Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number OA/21139/2013**

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons promulgated**
On 25 February 2015	**On 29 October 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

J.F.
(Anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the Appellant: Mr. C. Yeo of Counsel instructed by Legal Rights Partnership LLP.
For the Respondent: Ms. L. Kenny, Home Office Presenting Officer.

DECISION AND REASONS

Background

1. This matter comes back before me to remake the decision in the appeal following my finding of an error of law in the decision of First-tier Tribunal Judge Carroll.

2. The Appellant is a citizen of Jamaica. His date of birth appears inconsistently in the papers: the Respondent records it as 24 September 1975; the most recent statements of the Appellant give his date of birth as 31 May 1977. It is to be noted that the Appellant has used a false identity document in the past and it is likely this is the origin of the discrepancy; in the event for present purposes nothing turns on such a discrepancy *per se* (although necessarily the past deception as to identity informs the issues herein.) He appeals against a decision dated 25 October 2013 to refuse to revoke a deportation order.

3. The following Chronology is to be derived from the various documents on file.

5 OCT 2000:	Appellant entered the UK with leave as a visitor until 5 November 2000.
21 OCT 2000:	Appellant married CC, a British citizen who had met the Appellant when visiting Jamaica earlier in the year.
2 NOV 2000:	Appellant returned to Jamaica.
11 MAY 2001:	Appellant returned to UK; granted leave to enter as a visitor until 11 November 2001.
c. JUN 2001:	Relationship with CC broke down.
c. NOV 2001:	Appellant met SJ (whom he would later marry, and is referred to elsewhere herein, post-marriage, as SF).
11 NOV 2001:	Appellant's leave expired, but Appellant remained in UK as an 'overstayer'.
c. JUN 2002:	Appellant commenced cohabitation with SJ.
27 JUL 2003:	Appellant arrested in connection with suspected theft and immigration offences.
FEB 2004:	SJ (as she then was) visited Jamaica for 2 weeks and met the Appellant's family (whilst Appellant remained in UK).
27 JUL 2005:	Appellant applied for asylum.
2 AUG 2005:	Appellant's asylum claim refused.
20 SEP 2005:	Asylum appeal dismissed. (It is apparent that Article 8 was also considered: see later decision in deportation appeal at paragraph 23 - "*The appellant confirmed that Article 8 was considered in the original asylum appeal...*".)
26 OCT 2005:	Appellant removed from UK.
24 MAR 2006:	Decree absolute terminating Appellant's marriage.
27 MAR 2006:	Appellant married SJ in Jamaica.
12 MAY 2006:	SF (nee SJ) delivered of Appellant's daughter D-RF in UK.

c. SEP 2006: Appellant applied for entry clearance as a spouse.

7 FEB 2007: Entry clearance refused. (Reasons are set out in the Notice of Immigration Decision, pages 135-137 of the Appellant's bundle.)

SF and D-R made two visits to Appellant for 14 days in May/June and 14 days in October/November of 2007.

DEC 2007: Appellant applied for entry clearance as a visitor.

21 DEC 2007: Entry clearance refused. (Reasons are set out in the Notice of Immigration Decision, pages 138-140 of the Appellant's bundle.)

6 MAY 2008: Appellant arrived from Jamaica presenting a Jamaican passport in another identity; his previous identity was revealed following a fingerprint check.

Appellant claimed asylum.

21 MAY 2008: Appellant convicted at Lewes Crown Court in respect of possession of a false identification document, and sentenced to 9 months imprisonment with a recommendation for deportation. The sentencing remarks of the presiding judge, HHJ Kemp, included the following:

"…you have pleaded guilty to this offence of possession of a passport in the name of another with intent on 6th May to establish registrable facts about yourself, in other words, with intent to use it to persuade the Immigration Authorities to allow you to enter the United Kingdom.

You have pleaded guilty at the very first opportunity and for that I give you full credit, but the offence is a serious one. Officers at ports and airports, particularly Immigration Officers, are entitled to know who the holder of a passport is, and if that passport, on the face of it, tells a lie about the person presenting it, then rightly, as the public would expect, those officials will investigate the matter and the courts will come down hard on the heels of anybody convicted of that offence.

You have been to this country before; you knew you should not be here; you were using the false passport in order to seek to gain entry illegally. There are more legal and legitimate avenues for you to pursue, and that is what I strongly advise you to do hereafter.

For this offence, you have pleaded guilty at the earliest opportunity, I give you full credit for that. I am told you are a man hitherto of good character, and that indeed you have a wife and child to look after. That is what you should be concentrating on doing rather than spending time in prison, but you will serve a sentence of imprisonment nine months…

… and I recommend that you be deported back to Jamaica before you are in fact released from custody, as soon as the

Secretary of State has considered the recommendation …"

25 AUG 2008: Appellant withdrew his asylum claim.

9 SEP 2008: Appellant notified of a decision to make a Deportation Order.

12 SEP 2008: Appeal lodged against deportation decision (ref IA/15475/2008).

(Appellant subsequently granted bail.)

27 OCT 2008: Appeal dismissed.

It is apparent on the face of the determination of Immigration Judge Metzer and Non-Legal Member Mrs Roe (which is a matter of record on file and also extensively quoted in the decision of First-tier Tribunal Judge Carroll herein) that the Appellant relied in considerable part upon Article 8 of the ECHR with reference to his relationship with his wife and daughter. The Tribunal found "*the appellant has established a private and family life in the United Kingdom under Article 8(1) on the basis of his marriage to his wife, the fact of his young daughter in the United Kingdom and his close relationship with members of his wife's family and friends*" (paragraph 39).

