Neutral Citation Number: [2020] EWHC 1482 (Admin)

Case No: CO/4055/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10th June 2020

Before :

Upper Tribunal Judge Markus QC (sitting as a Judge of the High Court)

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Between :

FH	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Gordon Lee (instructed by **Vincent Solicitors**) for the **Claimant**
Richard Evans (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 22 April 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00 AM on Wednesday 10 June 2020.

Upper Tribunal Judge Markus QC:

1. The Claimant is a national of Iran. He was born on 16th February 1955. He entered the UK as a visitor on 2nd January 1979 and was given leave to remain until 30th July 1980. At some point he went to France where he married a British citizen. On 27th January 1981 he re-entered the UK with his wife and was granted leave to enter as a spouse until 27th August 1981. On 30th June 2005 the Claimant was convicted of making a threat to kill and of assault occasioning actual bodily harm, and received consecutive sentences of imprisonment totalling four years. On 1st December 2005 the Claimant was convicted of thirteen counts of perverting the course of justice and two counts of obtaining property by deception and was sentenced to 30 months' imprisonment concurrent to the four year sentence.

2. The Claimant was served with notice of liability to deportation on 5th May 2006. On 9th May 2006 he made asylum and. human rights representations that he should not be returned to Iran. The Defendant refused the claims and on 12th November 2007 the Claimant was served with a notice pursuant to section 72 of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') inviting him to make representations rebutting the presumption contained within section 72 that anybody sentenced to more than 2 years' imprisonment was deemed to have committed a particularly serious crime and to constitute a danger to the community. The Claimant's representations were refused, he appealed and his appeal rights were exhausted on 20th January 2009. A deportation order was signed on 24th February 2009.

3. In June 2012 the Claimant made submissions against his deportation, relying on Article 8 of the European Convention on Human Rights. On 1st February 2016 the Defendant refused to accept the further submissions as a fresh claim pursuant to paragraph 353 of the Immigration Rules. On 15th July 2019 the Claimant was detained and served with removal directions. On 22nd July 2019 the Claimant made further submissions against deportation. On 24th July the Defendant refused to accept the submissions as a fresh claim and refused to revoke the deportation order. On 24th and 25th July the Claimant's then solicitor made further submissions. By two decisions on 25th July, the Defendant refused to accept these as a fresh claim and refused to revoke the deportation order. On 1st August 2019 the Claimant was removed to Iran.

4. In this application for judicial review the Claimant contends that the decisions of 24th and 25th July 2019 were unlawful and that, consequently, his detention and removal to Iran were unlawful. He seeks orders quashing the two decisions, a mandatory order compelling the Defendant to use her best endeavours to return the Claimant to the UK, and damages. It was common ground that the claim for unlawful detention and removal cannot succeed unless the decisions were unlawful.

Legal framework

Deportation

5. The Defendant has the power to revoke a deportation order pursuant to section 5(2) of the Immigration Act 1971. The factors to be considered when deciding to revoke a deportation order are set out in paragraphs 390 and 390A of the Rules:

> "390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
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> (i) the grounds on which the order was made;
>
> (ii) any representations made in support of revocation;
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> (iii) the interests of the community, including the maintenance of effective immigration control;
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> (iv) the interests of the applicant, including any compassionate circumstances.
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> 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."

6. Paragraphs A398, 398, 399 and 399A provide for circumstances where deportation would be contrary to an individual's Article 8 ECHR rights.

> "A398. These rules apply where:
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> (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
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> (b) a foreign criminal applies for a deportation order made against him to be revoked.
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> 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
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> (a) 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 at least 4 years,
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> (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; 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 or they are a persistent offender who shows a particular disregard for the law,

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 relationshjp with a child under the age of 18 years who is in the UK and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; 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; on

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

(c) 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) or (c) applies if –
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> (a) the person has been lawfully resident in the UK for most of his life; and
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> (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."

7. Paragraphs 398, 399 and 399A reflect the provisions of section 117C of the 2002 Act. Section 117C provides that the deportation of foreign criminals is in the public interest, and that the public interest requires deportation of offenders whose period of imprisonment was more than twelve months but less than four years unless Exception 1 (lawful long-term residence, integration in the United Kingdom and significant obstacles to integration into the country of deportation) or Exception 2 (there was a genuine and subsisting relationship with a qualifying partner or child and the effect on them of deportation would be unduly harsh) applies. Section 117C(6) provides that, in respect of those 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 in Exceptions 1 and 2.

