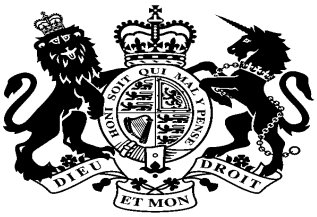

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01959/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 January 2015	**On 23 January 2015**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MISS MORAMAY NUNEZ-TREJOS
(Anonymity Direction not made)

Respondent

Representation:
For the Appellant: Mr T Wilding a Home Office Presenting Officer
For the Respondent: Mr G Lee of Counsel Lawrence & Co Solicitors

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Colombia who was born on 27 May 1968 ("the claimant)". On 23 July 2008 the Secretary of State decided that the deportation of the claimant would be conducive to the public good pursuant to section 3(5) of the

Immigration Act 1971. On 26 July 1999 she pleaded guilty at Middlesex Crown Court to the supply of 1 kg of cocaine and she was sentenced to 8 years imprisonment. She was released from prison in 2003.

2. The claimant appealed the Secretary of State's decision and her appeal was heard and allowed on Article 8 human rights grounds by a panel of the First Tier Tribunal comprising First-Tier Tribunal Judge Widdup and Sir Jeffrey James KBE CMG (non-legal member) ("the FTTJ").

3. The Secretary of State appealed that decision arguing that there was a material error of law. Permission to appeal to the Upper Tribunal was granted. I heard the appeal sitting with Lord Boyd. We found that there was a material error of law. We allowed the Secretary of State's appeal and set aside the decision. Our decision and reasons is set out in the Appendix to this determination.

4. The appeal now comes back before me for the decision to be re-made. Mr Lee informed me that no new evidence would be submitted and no oral evidence called. Both representatives agreed that the hearing would be limited to submissions. The claimant attended the hearing with her partner and members of her family and friends.

5. Mr Lee submitted a skeleton argument and Mr Wilding relied on the skeleton argument submitted by the Presenting Officer at the previous hearing before us entitled "remaking the decision". I was provided with the judgement in YM (Uganda) v SSHD [2014] EWCA 1292.

6. Mr Lee relied on his skeleton argument. Both he and Mr Wilding accepted that both the Immigration Rules and the Immigration Act 2014 which came into effect on 28 July 2014 must be applied in determining this appeal. In relation to section 117B the claimant speaks fluent English. She is financially independent and has at all times been in the UK legally. For most of that time her status has not been precarious. She has had indefinite leave to remain and the sentencing judge did not make a recommendation for deportation. I note that the last statement does not appear to be correct. The transcript of the sentencing remarks records, in relation to the claimant; "I also recommend your deportation, because your continued presence in this country is not desirable in view of your involvement in drugs in this matter." Section 117B(6) does not apply. It is accepted that sections 117C(1) (2) and (3) apply so that it is necessary to consider whether Exceptions 1 and 2 apply. If they do not then the claimant needs to show that there are "very compelling circumstances". He submitted that she had done so. He relied on our findings as to the delay by the Secretary of State. During the periods of delay the claimant had been able to build up her private and family life and also a longer period during which she had not reoffended.

7. Mr Lee submitted that, when weighing up the public interest as against the claimant's circumstances, there had been a significant period following her release

from detention exacerbated and extended by the inaction and delay on the part of the Secretary of State. The Secretary of State could have signed a deportation order but for no clear reason had never done so. During this period the claimant got on with her life. The Secretary of State had not done anything which entitled her to say that the claimant should have left the country because she still had indefinite leave to remain. The total delay by the Secretary of State in this case was more than nine years. This began in 2003 on the claimant's release from prison and continued notwithstanding the decision in July 2008. The claimant's appeal rights were not exhausted in May 2009 and the delay did not come to an end until the new decision of 12 September 2013. All this, Mr Lee submitted, had a considerable effect on the public interest. The claimant came here in 1977 or 1978 when she was nine years old. It was clear that she was settled here. I was referred to IO at page 143 of the claimant's bundle and the extract from Maslov. Mr Lee argued that the new Rules reflected Maslov principles, but only partially. "Very compelling circumstances" needed to be circumscribed by what was said in Maslov. All this, he argued, made the claimant's case a special one with very compelling circumstances. Since her release from prison she had made a substantial contribution to society. I was taken to the passages in her bundle which supported this contention. I was asked to allow the appeal.

8. Mr Wilding relied on the skeleton put before us at the last hearing. There was no obligation on the Secretary of State to sign a deportation order. If this had been done she would then have needed to consider and probably refuse any application by the claimant to revoke the deportation order. Had she followed this course it could have been argued that she had not properly considered the additional factors submitted by the claimant which amounted to a fresh claim. They were in effect updating factors relevant to the notice of intention to deport. If she had wished to prevent an in country right of appeal she would have needed to certify her decision.