6 NOV 2008: Application for reconsideration refused by Senior Immigration Judge Eshun.

16 DEC 2008: Application for reconsideration dismissed by Mr Justice Silber: "*The Tribunal was entitled to regard the applicant's offending as serious as it struck at the basis of border control; indeed the sentencing judge considered it sufficiently serious to justify a prison sentence.*"

8 APR 2009: Deportation Order signed.

22 JUL 2009: Son, KF, born to Appellant and SF.

28 APR 2010: Appellant deported.

6 OCT 2010: Application letter for revocation of Deportation Order.

13 MAY 2011: K travelled to Jamaica to stay with Appellant.

8 AUG 2011: SF and D-R travelled to Jamaica.

27 AUG 2011: SF and both children returned to UK.

29 APR 2013: SF and K travelled to Jamaica.

6 MAY 2013: SF returned to UK leaving K with the Appellant.

31 JUL 2013: SF travelled to Jamaica.

7 AUG 2013: SF and K returned to UK.

25 OCT 2013: Decision refusing to revoke Deportation Order. (A

'reasons for refusal' letter ('RFRL') and a Notice of Immigration Decision both dated 25 October 2013 were served on 30 October 2013.)

4. There is no real issue between the parties in respect of the primary facts, and as such it is was not necessary to reconvene a fact-finding hearing following the 'error of law' decision.

Consideration

5. It was common ground that the relevant framework for considering the Appellant's application for revocation of his deportation order, and in turn the framework for the appeal, was to be found in Part 13 of the Immigration Rules at paragraphs 390 *et seq*.

6. The particular version of the Rules that was applicable (i.e. extant at the date of the Respondent's decision) was agreed by the parties to be that set out in the Skeleton Argument of Ms Kenny. For completeness I reproduce those paragraphs of the Skeleton Argument here:

> "390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
>
> (i) the grounds on which the order was made;
>
> (ii) any representations made in support of revocation;
>
> (iii) the interests of the community, including the maintenance of an effective immigration control;
>
> (iv) the interests of the applicant, including any compassionate circumstances.
>
> 390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.
>
> 391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:
>
> (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order, or
>
> (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,
>
> Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

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

...

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

(a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good 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 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, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

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

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

(i) the child is a British Citizen; or

(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 not be reasonable to expect the child to leave the UK; and

(b) there is no other family member who is able to care for the child in the UK; or

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

(i) the person has lived in the UK with valid leave

continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

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

(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or

(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

7. Ms Kenny's reproduction of the Rules omits, amongst others, paragraph 392 which states: "*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.*" Also omitted is paragraph 396: "*Where a person is liable to deportation the presumption should be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007*". (I do not criticise such omissions; the Skeleton focuses on the more directly relevant Rules; I make good in part the omissions herein however for completeness and context.)

8. Also omitted are the sub-headings. For completeness: above paragraph 390 is the sub-heading 'Revocation of deportation order'; after paragraph 392 – 'Rights of appeal in relation to a decision not to revoke a deportation order; above paragraph 398 – 'Deportation and Article 8'.

9. The Rules appear to some extent problematic in that the same paragraphs that apply to deportation decisions are referenced in the context of revocation applications; this appears to strain the context and the language. For example, in considering paragraph 398 in the context of an out-of-country revocation application an applicant is past the point of claiming that their "*deportation would be contrary to the UK's obligations under Article 8*". Similarly, where pursuant to paragraph 390A a decision-maker considers paragraphs 399A it is artificial to consider a period of residence in the UK "*immediately preceding the date of the immigration decision*", or the ties in the country "*to which he would have to go if required to leave the UK*".

10. It seems to me that there is no easy resolution of such tensions: indeed both representatives recognised and acknowledged the apparent shortcomings in the drafting of the Rules in this regard. In the circumstances, and bearing in mind that the Rules do not have the absolute force of statute or secondary legislation and as such are not subject to the same rigours of statutory interpretation, it seems to me that a pragmatic and practical approach must be taken to an understanding of their meaning in the context of a revocation application, and bearing in mind the underlying principles relevant to issues of deportation and immigration control, but also recalling that the Rules are to be approached with a broad humanity.

11. In this latter context and generally I note that it was also common ground that the amendments to Part 5A of the Nationality, Immigration and Asylum Act 2002 introduced by virtue of the Immigration Act 2014 was of application in so far as issues of private and family life under Article 8 were concerned. Sections 117A – 117D are matter of public record and accordingly I do not reproduce them here. (See further below in respect of the relevance and applicability of Article 8.) For the avoidance of any doubt I recognise and acknowledge that the concept of an 'approach of broad humanity' to an interpretation and understanding of an immigration rule is not congruous with a consideration of Article 8, and may readily accommodate a wider – or more generous – approach than a strict jurisprudence led Article 8 balance. In effect in reaching an understanding of the meaning of a rule that might be poorly drafted, and applying it, what is required is a common-sense approach bearing in mind that the Rules impact upon people's lives.