8. In *NA (Pakistan) v. SSHD* [2016] EWCA Civ 662 the Court of Appeal held that individuals who had been sentenced to terms of imprisonment of less than four years but more than twelve months could also rely on very compelling circumstances over and above the circumstances in exceptions l and 2. This is given effect by the current version of paragraph 398.

9. Paragraph 391 of the Immigration Rules provides for the continuation of a deportation order where a person has been deported:

> "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:
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> (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
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> (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,
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> 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."

Fresh claims

10. Paragraph 353 of the Immigration Rules provides:

> "When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal referring to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection
>
> This paragraph does not apply to claims made overseas."

11. In *R (WM (DRC)) v. SSHD* [2006] EWCA Civ 1495, the Court of Appeal established the following principles applicable to paragraph 353: the question for the Secretary of State is whether there is a realistic prospect of success in an application before a tribunal judge; that is a "somewhat modest test"; the Secretary of State must be informed by anxious scrutiny of the material; the Secretary of State must ask herself the correct question, which is what a judge would make of the submissions; and her decision can only be impugned on *Wednesbury* grounds. The approach has been confirmed in relation to human rights claims as well as asylum claims, by the Court of Appeal in *R (TK) v SSHD* [2010] EWCA Civ 1550 and *MN (Tanzania) v SSHD* [2011] EWCA Civ 193.

12. The approach to be taken by an adjudicator to previous adjudications was explained by the Immigration Appeal Tribunal in *Devaseelan v SSHD* [2002] UKIAT 00702:

> "37. …The first Adjudicator's determination stands (unchallenged, or not successfully challenged) as an assessment of the claim the Appellant was then making, at the time of that determination. It is not binding on the second Adjudicator; but, on the other hand, the second Adjudicator is not hearing an appeal against it. As an assessment of the matters that were before the first Adjudicator it should simply be regarded as unquestioned. It may be built upon, and, as a result, the outcome of the hearing before the second Adjudicator may be quite different from what might have been expected from a reading of the first determination only. But it is not the second

> Adjudicator's role to consider arguments intended to undermine the first Adjudicator's determination.
>
> 38. The second Adjudicator must, however be careful to recognise that the issue before him is not the issue that was before the first Adjudicator. In particular, time has passed; and the situation at the time of the second Adjudicator's determination may be shown to be different from that which obtained previously. Appellants may want to ask the second Adjudicator to consider arguments on issues that were not – or could not be – raised before the first Adjudicator; or evidence that was not – or could not have been – presented to the first Adjudicator.
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> 39. In our view the second Adjudicator should treat such matters in the following way.
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> **(i) The first Adjudicator's determination should *always* be the starting-point.** It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.
>
> **(ii) Facts happening since the first Adjudicator's determination can *always* be taken into account by the second Adjudicator.** If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.
>
> **(iii) Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can *always* be taken into account by the second Adjudicator.** The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them."

13. It was common ground that this is the approach to be adopted when the Secretary of State is considering previous determinations.

Submissions

14. On behalf of the Claimant Mr Lee submitted that Secretary of State erred in the application of both aspects of the test in paragraph 353 of the Rules.

15. He submitted that that the starting point for a future immigration judge on appeal would be the previous appeal decision in 2008 and that the Defendant had incorrectly taken the decision in February 2016 as the starting point. The Claimant's circumstances in July 2019 and his submissions based on those circumstances were significantly different to those considered in 2008. Mr Lee relied on the following: the

codification in the Immigration Rules and the 2002 Act of the relevant Article 8 considerations so as to emphasise the length of time spent in the UK; the Claimant's age and the length of time he had been in the UK; that 14 years had passed since his last conviction, but at the date of the hearing before the tribunal in 2008 only 3 years had passed all of which had been spent in custody; that more than 10 years had passed since the signing of the deportation order; the Claimant's integration in the UK including his British Citizen children and grandchildren; and the difficulties in his integrating in Iran. As these circumstances were significantly different from those in 2008 (or, indeed, 2016), the sole question under paragraph 353 was whether they individually or cumulatively created a realistic prospect of the Claimant succeeding before a judge, in this case as to revocation of the deportation order pursuant to the provisions of the Immigration Rules.

16. In that regard Mr Lee submitted that, taking into account that the test of whether a claim has a realistic prospect of success is "somewhat modest", the Defendant's conclusion in this case was unreasonable. The Defendant had not engaged with all relevant matters arising in the case and had failed to give the case the "anxious scrutiny" which the claim deserved.

