinaj had pursued the appeal from Germany). In any event, an inability to pursue fertility treatment is the natural and inevitable consequence of a deportation order. In Agyarko v Secretary of State for the Home Department [2017] UKSC 11 [2017] 1 WLR 823 the Supreme Court upheld the conclusion of the judge in that case that the inability to pursue fertility treatment in the UK did not amount to an insurmountable obstacle (within the meaning of Appendix FM to the Immigration Rules) to the pursuit of family life outside the UK – see *per* Lord Reed JSC at [73].

39. Fifth, after reaching his conclusion that the continuation of the order would be disproportionate, the Judge said:

“In coming to my decision, I have had regard to the matters set out in s.117A-D of Part 5A of the 2002 Act. The maintenance of effective immigration rules is in the public interest. I attach great weight to that principle. The Appellant speaks good English. He would be financially self-sufficient if he were to return here. He would be maintained by Ms [K] or would find suitable employment. His relationship with her was formed when he was here unlawfully.”

40. It appears from this passage that the Judge considered that Mr Sinaj's proficiency in English, and his financial self-sufficiency, were significant factors to be weighed in the balance against the public interest in the maintenance of immigration control. However, these factors were not capable of outweighing the public interest in the maintenance of immigration control. Rather, they were neutral – see Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58 [2018] 1 WLR 5536 *per* Lord Reed JSC at [57]

Whether to revoke the deportation order

41. Both parties agreed that in the event we found that Judge Malone made a material error of law it would be appropriate for us to decide whether or not to allow Mr Sinaj's appeal against the Secretary of State's refusal to revoke the deportation order. Neither side sought to adduce further evidence on this issue.
42. We consider Mr Sinaj's appeal by reference to the test in paragraphs 390 and 391 of the Immigration Rules read with 391A and sections 117A-D of the 2002 Act. It is necessary to take account of the grounds on which the order was made, any representations made in support of revocation, the interests of the community, including the maintenance of an effective immigration control and the interests of the applicant, including any compassionate circumstances. In doing so it is necessary to determine whether there has been any material change in circumstances since the deportation order was made.

43. In the light of our reasons for finding that Judge Malone erred in law, we are not satisfied that any of the matters relied on by the appellant reveal that continuation of the deportation order would be contrary to his (or Ms [K]'s) Article 8 rights. There has been a change in circumstances since the deportation order was made: ten years have passed. Mr Sinaj has met Ms [K], formed a relationship with her and married her. They wish to start a family together. At the time of the decision under challenge they were 10 months older than at the time of the decision of Swift J. As Judge Malone put it, Ms [K]'s "biological clock is ticking." The maintenance of the deportation order will have an effect not just on Mr Sinaj but also on Ms [K]. However, Mr Sinaj was unlawfully in the UK at the time he commenced his relationship with Ms [K]. By reason of section 117B(4) "little weight" should be attached to the relationship.
44. For the reasons given by Swift J, the impact of the deportation order on Ms [K] is harsh, but not unduly harsh.
45. It follows that to the extent that the deportation order interferes with the couple's right to respect for private and family life, that interference is proportionate to the importance of the maintenance and enforcement of effective immigration control and is therefore justified. It follows that the decision of the Secretary of State not to revoke the deportation order was likewise justified. It follows that the decision of the Secretary of State must be restored.

Outcome

46. We consider that the First-tier Tribunal made a material error of law. Its decision is set aside and we re-make the decision by dismissing the appellant's appeal.

Decision

The Secretary of State's appeal is allowed. We substitute a decision dismissing Mr Sinaj's appeal against the Secretary of State's decision.

No anonymity direction is made.



PP. MR JUSTICE JOHNSON sitting as an Upper Tribunal Judge.

26/03/20

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email