9. Mr Wilding submitted that the reasons for refusal letter did address the question of whether the Secretary of State should have signed a deportation order, from paragraph 19 to the end. The Secretary of State had followed correct and lawful procedures. The claimant needed to show very compelling circumstances under the provisions of the 2014 Act and the Immigration Rules. This was a very significant hurdle. Whilst he agreed with Mr Lee's assessment of most of the provisions of section 117B he did not agree that the claimant's position had not been precarious.

10. In relation to delay, Mr Wilding accepted that there had been delay. He accepted that this had strengthened the claimant's social and personal ties in the UK from 2003. It did not assist to try and compartmentalise these periods. He accepted what we said in paragraphs 20 to 22 of our earlier decision and reasons. Delay was not a very compelling circumstance on its own, although it was a factor. It was easy to fall into the trap of double counting. This was not a case like Maslov where the offending took place when the appellant was under 18. The claimant's offence took place when she was 30 years of age. The Maslov principles needed to read in the light of Balogun v. The United Kingdom - 60286/09 [2012] ECHR 614. In reply to my question as to

whether there was a material difference between "very serious reasons" and "very compelling circumstances" Mr Wilding said that one was for and the other was against an individual but the differences were only a matter of emphasis. Most of the Maslov factors were in Exception 1. He submitted that in this case the claimant had not established very compelling circumstances over and above those set out in the Exceptions. I was asked to dismiss the appeal.

11. In his reply Mr Lee submitted the Maslow principles did apply and that very serious reasons were required to justify deporting the appellant. Some of the Maslow criteria were reflected in section 117C. "Lawful residency" was a purely mathematical test the elements of which needed to be assessed. He rejected the submission that there was any element of double counting.

12. I reserved my determination.

13. Mr Lee said that the claimant wished to address me. I agreed to hear what she wanted to say. She accepted that she had committed a crime the circumstances of which would be clear to me. However, since her release from custody she had been productive in society and made a positive contribution. The long-running process had exacerbated her ill-health and she had attempted to take her own life. She had mental health problems and found it difficult to function. She deeply regretted what she had done and at that time she had been oblivious to the effects on society. Because of the work she now did she had become well aware of this. She no longer had any family or connections in South America and would be unemployable. All her family were here and her life would fall apart without them. She spoke English better than Spanish.

14. In paragraphs 15 of YM Uganda Aikens LJ helpfully set out the current and former provisions of the Immigration Rules;

> "The 2012 Rules were modified by ***Statement of Changes to the Immigration Rules of 10 July 2014 (HC 532)*** which were laid before Parliament on 10 July 2014. I will call these the 2014 Rules. I have set out below the relevant 2012 Rules, as amended by the 2014 Rules. I have put the new 2014 provisions in square brackets and I have crossed through the provisions of the 2012 Rules which are deleted by the 2014 Rules, in the hope that both the 2012 Rules and the 2014 Rules modifications can be plainly seen:
>
> A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at [28 July 2014] are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.'
>
> …
>
> 397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the

Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

[A.398. These rules apply where:

(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;

(b) a foreign criminal applies for a deportation order made against him to be revoked.]

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and (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 four years; (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, ~~it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors~~ [the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.]

399. This paragraph applies where paragraph 398(b) or (c) applies if – (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK and (i) the child is a British citizen; or (ii) the child has lived in the UK continuously for at least the seven 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~~ [it would be unduly harsh for the child to live in the country to which the person is to be deported]; and (b) ~~there is no other family member who is able to care for the child in the UK~~ [it would be unduly harsh for the child to remain in the UK without the person who is to be deported]; or (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, [or] settled in the UK, ~~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~~ [(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 – ~~(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.~~

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

399B. ~~Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted.~~

[where an ***Article 8*** claim from a foreign criminal is successful:

(a) in the case of a person who is in the UK unlawfully or whose leave to enter or remain has been cancelled by a deportation order, limited leave may be granted for periods not exceeding 30 months and subject to such conditions as the Secretary of state considers appropriate;

…….]

[399C. Where a foreign criminal who has previously been granted a period of limited leave under this Part applies for further limited leave or indefinite leave to remain his deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave.]

[339D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances]."

15. The provisions of the Immigration Act 2014 set out where the public interest lies in paragraphs 117A, 117B, 117C and 117D as follows;

"117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the

United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—

"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"qualifying partner" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, "foreign criminal" means a person—

(a) who is not a British citizen,

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

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),

has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

16. I will adopt the description of the two sets of Rules in YM Uganda and refer to them as the 2012 Rules and the 2014 Rules. The FTTJ heard the appeal on 24 July 2014 and correctly applied the 2012 Rules. In paragraph 25 the FTTJ recorded, again correctly, that the provisions of the Immigration Act 2014 and the 2014 Rules had not then come into effect. However, they are now in force and as both representatives accept I must apply them in remaking the decision in this appeal

17. The FTTJ made clear and detailed findings of fact in paragraphs 23 to 42 of the determination. These have not been disputed and I adopt them. There has been no material change in the situation since the hearing in July 2014 apart from the further passage of time.