17. Mr Lee placed particular emphasis on three particular aspects of the case. First, he submitted that the passage of time since the Claimant's offending and the making of the deportation order was significant, in particular as evidence of his rehabilitation and of his integration in the UK. He relied on a number of decisions of the European Court of Human Rights as well as domestic authority in which, Mr Lee submitted, on comparable facts the courts had found that deportation was or may be disproportionate in the light of the passage of time. In addition, the weight to be afforded to the public interest in deportation was substantially diminished by the delay between the Claimant's submissions in June 2012 and his detention in 2019.

18. Second, Mr Lee submitted that the Defendant had erred in the approach to the length of time for which the Claimant had been resident in the UK. He accepted that at the date of the 2019 decisions the Claimant had not been lawfully in the UK for most of his life but that the Defendant had failed to take into account the actual length of his stay as establishing the strength of his connection with the UK.

19. Mr Lee's final submission was that, although paragraph 391 applied to foreign national criminals who had been deported, by analogy the passage of 10 years since the date of making the deportation must also be significant in respect of a proposed deportee who has not left the UK.

20. I summarise Mr Evans' submissions on behalf of the Defendant very briefly here because I have largely adopted them and the substance of the submissions is incorporated in the discussion below. He submitted that the question whether submissions had previously been considered was to be answered not only by reference to previous tribunal decisions but also by reference to previous considerations by the Defendant. The decision letters of 24 and 25 July 2019 addressed the representations made by or on behalf of the Claimant, addressed the relevant provisions of the Rules in relation to revocation of a deportation order and the correct test under paragraph 353, approached the case correctly in the light of *Devaseelan* and reached *Wednesbury* reasonable decisions.

Discussion

21. I start the discussion with a summary of the previous decisions made regarding the Claimant and the Claimant's representations and the three decisions that were made in July 2019.

22. The Asylum and Immigration Tribunal decision of 8 December 2008 gave detailed consideration to the claim based on the private and family life in the UK of both the Claimant and others including the circumstances of his family members and the nature of the Claimant's relationship with them. The tribunal's findings included: the Claimant was divorced and remained on good terms with his wife; there was no special dependency between his adult children and him; his youngest daughter lived with his former wife and had done so since she was very young; and the Claimant and his children could maintain family contact if he returned to Iran. The tribunal found that the family relationships did not transcend normal ties and the Appellant had extensive experience of creating and operating businesses in the UK which would assist his integration in Iran. The tribunal concluded that the interference with private and family life would be proportionate taking into account the seriousness of the offences and the need to protect the public from serious crime and for deterrence, and the Claimant's lack of acceptance of his criminality.

23. The next relevant decision is that of 1 February 2016, addressing the application of 22 June 2012 for revocation of the deportation order. It set out the relevant paragraphs of the Immigration Rules and correctly observed that paragraph 398(b) applied to the Claimant (the longest sentence having been 3 years). As none of the Claimant's children was under the age of 18 and as he did not claim to have a wife or partner in the UK, paragraph 399 did not apply. The letter then addressed paragraph 399A. The letter stated that the Claimant had not been lawfully resident in the UK for most of his life. He was almost 61 years old at that time. He came to the UK in 1981 at the age of 26 and obtained indefinite leave to remain in August 1982 when he was 27, and the deportation order was made on 24 February 2009. The letter incorrectly stated that he had been lawfully resident for 24 years rather than 26 years but the error made no difference. The Defendant accepted that the Claimant was socially and culturally integrated in the UK but his skills would assist him in obtaining employment in Iran. It was not accepted that there would be very significant obstacles to the Claimant's re-integration to Iran as he had spent his early and formative years there giving him a strong foundation in Iranian culture and he was likely to have extended family members in Iran. His family was at liberty to join him in Iran or keep in contact with him.

24. The letter went on to address whether there were very compelling circumstances. It noted his claim that his risk of re-offending was lower than found by the Tribunal but stated that there was a significant public interest in deportation given the number and nature of his convictions, setting out the sentencing judge's remarks. The Defendant noted that the Claimant had been lawfully resident in the UK for a large part of his life, and that this was fully considered in the deportation process. Passages from the 2008 tribunal determination in relation to his private and family life were set out, as were the Upper Tribunal's reasons for refusing permission to bring judicial review including the statement "With respect, given the very serious nature of the convictions, the fact that the appellant had been here since 1981 was hardly likely to be determinative of this appeal". The letter continued that, in order to outweigh the very strong public interest in deporting him, the Claimant would need "to provide evidence of a very strong

Article 8 claim, over and above the circumstances described in the exceptions to deportation" and that the Claimant's circumstances regarding his family and private life were not significantly different from when the deportation decision was made.