12. In addition to the Rules there is published Guidance: Mr Yeo has provided a copy of the Respondent's 'Criminal casework' guidance document 'Revocation of deportation order: requests made from outside the UK' (v3.0, valid from 23 January 2014). (A copy is on file; the document is a matter of public record and accordingly I do not reproduce it here.) Necessary I remind myself that such guidance does not constitute the Rules themselves, and the Tribunal is concerned in the first instance with a consideration of whether the Respondent's decision is in accordance with the rules. Such guidance may, nevertheless, assist in an understanding of the meaning of the rules; moreover a failure to consider the guidance, unwarranted and or unreasoned departure from the guidance, may found a conclusion that a decision is not in accordance with the law. Neither representative sought to emphasise any particular passages in the guidance.

13. Neither representative has made any express reference to the duties under section 55 of the Borders, Citizenship and Immigration Act 2009 in their respective Skeleton Arguments. Nonetheless the welfare of the Appellant's children has featured as a primary element of the evidence and submissions herein – in particular in respect of events since the Appellant's deportation. I have accorded the position and welfare of the children a primary consideration in my deliberations.

14. Before turning to the particular facts of this appeal, I make two further preliminary observations as to its parameters.

15. The first echoes paragraph 392 of the Rules, (quoted at paragraph 7 above). This appeal is not about whether the Appellant should be admitted to the UK, but whether he should be able to make an application for entry clearance – which necessarily will then have to be considered in accordance with the applicable Rules for entry clearance as a spouse and or parent. It was this feature of the case that caused me, following the finding of an error of law, to invite the parties to provide assistance as to the role of Article 8 in a revocation case "*bearing in mind that a decision to revoke a deportation order is not a decision to grant entry to the UK, but merely 're-opens the gateway' to making an application for entry clearance under the Rules*" (paragraph 14 of my 'Error of Law' decision). In the event little was said by way of submission on this point; after some discussion it appeared to be common ground that in effect Article 8 was still of relevance (because a decision to refuse to revoke could potentially impact on the Article 8 rights of an applicant and persons present in the UK in that it would maintain an obstacle to *seeking* to enjoy any mutual family/private life in the UK), but must be considered through the prism of a decision that did not itself resolve the issue of entry to the UK. In effect a case might come down to the proportionality of an applicant being denied the opportunity to make a substantive application for entry in which he/she would be asserting Article 8 rights. This is a slightly different balancing exercise from that more usually considered in the context of immigration cases, be they in the entry clearance or removal, but is perhaps approximately analogous to the circumstances of an applicant with no basis to remain in the UK who nonetheless is pursuing an application for contact with his or her children in the UK family courts wherein it may be a breach of Article 8 – depending on of the particular facts – to deny such a person the opportunity of pursuing matters relevant to their family life.

16. It seems to me that what follows from that is that any Article 8 issues raised by an applicant for revocation – i.e. an applicant wanting to put himself in a position to apply for entry clearance – are not inevitably to be determinatively answered by a suggestion of UK-based family members relocating. Be that as it may, and in any event what is clear on the facts here is that this is not a case about the reasonableness of relocation of the Appellant's wife and children. I approach the appeal on the premise that the issue is in respect of the possibility of the Appellant seeking to apply for entry clearance and that that cannot adequately be answered by the suggestion that his wife and children could instead relocate.

17. The second preliminary observation is, just as this is not an 'entry clearance' appeal, neither is at an appeal against the decision to make a deportation order, or the decision of the Tribunal upholding the decision to deport.

18. Whilst this is a trite proposition, it is nonetheless worth stating given that much of the representations made in support of the Appellant's application for revocation seek to revisit, deconstruct, and criticise the reasoning of the Tribunal in the Appellant's unsuccessful deportation appeal.

19. In this context I note in particular that the application letter of 6 October 2010, having set out the relevant criteria under paragraphs 390 and 391 of the Immigration Rules then states "*First and foremost the factor that ought to be considered is the grounds on which the original order was made and in this regard we would submit that the Immigration Judge's decision was fundamentally flawed*", before going on to analyse the decision of the Tribunal promulgated on 27 October 2008. Further in this regard it is to be noted that when the application letter was written only 6 months had elapsed since the Appellant's deportation. The only material alteration in terms of the facts identified in the letter – and addressed in a single short paragraph – was the birth of KF. (With the passage of time between the application and the Respondent's decision other occurrences have now been highlighted: see further below.)

20. I remind myself that the attempt to challenge the decision of the Tribunal in the deportation appeal was unsuccessful – permission to appeal was refused and a subsequent application for permission to apply for judicial review dismissed.

21. Further, for the avoidance of any doubt, in so much as the approach of the letter of 6 October 2010 is apparently implicitly based on the proposition that paragraph 390(i) of the Immigration Rules – "*An application for revocation of a deportation order will be considered in the light of all the circumstances including... the grounds on which the order was made*" – allows a challenge to those grounds, I reject such a notion as legally flawed. The imperative of paragraph 390(i) is to remind the decision-maker to take into account when considering revocation the actual basis of the deportation order itself: it is not an invitation to an applicant to challenge the basis of the deportation order at the time of an application for revocation – which is inevitably at a time after becoming 'appeal rights exhausted' in respect of the initial deportation decision. Of course this does not mean that in considering the grounds upon which the deportation order was made the decision-maker in a revocation application (and in turn the Tribunal) cannot look at those grounds from the different perspective and distance of the revocation application; that is a very different process from impugning the grounds for deportation *ab initio*, which is what the letter of 6 October 2010 in the main attempts. This appeal is not a chance to re-litigate the decision to deport - albeit such a decision inevitably forms the backdrop to, and informs, the issues herein.