25. The letter next addressed paragraph 353. It stated that most of the points raised by the Claimant were not significantly different from those that had previously been considered and so did not amount to a fresh claim, in accordance with *Devaseelan*. It went on to address the points not previously considered and found stated that, taken together with the previously considered material, they did not create a realistic prospect of success before an immigration judge. The conclusions in this regard addressed two matters raised at that time which were also relied on by the Claimant in this judicial review. The first was that he said there had been developments in the case law on deportation of foreign nationals, to which the Defendant responded that consideration had been given under the current Rules as already outlined in that letter. The second was that the Claimant said he was at lower risk of re-offending and referred to the length of time since the offences and his exemplary response to the sentences, to which the Defendant said that those matters had been fully considered previously by the Defendant and the tribunal, and the Claimant had remained in the UK unlawfully since he became appeal rights exhausted in 2009.

26. The first set of representations triggering the decisions with which this claim is concerned were contained in the Claimant's letter of 22 July. He asked the Defendant to reconsider the decision. The main points made by the Claimant were that he had been in the UK since 1979 and had treated England as his own country, he had worked all his life and respected the law and authority, he was sorry for the situation he found himself in, he had four children two of whom had served with the British army and six grandchildren. He also mentioned other matters concerning his family background and mental health which the Claimant does not rely on in these proceedings.

27. In the decision letter of 24 July 2019 the Secretary of State noted that the Claimant had provided no new documents or evidence relating to his family and private life in the UK and relied on information that had been before the 2008 tribunal. The letter set out that the tribunal had considered the Claimant's claim to have had a family and private life in the UK, having lived in the UK since 1979, and that he had four adult children, six children and a partner in the UK all of whom were British. This was substantially the same case as advanced by the Appellant on 22 July 2019, save that the length of time for which he had been in the UK and during which he had not offended further had increased. The letter of 24 July then set out passages from the decision of the 2008 tribunal, noted that that the Claimant was seeking to reiterate previous submissions made and considered, and said that there was no reason to expect that a tribunal would find in his favour on the basis of the same grounds at any further appeal. The Claimant had not provided any further evidence not previously considered and his submissions as to his private and family life, taken together with previously considered material, did not create a realistic prospect of success.

28. The Secretary of State went on to consider whether it would be appropriate to revoke the deportation order. She set out paragraphs 390 and 390A of the Immigration Rules and said that, in the light of the reasons already explained, the Appellant did not qualify for leave to remain in the UK on any basis and that there were no exceptional

circumstances and no evidence that deportation to Iran (the letter referred to Iraq but this was clearly a mistake) would breach his Convention rights.

29. The second set of representations, dated 24 July 2019, were written by the Claimant's solicitors at that time and were said to be a statement of additional grounds made pursuant to s.120 of the Nationality, Immigration and Asylum Act 2002 (further submissions pursuant to a protection or human rights claim). In relation to private and family life, the representations referred to the length of time the Claimant had been resident in the UK, that he was settled in the UK and had a genuine and subsisting relationship with a British citizen and other ties in the UK, and said that he apologised for his criminal behaviour and was rehabilitated.

30. The Defendant's reply to this letter was in the first decision of 25 July 2019. The Defendant dismissed the asylum and protection claim. The reasons included that the Claimant had not explained why financial or emotional support would not be available in Iran, and that the Claimant was born in Iran and spent his formative years and a significant period of his adult life there and so was familiar with the customs and language of the country. Because the Claimant was an Iranian national, he would not be of interest to the Iranian authorities or at risk in Iran.

31. In relation to family and private life in the UK, the decision noted that no documentary evidence had been provided to confirm the Claimant's partner's identity or the nature of their relationship. The letter referred to the considerations regarding private life in the letter of 24 July and the February 2016 decision. The Defendant stated that the public interest in deporting the Claimant outweighed his right to private and family life.

32. The letter went on to consider whether it would be appropriate in all the circumstances to revoke the deportation order and referred to the applicable paragraphs of the Immigration Rules. It set out that the reason for deportation was the Claimant's convictions and it continued to be in the public interest to deport him, that his circumstances had not materially altered and there were no grounds to warrant revocation of the order. It stated that there was nothing in his personal history or any application pending with the Home Office that made it appropriate to allow him to remain and there were no exceptional circumstances that made deportation inappropriate.

33. The final set of representations were in a letter from the Claimant's solicitors dated 25 July 2019. A copy of the letter of 24 July was provided along with the Claimant's father's death certificate, a copy of the bio-data pages of the passports of the Claimant's partner and family members, supporting letters from the Claimant's partner and family members and a Rabbi, and photographs. The letter and documentation were principally concerned with the assertion that the Claimant had converted to Judaism and so would be at further risk if returned to Iran. It also referred to the number of years he had lived in the UK, that he had settled into the UK way of life and that he was a rehabilitated character with strong family ties to the UK

34. The Defendant replied to these further representations by a second letter dated 25 July 2019. The Defendant considered the representations under paragraph 353 of the Rules, explained all evidence and representations previously submitted had been considered thoroughly, the evidence submitted on 24 July had either been considered

before or added nothing new, and noted that the Claimant appeared simply to disagree with the decisions made. The letter went on to consider the application to revoke the deportation order and explained that the latest submissions and evidence took the Claimant's case no further.

35. Although none of the letters of July 2019, in terms, asked the Defendant to revoke the deportation order and so did not refer to relevant paragraphs of the Rules, the above summary shows that the Defendant nonetheless considered whether to do so and correctly identified the issues arising under the Rules. The decision letters did not expressly set out why the exceptions to deportation in paragraphs 399 and 399A did not apply, but there was no need for them to have done so. The letter of 1 February 2016 had explained that those exceptions did not apply. The Claimant had not challenged that conclusion at the time or at any time since. There was nothing in the materials before the Defendant to suggest that they applied and, as Mr Lee now accepts, they did not do so. The Defendant therefore properly limited her consideration of the revocation application to the question of very compelling or exceptional circumstances (paragraphs 398 and 390A). Having rejected that application, she went on to consider whether paragraph 353 applied.

36. Mr Lee submitted that the question whether the content of the submissions had a realistic prospect of success before a future tribunal judge had to be answered by reference to the previous tribunal decision (2008). However, other previous considerations including, in this case, the decision of February 2016, are relevant as context.

37. The decision letters in substance took the 2008 determination as the starting point and found that the submissions had been considered both by the tribunal and, since, by the Defendant. Moreover, there could be no objection to the Defendant's reasoning in the instant decisions incorporating the reasons for her previous decision in so far as that remained relevant.

38. Mr Lee complained that the Defendant simply failed to engage with circumstances which had not previously been considered and which had the potential to persuade a judge to allow his appeal.

39. First, he said that a judge would note that the Article 8 considerations had been codified in the 2002 Act and the Rules and there was a body of case law which had developed since 2008. This does not avail him. The Defendant correctly considered the case in the light of the law as it presently stands.

40. Second, Mr Lee submitted that there was new evidence regarding the Claimant's family life. The tribunal appeal hearing had been 11 years earlier. His private life had developed since then. The difficulty with this is that the Claimant's representations did not explain how this had changed since 2016. The Claimant submits that new relevant evidence had been provided of the Claimant's family life, in a letter from the Claimant's son who described the Claimant's involvement with his (the son's) family including his young children. It was in substance no different to that which was considered in 2008 and 2016. I am satisfied that the Defendant was reasonably entitled to conclude that those submissions had previously been considered.

41. The main force of Mr Lee's case related to three matters which he said showed that submissions in 2019 were significantly different from matters previously considered and that the Secretary of State could not reasonably have concluded, applying anxious scrutiny to the modest criterion for realistic prospect of success, that there was no realistic prospect of success before a hypothetical immigration judge. I address each of these in turn.

a) Passage of time

42. The first matter relied on by Mr Lee was the passage of time since the Claimant's offences and the making of the deportation order and the Claimant's conduct during that period. It is true that the Defendant did not specifically address this as a relevant factor in her decisions in July 2019, although it is also obvious that the Defendant was fully aware of the chronology which was set out. The Defendant had rejected the submission in February 2016, pointing out that the Claimant had remained in the UK unlawfully since January 2009. The Claimant's further representations in July 2019 did not any material to substantiate his claim to have been rehabilitated. The representations in this regard were little more than bare assertion. In the letter of 22 July the Claimant said he was very sorry and that "if I could turn back the clock things would be different". His solicitor's letter of 24 July offered the Claimant's apology for his criminal conduct but the only submission that could possibly be relevant to his not having offended during the further passage of time was "The applicant has served his time for his mindless actions and is fully rehabilitated. The applicant has moved on with his life and a number of years have passed since his actions…the applicant is now a grandfather and completely changed his ways." There was also a letter from the rabbi stating that the Claimant has "continued to demonstrate total remorse for his past actions and has done so much to work on himself…He has put himself out to help others and has tried to participate in local communal life". The third letter simply repeated the length of time for which the Claimant had lived in the UK and that he was a "rehabilitated character".