22. Taking these two observations together: the central issue is whether the valid deportation order should now be revoked, which would then permit an application for entry clearance to be considered under the Rules.

23. Mr Yeo's principal submission in this regard is this: where a sentence of less than 12 months led to deportation, revocation will normally be the correct course. (See Skeleton Argument at paragraph 15.) Indeed he goes so far as to submit that absent the aggravating factors listed at paragraph 398(c) – serious harm or persistent offender – revocation is "*essentially mandatory*" (paragraph 21).

24. This submission is based on the fact that under the automatic deportation regime introduced pursuant to the UK Borders Act 2007 and the Immigration Act 2014 (which was not in force at the time the Appellant was deported), a person otherwise facing 'automatic' deportation will not be deported if the circumstances of either paragraph 399 or 399A pertain, save in exceptional circumstances. Mr Yeo argues that the public interest in removing a person who has received a sentence below that which triggers 'automatic' deportation must be considered even less. In short, he argues that the Appellant's offending behaviour would not result in a deportation order today, and accordingly maintaining a deportation order is not appropriate.

25. In my judgement this represents too simplistic an approach that overlooks that the Appellant was not deported simply because of his criminal behaviour. In particular in essentially focusing on a sentencing tariff, or scale, as currently applicable in 'automatic deportation' cases, it overlooks that the criminal behaviour of which the Appellant was convicted was specifically in the context of frustrating immigration control. It also ignores that the deportation order related to an individual with a history of disregard for immigration control. In all such circumstances – irrespective of the current provisions in respect of automatic deportation – it is plain and evident why the onerous sanction of deportation was imposed upon the Appellant after a non-automatic discretionary consideration of all of his circumstances.

26. It also seems to me that Mr Yeo's submission essentially ignores the fact that the regime of automatic deportation for foreign criminals does not represent the entire deportation scheme. A person sentenced for fewer than 12 months who is nonetheless the subject of a recommendation for deportation by the sentencing judge may yet be made the subject of a decision to deport pursuant to the exercise of the Secretary of State's discretionary powers. In such circumstances I do not accept the essential premise of Mr Yeo's argument that a person sentenced in the same way as the Appellant, could not currently face deportation. True, such a person would not engage the automatic deportation regime, but it does not follow that a decision to deport might not yet be made in all of the circumstances of the particular case.

27. Further and in any event, in my judgement the submission disregards that the exceptions to automatic deportation would not have been met by the Appellant. (Of course I recognise that Mr Yeo's starting point is that the automatic deportation provisions are not engaged in any event by reason of the sentence; however in seeking to argue that a person with a lower

sentence would not face deportation by analogy, inevitably regard must be had to those balancing elements that would defeat automatic deportation as similar elements may be relevant to a consideration of discretionary deportation in respect of a criminal with a lesser sentence.) The Appellant would not have met the requirement of paragraph 399(a)(b) – "*there is no family member who is able to care for the child in the UK*" – by reason of the presence of the mother; further the Appellant would not have met the requirement of 15 years continuous valid leave.

28. In any event I am unable to accept that support for this submission emerges from a consideration of the relevant Immigration Rules.

29. Mr Yeo's submission essentially invites a decision-maker to commence consideration of a revocation application at paragraph 398 of the Rules, and to determine that if paragraph 398 does not apply – and therefore it is unnecessary to consider the exceptions at paragraph 399 and 399 A – then revocation must follow. This is to ignore the other provisions of the Immigration Rules.

30. In my judgement the starting point is paragraph 390. This sets out in broad terms the matters that must be taken into account. Numerically and logically the next matter for a decision-maker to consider is paragraph 390A – which directs attention to paragraph 398. If paragraph 398 does not apply then "*it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors*" (paragraph 390A). Paragraphs 391 and 391A provide further guidance which is relevant to the balancing exercise adverted to in paragraph 390 and the last part of paragraph 390A.

31. In contrast Mr Yeo's submission is to the effect that if paragraph 398 does not apply then revocation is inevitable. I cannot reconcile this submission with the scheme of the Rules, and reject it accordingly.

32. I turn then to a consideration of the Appellant's case in accordance with the scheme of the Rules.

33. The starting point is the grounds on which the deportation order was made. I have set out above in the chronology fulsome extracts from the sentencing remarks of the Judge that recommended deportation. The details of the decision to make a deportation order are also set out in the determination of the Tribunal which upheld that decision – and which is a matter of record on file.

34. At paragraph 41 the Tribunal commented on the Judge's sentencing remarks - "*The sentencing judge made a recommendation for deportation which was not appealed against and noted in his sentencing remarks that the offence was a 'serious one'. He further noted that the appellant had been to the United Kingdom previously and knew he should not be here and used a passport in order to gain entry illegally*" – before adding the following observation: "*In addition, although the appellant had committed*

no previous criminal offences, it was clear that he had been an overstayer and had no lawful status in the United Kingdom for a number of years before being deported". The Tribunal then went on at paragraph 42 to comment on the unsatisfactory nature of the Appellant's immigration history. In drawing matters to a conclusion, at paragraph 51, reference to the wider immigration history of the Appellant over and above his criminal offending is again made: "*He had been present in the United Kingdom illegally for most of his first stay in the United Kingdom and married and had a child in circumstances where he had no status in the United Kingdom. It was only once he had been arrested that he sought to regularise his position in the United Kingdom*".