43. It is clearly established that the time elapsed and conduct since the offence was committed should be taken into account in all cases: see *Boultif v Switzerland* (2001) 33 EHRR 50 at [48] and *Uner v Netherlands* (2006) 45 EHRR 14 at [57] and [60].

44. Mr Lee referred to a number of Strasbourg and domestic cases which showed the relevance of these factors and he submitted that it could not be said that, taking that case law into account, there was no realistic prospect of a judge finding in the Claimant's favour.

45. The first case that Mr Lee referred to was *Boultif*. The applicant had been sentenced to 2 years imprisonment for robbery and damage to property. The Court held that the fact that those offences had been committed 4 years prior to the decision in question mitigated the risk he presented to public order and security. However, although the Court acknowledged that the offences were serious, it appears from its review of the sentencing at [51] that it did not consider the threat posed by the applicant to be particularly grave.

46. *Boultif* was relied on in *Yildiz v Austria* (App no 37295/97) in which the Court concluded at [45] that the fact that the Applicant had not committed offences between April 1994 and December 1996 was material to the proportionality of removal.

However, this was in the context of the Court's view that the national authorities considered the offences to have been minor.

47. Mr Lee next referred to *CI (Nigeria) v SSHD* [2019] EWCA Civ 2027 which showed that the potential for future rehabilitation was relevant. CI had been aged 20 and 23 when he was convicted of serious offences (theft, attempted robbery, robbery and assault). Unlike the position in the present case, there was specific evidence as to the circumstances of CI's offending and his potential for rehabilitation. First, as the Court said at [119], the offences were committed when CI was young and had to be seen in the context of abuse and neglect which he had suffered through his childhood. Second, at [120], there was evidence of his potential for rehabilitation if his mental health problems were addressed.

48. The next case relied on by Mr Lee was *SSHD v. Garzon* [2018] EWCA Civ 1225. At the date of his appeal before the First-tier Tribunal, Mr Garzon had been in the UK for 36 years and had a significant criminal history including custodial sentences, imposed on separate occasions of 3 years for possession of a Class A drug with intent to supply and 45 months for wounding with intent. In addition, he had been convicted on 8 separate occasions for 11 offences between 1987 and 2010 and the tribunal concluded it was likely that he had been involved in other criminality for which he had evaded detection and punishment. The tribunal found that there were no 'very significant obstacles' to his integration back into Colombia. Notwithstanding these matters the tribunal allowed Mr Garzon's appeal on Article 8 grounds against the Defendant's decision to seek his deportation. Macfarlane LJ stated in his judgment that there were two important factors (in addition to the relationship the Appellant had with his partner) that formed the basis of the tribunal's decision that there were 'very compelling circumstances' justifying their finding that his proposed deportation would be disproportionate: the evidence of his rehabilitation, and the time that he had spent living in and degree of integration in the UK. At [13] Macfarlane LJ cited from the tribunal's findings on these points as follows:

> "120. The appellant has not come to the attention of the police for almost 5 years. His last conviction was in 2010 and there was no recent police intelligence to suggest that he had committed any further offences since that date. The appellant and his family all talk of the appellant being a changed man since his last offence. The appellant is in employment and has a new relationship with an Italian national. The appellant showed insight into his offending and was able to express how he felt that he had changed and how he now deals with aggressive or violent situations…perhaps of most importance is the fact that the evidence is that the appellant has removed himself from his previous chaotic lifestyle. There was no evidence of such a lifestyle before us now and the appellant's partner's evidence was particularly compelling in this regard.
>
> 121. The appellant has lived in the UK for over 30 years. Although he has visited Colombia, he would, in effect, be a stranger to life in Colombia given his length of time in the UK and the strength of his connections to the UK. He spent the majority of his formative and all of his adult years in the UK

> and is integrated into UK life. His primary language is English and he has studied and worked in the UK. All of his close relatives are in the UK including his parents and a brother with whom the appellant has a close relationship. They are very supportive of the appellant and have remained supportive of him despite his convictions. The appellant's partner is also supportive and hopes to marry the appellant in the future. She is working in the UK running her own business and as a freelance tutor."

49. Mr Lee submitted that the arguments accepted by the Court of Appeal in that case could equally be deployed in the Claimant's case. But the above passages show that *Garzon* was a very different case. The tribunal had not relied on the mere passage of time. There was substantial and compelling evidence to show that he and his lifestyle had changed, and this was coupled with an entirely different assessment of his private and family life to that in the present case.

50. Finally, Mr Lee relied on *SSHD v MN-T Colombia* [2016] EWCA Civ 893. The Appellant had been convicted of supplying a kilogramme of cocaine and had been sentenced to 8 years imprisonment. There was a five-year delay between the Appellant's release from prison and the Respondent commencing deportation action. At [41] Jackson LJ identified three reasons for the public interest in the deportation of foreign criminals: (1) once deported the criminal will cease offending in the UK; (2) deterrence of others; and (3) the expression of society's revulsion. Contrary to Mr Lee's submission however, Jackson LJ did not say that the strength of those factors diminished by reason of the mere passage of time. At [42] he said:

> "If the Secretary of State delays deportation for many years, that lessens the weight of these considerations. As to (1), if during a lengthy period the criminal becomes rehabilitated and shows himself to have become a law-abiding citizen, he poses less of a risk or threat to the public. As to (2), the deterrent effect of the policy is weakened if the Secretary of State does not act promptly. Indeed lengthy delays, as here, may, in conjunction with other factors, prevent deportation at all. As to (3), it hardly expresses society's revulsion at the criminality of the offender's conduct if the Secretary of State delays for many years before proceeding to deport."

51. What is said about as to (1) shows that passage of time must be accompanied by evidence of rehabilitation. Even as to that, at [35] Jackson LJ said that rehabilitation alone would not suffice to outweigh the public interest in deportation. Factors (2) and (3) were concerned with a different point, namely the effect of delay by the Secretary of State. That does not arise in the same way here. The deportation order was made promptly. The Claimant was in immigration detention from the signing of the deportation order until 2012. There was little evidence before me as to what had occurred while he was in detention or thereafter but the Claimant's skeleton argument did not advance a case that the cause of delay was relevant (indeed the case was made "irrespective of the cause of the delay"). Some explanation was provided by Mr Evans at the hearing, and not contested by Mr Lee, namely that between February 2009 and June 2012 it had not been possible to remove the Claimant to Iran due to the

state of diplomatic relations and it was possible that this situation persisted up until 2019.

52. The above decisions do not establish any principles of law which assist the Claimant and the outcomes turned on the specific circumstances in each case. The present case is very different. The mere assertion by the Claimant that he was rehabilitated or presented a lower risk of offending than previously could not possibly have altered significantly the weight of the public interest in deportation. I note that there was a letter from a Rabbi of 24 July 2019 stating that the Claimant had "continued to demonstrate total remorse for his past actions and has done so much to work on himself and improve his psychological and mental state. He has put himself out to help others and has tried to participate in local communal life". This letter contained little substantive evidence of the matters asserted. No examples were provided of what the Claimant had done to show remorse or change. This letter did not materially improve on the submissions contained in the Claimant's and his solicitor's letters. The only concrete *fact* advanced by or on behalf of the Claimant in those letters was the period of time which had elapsed since the last offence. However, passage of time alone cannot be material to whether there are exceptional or compelling circumstances. Passage of time will be relevant when, during that time, a person has strengthened their private or family life or has become rehabilitated such that the public interest in deportation is diminished. See also the discussion of *ZP* below.

53. Moreover even if there was evidence that the Claimant had established a private or family life during the period in question (and in this case there was no such evidence), it would carry little weight because during the period he had been in the UK unlawfully: see section 117B(4) of the 2002 Act. Mr Lee said that that provision would not preclude consideration of his private or family life and that, as established by *Rhuppiah v SSHD* [2018] 1 WLR 5536, it allowed for some flexibility. As is clear from that judgment at [49] and [58], there was room for flexibility "in an exceptional case" where there were "particularly strong features of the private life in question". The Claimant's case was a long way from demonstrating such features.