35. In my judgement it is very clear that the notion that the decision to make a Deportation Order was not merely a product of the Appellant's offence in attempting to secure entry by use of a false passport in May 2008 is underscored by these passages. This not only undermines Mr Yeo's essential reliance upon length of sentence as the determinant of revocation – because the conviction and the sentence length were not the only bases of the deportation decision, but also serves to emphasise the nature of the Appellant's conduct as striking at immigration control. This latter matter was also emphasised by Mr Justice Silber in dismissing the Appellant's application for reconsideration (quoted above in the chronology). Necessarily such matters are relevant to a consideration of paragraph 390(iii) as well as 390(i).

36. I depart temporarily from paragraph 390. However in doing so I observe the paragraph 390 is an overarching provision to which the subsequent paragraphs are subordinate. Much of the analysis set out below will in turn be considered as part of "*all the circumstances*" required to be considered under paragraph 390.

37. Paragraph 390A directs attention to paragraph 398. There is no dispute that neither paragraph 398(a) nor (b) applies to the Appellant. Further, I accept Mr Yeo's submission that paragraph 398(c) does not apply. There is no suggestion of the Appellant being "*a persistent offender*". Nor has the Respondent previously articulated a case in respect of "*serious harm*". I do note, however, in this context that at one point Ms Kenny argued that the references to the Appellant's offence being a 'serious' offence in the determination of the deportation appeal were tantamount to a finding of 'serious harm'. I do not accept that the concept of a serious offence is congruent with the concept of offending that has caused serious harm, and I am not prepared to infer without more that this is what the deportation Tribunal had in mind. Ms Kenny is otherwise unable to identify anything in the documentary evidence to indicate that the reasons for deportation related to offending behaviour that had caused serious harm.

38. In circumstances where I find that paragraph 398 does not apply it is not necessary for me to give consideration to paragraph 399 and 399A in the context paragraph 398 and pursuant to the imperative of paragraph 390A. (Nonetheless, I have in any event given consideration in my overall

evaluation of the case to those matters covered by the substance of paragraph 399, specifically the Appellant's relationship with his wife and children: see further below.)

39. Pursuant to paragraph 391(a), and where the Appellant was deported following conviction with a sentence of less than 4 years, "*the continuation of a deportation order… will be the proper course… unless 10 years have elapsed since the making of the deportation order*" unless one of the exceptions identified in that paragraph – contrary to the ECHR, contrary to the Refugee Convention, exceptional circumstances constituting 'compelling factors' – pertains In other words, under the scheme of the Rules the Appellant's exclusion is envisaged at least until April 2019. I note that the Respondent's decision herein was made some 4.5 years after the deportation order was signed, and 3.5 years after the Appellant's actual deportation.

40. Paragraph 391A directs attention "*in other cases*" to a consideration of changes of circumstances, fresh information, and the passage of time, on the premise that absence such features revocation of the order will not normally be authorised. In my judgement this provision does not apply herein because this is not an 'other case' because 391(a) applies.

41. Pursuant to the latter part of paragraph 391 – the exception limb ("*Unless…*") - and the overarching imperatives of paragraph 390, I have accordingly attempted to explore herein factors in relation to the ECHR, exceptional circumstances (which in reality on the facts here are rooted in the family life of the Appellant in any event), the events that have occurred since the Appellant's deportation (again, as advanced herein, essentially matters relating to the circumstances of the Appellant's family in the UK), and the passage of time.

42. The Appellant relies upon a number of events / changes of circumstances in addition to the passage of time, specifically: the birth of K, which postdates the signing of the Deportation Order, (albeit that it predates the Appellant's actual deportation); a house fire which led to the relocation SF and the children for 5 weeks in September/October 2010; a claim that it was discovered that D-R had been abused by an older child at her after-school club; SF being diagnosed with a prolapsed disc in September 2011; and the death of SF's father in November 2013.

43. As regards K's birth, and the circumstances of the children more generally, I address these matters both incidentally in considering the other events, and more particularly, below.

44. In respect of the house fire I have noted the news report from a local paper which is on file. This suggests the cause to have been a faulty plug socket. Detail is also provided by SF in her witness statement at paragraphs 11-13. I do not understand it to be suggested that the Appellant's presence could have avoided such an event, and therefore could not have avoided the upset, the loss of treasured possessions, and

the subsequent unsettling of being placed in temporary accommodation, or the resulting nightmares and residual nightime worries. The best that might be said is that the presence of the Appellant might have helped in comforting and coping after the event.

45. The exposure of D-R to inappropriate sexualised behaviour is the subject of a Children's Services assessment made in December 2010 (Appellant's bundle pages 115-119). D-R would have been 4 years old at this time. The referral appears to have been prompted by SF observing her daughter inappropriately touching a family member's child; when asked about her conduct D-R had said that her friend had taken her into the toilet at after-school club, they had undressed and then her friend had told her to get on top of her.

46. The report, after setting out the details of the 'information gathering' exercise, states: "*Based on the information gathered, my opinion is that [D-R] displayed signs which suggested she might have seen or directly involved with sexualised behaviour. It appears [D-R] may perceive this behaviour as child play since she has not developed the social moral maturity to interpret it as inappropriate*". After considering a wide variety of factors, and concluding that the incidences between D-R and the other child were inappropriate, the report recommended that Social Services had no further role to play because the parents had demonstrated strength in safeguarding their child: in particular SF had acted promptly by discontinuing the after-school sessions and reporting the matter to social services, and was open to receiving support for D-R to engage with therapeutic intervention; it was considered "*the protective factors out weight the risk of young person being exposed to inappropriate sexualised behaviour*".

47. It is to be noted that the report does not otherwise identify any significant concerns about the children's domestic circumstances and upbringing: D-R was reported by her Primary school to be "*doing well*" in her cognitive and learning development; a relatively low attendance record was considered to be likely attributable to a family holiday in Jamaica; "*The children appeared to be well cared for with neatly braided hair and clean clothes*"; both children had regular routines and opportunities for social learning and development; secure attachment was observed between the children and their mother.

48. I note that the Appellant does express the view in his witness statement that had he not been deported his daughter would not have needed to attend an after-school club, and would therefore in turn not have been exposed to the sexualised behaviour of another child. He expresses considerable regret over such circumstances.

49. Necessarily, and bearing in mind that this is not a challenge to the decision to deport the Appellant in the first place, the events of the past cannot be altered. Accordingly the significance of this episode to the Appellant's case in respect of revocation is again the more general point in

respect of the support to be gleaned from a father (which in the ordinary course of events will include both the provision of comfort when hurt, and an element of parental protection).

50. The Appellant has also filed a letter from a Consultant Community Paediatrician dated 27 July 2011 addressed to the family GP (Appellant's bundle pages 120-121). This letter is written in the context of a concern about D-R's memory retention, and her mother's query as to whether she might be dyslexic; there were also concerns expressed by her school as to falling asleep during numeracy and phonics. D-R (5 years and 2 months old, i.e. 62 months) was assessed to be at a 44 month developmental age, and it was thought - "*I suspect…*" - that this accounted for her "*difficulties with memory, progress and engaging at school*". The Consultant recommended appropriate support be given at school "*to address her mild learning impairment*", and that SF discuss with the school ways of supporting her daughter at home. The letter concludes "*Hopefully, with adequate support and encouragement she will make good progress*".

51. The school report for the year ending July 2011 (pages 122-124) must be seen through the prism of the Consultant Community Paediatrician's assessment. Although concern is expressed with regard to literacy and numeracy, it is also indicated that D-R is interested in many topics, seems on the whole motivated and excited to learn, works well as part of a group, has good relationships with adults and a number of her peers, expresses her needs and feelings in appropriate ways, and is developing awareness of her own needs, views and feelings and those of others; she is described as "*a very good-natured, kind and sensitive child, with strong creative impulses*".

52. A more recent report on D-R in respect of Drama and Movement Therapy at school dated December 2013 (pages 25–26) refers to problems engaging in class, difficulties expressing thoughts / feelings / emotions, and problems connecting with peers socially. The report indicates a highly positive response: "*appeared to enjoy*"; "*often initiated*"; "*able to make direct choices*"; "*lead the group confidently and articulately in an activity that she had instigated*"; "*positive connections with other group members"; "energetic, playful and enthusiastic role*"; "*she developed a strong supportive presence*"; "*many positive experiences in allowing [D-R] to explore her feelings of adult to child relationships and communication*".

53. I am, of course, cautious not to lose sight of the fact that a positive response to therapy nonetheless does not detract from the fact that there was a perceived need for therapy in the first place. However, in my judgement all of these reports, individually and in combination, not only reveals nothing of any great adverse significance (and certainly nothing obviously and directly attributable to the absence of the Appellant), but also indicate that SF is demonstrably able to cope and act to safeguard the best interests of her children and to seek appropriate support and input from other agencies as required.

54. In respect of SF's back problems, supporting documents (pages 128-129) show that she was admitted to hospital on 18 September 2011, and discharged on 24 September 2011 with a one year history of bearable, non-traumatic back pain diagnosed as acute exacerbation of Left S1 root syndrome, treated by way of a micro-discectomy at Left L5/S1. She was discharged with routine post-operative advice, there were no sutures, her operation wound was clean and dry, and she was provided with analgesics and laxatives.

55. SF has also provided a statutory sick note indicating that she was not fit for work between 13 May 2014 and 30 May 2014 because of pneumonia.

56. There is also on file a discharge notification from Kings College Hospital indicating that K was admitted overnight on 20 March 2014 with viral gastroenteritis.

57. There is no dispute in respect of the death of SF's elderly father.

58. With all due respect to the Appellant and his family, and not wishing for a moment to belittle their experiences and any resulting upsets and anxieties, ultimately it seems to me that all of these matters are essentially the vicissitudes of life – albeit the exposure to inappropriate sexualised behaviour is particularly troubling notwithstanding D-R's apparent lack of insight into this as being anything more than play.

59. I note what the Appellant has had to say in his witness statement at paragraphs 22 and 23 about these matters and his absence from his family during such episodes. I am prepared to accept that it is more likely than not that all would have been better able to cope if the Appellant had been – or was to be – present in the UK. This would likely alleviate some of the pressure on SF and the children would enjoy his company better than on the occasional visits (the financial pressures of which would also be alleviated).