54. There is a further difficulty with this aspect of the claim. There is no indication in any of the cases relied on by Mr Lee that a claimant was unlawfully in the country during the period of non-offending relied on. I asked Mr Lee to check this during the lunchbreak. After lunch he identified only one such case, *MN-T*, because the period in issue there was after the date on which a tribunal had dismissed the claimant's appeal against the Secretary of State's decision that deportation would be conducive to the public good. However, what is clear is that no deportation order was made in that case and, as the judgment states at paragraph 7, the Secretary of State had made no move to deport the claimant.

55. The fact that the Claimant remained unlawfully in the UK would not itself undermine his claim to have become rehabilitated in regard to criminal conduct. However, it would affect the weight to be afforded to that factor when balancing it against the public interest in deportation. It seems to me that this was what underlay the Secretary of State's reasoning as to this issue in the February 2016 decision and it remained just as relevant in July 2019.

56. In the light of the above I conclude that the passage of time that had passed since the Claimant's offending was not of itself a material factor that called for specific consideration by the Defendant in July 2019.

b) Length of residence in the UK

57. The second specific matter to which Mr Lee referred was the Defendant's failure to give appropriate weight to the proportion of the Claimant's life for which he had in fact been resident in the UK. The Court of Appeal in *CI (Nigeria v SSHD* [2019] EWCA Civ 2027 had decided that temporary admission *per se* did not amount to lawful residence, and so at the date of the decision in this case the Claimant had not been lawfully resident in the UK for most of his life and so he accepted that the exception in paragraph 399A did not apply. However Mr Lee relied on the observation by Jackson LJ in *SSHD v SC (Jamaica)* [2017] EWCA Civ 2112 at [54] that length of stay was a proxy for strength of connection, and also on the decision of the Upper Tribunal in *Tirabi (Deportation: "lawfully resident": s.5(1))* [2018] UKUT 00199 (IAC) at [13]:

> "…we regard it as inconceivable that he thought that the determination of this issue, which is essentially one of the nature of the appellant's integration into the United Kingdom, should depend on the apparently random fact of whether a deportation order happens to have been signed before the appeal is brought'"

58. Mr Lee said that from 2008 until April 2011 the Claimant had been in the UK lawfully for more than half his life. The equation changed when he ceased to be lawfully resident but it remained the case that he had been actually resident in the UK for most of his life and it was unlikely in such circumstances a judge would consider that the Claimant's "strength of connection" somehow lessened when the mathematics had changed.

59. The reliance on *Tirabi* is misplaced. It was concerned with the question of what should count as lawful residence for the purpose of paragraph 399A and section 117C, and was concerned with a particular injustice arising from the "random fact" of the date on which the deportation order was signed. In the present case it is conceded by the Claimant paragraph 399A did not apply. The approach to the length of time for which the Claimant had actually been living in the UK has been addressed above.

Paragraph 391

60. The final matter relied on by Mr Lee was paragraph 391 of the Rules. Mr Lee accepted that paragraph did not apply in this case because the Claimant had not been deported when the decision was taken. However, he sought to rely on it by analogy and submitted that it meant that the Defendant should have afforded weight to the fact that 10 years had passed since the deportation order was made. In support of this he referred to the comments of Underhill LJ in *ZP (India) v* SSHD [2015] EWCA Civ 1197 at [24]:

> "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."

61. This passage does not support Mr Lee's submission. The nature of the exercise required for the proportionality assessment, whether before or after deportation, is *broadly* the same in that it involves balancing the maintenance of the deportation order against the applicant's article 8 rights. The reasoning is explained by Underhill LJ in his judgment immediately preceding the above passage, which is essentially that paragraph 391 and paragraphs 390A and 398 require the same exercise as that required by article 8. There is nothing in this passage to suggest that the specific provisions regarding passage of time in paragraph 391 apply to cases being considered under paragraph 390A or 398. On the contrary, as Underhill LJ explained at [23], paragraph 391 reflects the Secretary of State's policy as to the proper length of time for which a deportation order should "continue", and the last sentence of the above passage relates to that factor.

62. In any event the next paragraph of Underhill LJ's judgment makes it clear that passage of time alone will not assist.

> **"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."

63. As I have already explained, in the present case the Claimant had not advanced any factors that were capable of being found to be compelling and so in these circumstances the Defendant was not required to consider the effect of passage of time.

64. For all the above reasons the challenges to the Defendant's decisions not to revoke the deportation order, and to her decisions that the requirements of paragraph 353 were not met, fail. Accordingly this application for judicial review is refused.