60. However, such matters are the near inevitable consequence of any deportation and necessarily do not in themselves justify either not making an order in the first place, or – more pertinently in this case – revoking such an order.

61. In this context I turn again to the background to the making of the deportation order, including as it does a consideration of the Appellant's immigration history, and consider such matters with reference to the Appellant's comments and observations in his witness statement – which regrettably in my judgement do not reveal genuine contrition. I also give further consideration to the 'family life' aspect of the case in the context of the immigration history. I make the following observations:

    (i) Following his entry in 2001 the Appellant became an overstayer. I find that it is more likely than not that he would have done nothing to regularise his status if he had not been arrested in July 2003

(ii) I note that in his witness statement, at paragraph 6, he seems to suggest CC had taken his passport and told him that she would be applying to extend his lead on his behalf, and that he only found out "*much later*" that she had not made any such application. I do not accept that this in any way provides an explanation for overstaying from November 2001: on his own account the relationship had broken down by June 2011 and so he had no basis to consider that there was any foundation for an application to remain in the UK to be made on his behalf by CC by reference to their relationship or otherwise. I consider the Appellant's attempt to distance himself from the wrongdoing to be disingenuous, and an adverse matter in the overall consideration of this appeal: it is indicative of a continuing lack of responsibility for his own actions and in particular his contravention of immigration control.

(iii) In my judgement the Appellant's lack of willingness to shoulder responsibility for his (and in turn his family's) predicament, and his misplaced sense of injustice is also illustrated at paragraph 14 of his witness statement: "*The Crown Court Judge was not made aware of all my personal and family circumstances when he sentenced me by recommending the deportation order. Therefore I believe that the decision to recommend my deportation was made without full information regarding my circumstances. I honestly believe that had the judge been made aware of all my circumstances then he may well not have made a recommendation for deportation and I would not have got into all these difficulties*".(See similarly at paragraph 16.) There is no basis for such a belief. More critically it is manifestly not the case that Judge Kemp was unaware of the Appellant's domestic circumstances to which he made express reference - "*I am told you are a man hitherto of good character, and that indeed you have a wife and child to look after. That is what you should be concentrating on doing rather than spending time in prison*".

(iv) The Appellant seeks to blame "*all these difficulties*" on a misunderstanding by the criminal Judge in preference to acknowledging his own wrongdoing as the source of his difficulties.

(v) Whilst I recognise that at paragraph 13 of his witness statement the Appellant comments that he made "*a foolish decision*", and that he "*knew this was wrong*", he still does not seem prepared to acknowledge that it was in consequence of his actions that a deportation order was made; rather he attributes the making of the deportation order to a misunderstanding on the part of Judge Kemp and thereafter a misapplication of law and principle by the Respondent and in turn the Tribunal. In such circumstances the Appellant's observations at paragraph 16 that he is not seeking to justify or condone his actions seem to me little more than empty platitudes driven by a sense of needing to appear contrite rather than being driven by any insight into how seriously his misconduct has appropriately been treated by the criminal courts, the Respondent, and the Tribunal.

(vi) The asylum claim following his arrest appears no more than an attempt to frustrate the process of removal. This is exacerbated by a further 'empty' asylum claim following upon his arrest in May 2008 – although had the good sense later to withdraw that.

(vii) The attempted re-entry in 2008 using a false document followed soon after – and necessarily was in defiance of - two refusals of entry clearance.

(viii) It is suggested that family difficulties following burglaries in December 2007 and January 2008 were the trigger for seeking to enter unlawfully. Supporting evidence by way of two letters from the Metropolitan Police both dated 15 February 2008 addressed to SF as a victim of burglary have been provided. However, bearing in mind the earlier applications for entry clearance, his denial of the justice of the deportation decision, and the presence of his family in the UK, in my judgement it was clearly the Appellant's wish to come to UK come what may, and I do not accept these burglaries were trigger events that led to him taking steps that he would not otherwise have taken. The passage of time between the burglaries and the entry does not obviously suggest a nexus even allowing for time to make the necessary arrangements. He has shown himself previously – and since by the making of an abusive asylum claim – to have no respect for immigration control and I am satisfied on a balance of probabilities that he would have sought to enter the UK unlawfully in any event.

(ix) I find nothing has been advanced that in any way mitigates the Appellant's misconduct. I find it an unsatisfactory aspect of his case that he does not accept full responsibility for his, and in turn his family's, circumstances.

(x) The Tribunal considering the Appellant's Article 8 grounds in his asylum appeal recognised that the marital relationship had been entered into at a time of 'precariousness' in immigration terms: "*The appellant and his wife married in entirely precarious circumstances in Jamaica when the appellant's wife was fully aware that he had no lawful status in the United Kingdom*" (paragraph 43).

(xi) Indeed it seems to me also that both children were conceived at times of the utmost precariousness of his immigration status: D-R was born in May 2006 which suggests conception at earliest in or about August 2005 – and most likely just after the refusal of his asylum claim. K was born in July 2009, and so conceived at the earliest in or about October 2008 – just after the service of the Notice of Intention to Deport.

(xii) Again the earlier Tribunal commented in respect of the first child: "*Although we accept the appellant's wife is dutiful towards her parents and did not know until 2003 of the appellant's lack of status in the United Kingdom, she clearly married him and had the child with him in that knowledge*" (paragraph 45). (D-R's conception was described before the Tribunal in October 2008 as a 'planned pregnancy' (paragraph 19).)

62. The Appellant has been able to maintain family life both with his wife and children through visits: indeed he accepts as much in his witness statement at paragraph 19 "*I have developed and maintained a close bond with my children*". There are assorted photographs on file in this regard, and SF gives a breakdown of the various visits to Jamaica at paragraphs 8 and 9 of her witness statement.

63. Of course I entirely accept that such 'family life' is not qualitatively the same as if the Appellant and his children had been, or were to, reside in the same country (and thereby in the same household). However I note that the current predicament is not simply a consequence of the deportation order; it is also in significant part both a consequence of the decision of the Appellant and SF to have children when they did, and, more particularly, a consequence of the election not to relocate as a family with the Appellant. Whilst the children are blameless in such matters it does not, in my judgement, behove the adults to rely upon the stress and inconvenience to themselves of having to bring up their children apart. As regards the impact on the children – that is inevitable in a deportation case; indeed every child is impacted by the actions of their parents whether for good or bad, the State's obligation to remedy such impact is not absolute, which is illustrated in the immigration context by the principal that whilst a child's best interests are a primary consideration they are not paramount.

64. As regards the children's best interests I accept that it would be better if their father was part of their household than if he was not. However, it also seems abundantly clear from the evidence that SF has been well able successfully to protect their welfare in their father's absence.

65. In terms of the public interest considerations – which inevitably must inform any decision to revoke a deportation order involving a separated family (and in this regard it seems to me that Article 8 considerations are subsumed in the overarching consideration under paragraph 390 – "*all the circumstances*" - and do not require any separate consideration in the event that it is determined that an applicant does not satisfy the Rules) – necessarily I take into account the public interest in the maintenance of effective immigration control as should be apparent from the various observations in respect of the reasons for making the deportation order in the first place. I acknowledge that the Appellant is able to speak English. I also acknowledge that SF is in steady employment, although I have not been provided with any costings as to the financial independence of the family in the event of the addition of the Appellant to the household. Nor has anything of detail been provided in terms of his economic circumstances whilst living in Jamaica beyond the fact that he has been living with family.

66. I have had regard to the risk of re-offending. I do not accept that the Appellant's offence was triggered by exceptional circumstances and therefore can be considered a 'one-off' on that basis. He had previously demonstrated a longstanding disregard for immigration control and

thereby disrespect for the law of the land. Nonetheless there is nothing before me by way of a professional assessment of the risk of reoffending, and ultimately I treat this as a neutral factor.

67. For the avoidance of any doubt I have had regard to the early case law referred to at paragraphs 11 and 12 of Mr Yeo's Skeleton Argument, and also the cases at paragraphs 13 and 14. Mr Yeo acknowledges that the early case law was in a different context where no minimum period of exclusion was specified, and deportation was the only means of physical removal (there being no administrative removal until the Immigration and Asylum Act 1999). As such these cases are of minimal value in terms of principle, and as regards the circumstances of the appellants therein, necessarily each case must turn on its own facts. As regards **N v SSHD [2006] EWCA Civ 299**, it seems that reliance is placed on this for little more than the uncontroversial proposition that paragraph 390 means what it purports to say. **HM (Malawi) [2010] EWHC 1407 (Admin)** is again recognised to be a case of a very different nature, and as such is of limited – though not irrelevant – value.

68. Having had regard to the grounds on which the order was made (paragraph 390(i)), the interests of the community including the maintenance of effective immigration control (paragraph 390(iii)), the interests of the Appellant including the compassionate circumstances in particular of his wife and children being present in the UK (paragraph 390(iv)), and on the basis that paragraph 398 does not apply to the Appellant's case, (but nonetheless having regard to the terms of paragraphs 399 by approximate analogy as matters that have featured in the Appellant's representations both as matters of form and substance, and bearing in mind that such matters are broadly instructive in respect of a consideration of the compassionate circumstances of the case), I have reached the conclusion that the deportation decision should not be revoked. In particular, in my judgement the vicissitudes of life that have transpired since the making of the deportation order, and otherwise the circumstance of the Appellant living apart from his wife and children, do not on the facts of this particular case constitute compelling factors outweighing the continuation of the deportation order. The continuation of the deportation order, and thereby the deprivation of the ability to make an application for entry clearance does not constitute a disproportionate interference with the mutual Article 8 rights of the Appellant and his family.

69. The decision of the Respondent was in accordance with the Immigration Rules, was proportionate in human rights terms, is not to be impugned as not being in accordance with the law, and moreover was the appropriate decision on the merits.

Notice of Decision

70. The decision in the appeal is remade. The appeal is dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis 27 October 2015

Anonymity Order

In order to secure the anonymity of the Appellant throughout these proceedings I order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and Section 11 of the Contempt of Court Act 1981 the no report or publication of these proceedings or of any part or parts of them shall name or directly or indirectly identify the Appellant. Reference to the Appellant may be by use of his initials but not by name. Failure by any person, body or institution whether corporate or unincorporated (for the avoidance of doubt to include a party to this appeal) to comply with this order may lead to proceedings for contempt of court. This order shall continue until the Tribunal or an appropriate Court shall lift or vary it.

Deputy Judge of the Upper Tribunal I. A. Lewis 27 October 2015