18. The provisions of the 2014 Rules and paragraphs 117A, 117B, 117C and 117D of the Immigration Act 2014 mirror each other. Paragraph 117A applies because I am required to determine whether the decision made under the Immigration Acts breaches the claimant's right to respect for private and family life under Article 8 and would therefore be unlawful under section 6 of the Human Rights Act 1998. I must have regard to the considerations in paragraphs 117B and 117C.

19. Under paragraph 117B I find that the maintenance of effective immigration controls is in the public interest. The economic well-being of the UK is served because the claimant speaks good English and is financially independent. She came to the UK in 1977 when she was nine years old and has lived here ever since, a total of 38 years. She was granted indefinite leave to remain in September 1980. That leave has never been revoked. It would only have been revoked if the Secretary of State had signed a deportation order, which has not been done. She has built up her private life in this country over that lengthy period. I find that she would have been aware that her immigration status had become precarious at the time of the Secretary of State's decision in June 2008 although the delays by the Secretary of State since then would have given her increasing cause to rebuild a feeling of permanence. Her relationship with Mr Sanchez is such that he is not a qualifying partner although I agree with the FTTJ that it is an important and developing part of her private life. The claimant's children are grown up and she is not in a genuine and subsisting parental relationship with a qualifying child. The claimant does have an important relationship with her mother who suffers from dementia and familial relationships with her sister, son and daughter-in-law and grandchildren.

20. By reason of paragraph 117C I find that the deportation of the claimant is in the public interest. She committed a very serious offence and was sentenced to more than four years imprisonment. As a result the public interest requires her deportation

unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

21. I find that Exception 1 applies because the claimant has been lawfully resident in the UK for most of her life. She is socially and culturally integrated in the UK. There would be very significant obstacles to her integration into Colombia. She has not lived there for 38 years. All her family and friends are here except for her father who has remarried and with whom she has very limited contact. She has no remaining contacts in that country and would find it very difficult to obtain accommodation and employment.

22. Exception 2 does not apply because the claimant is not in a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualifying child

23. In line with MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 and YM (Uganda) I find that the 2014 Rules and paragraphs 117A, 117B, 117C and 117D of the Immigration Act 2014 are a complete code for dealing with a person in the claimant's circumstances. However, by analogy with what is said in paragraph 43 of YM (Uganda) I find that these cannot cover all the very many different possible circumstances that might arise. In considering whether there are very compelling circumstances, over and above those described in Exceptions 1 and 2 I must take into account all the material circumstances of the claimant's case. Apart from the fact that one is for and the other is against an individual I am not persuaded that there is a material difference between a conclusion that there are "very serious reasons" for deporting an individual and "very compelling circumstances" entitling him to remain so long as all the material circumstances are taken into account including Maslov criteria which go beyond what is contained in Exceptions 1 and 2.

24. I adopt what we said in paragraphs 15 to 23 of our decision and reasons as to the extent and effect of the delay on the part of the Secretary of State. It is not clear why the Secretary of State decided, if indeed there was a conscious decision, not to sign the deportation order. Some explanations have been provided as to the possible reasons but these are likely to be speculative and with the advantage of hindsight. There is insufficient evidence for me to reach any clear conclusion as to whether the Secretary of State could or should have signed a deportation order at any particular stage. What is clear is because this was not done the claimant has always been in this country legally since she was granted indefinite leave to remain in 1980 and probably before that.

25. It is clear that the claimant committed a very serious criminal offence resulting in eight years imprisonment. She had pleaded guilty. As the judge's sentencing remarks

in August 1999 make clear she played a major role in the importation of 1 kg of good quality cocaine then worth £25,000 at wholesale value and she must have been near to the source of these drugs in this country. He recommended that she be deported. In these circumstances the public interest requires her deportation unless she can show very compelling circumstances over and above those described in Exceptions 1 and 2. She was released from prison in 2003 and has never reoffended. After that length of time the risk of reoffending must be very low. The Secretary of State did not start any action in relation to possible deportation until June 2008. There have been further delays since then. The claimant has built up a stronger private life and family life ties over a total period of approximately nine years between her release in 2003 and the decision under appeal in 2013.

26. I find that, to the standard of the balance of probabilities, the claimant has established that the low risk of reoffending, her rehabilitation and the extent to which her private and family life have grown over the period since her release and in particular during the lengthy delays by the Secretary of State amount to very compelling circumstances over and above those described in Exceptions 1 and 2.

27. I have not been asked to make an anonymity direction and can see no good reason to do so.

28. Having set aside the decision of the FTTJ I remake that decision and allow the claimant's appeal on Article 8 human rights grounds.

……

Signed Date 20 January 2015

Upper Tribunal Judge Moulden

Appendix

Introduction

1. The appellant is the Secretary of State for the Home Department. She appeals against a determination of the First Tier Tribunal comprising FTT Judge Widdup and Sir Jeffrey James KBE CMG (non-legal member) promulgated on 6 August 2014 allowing the appeal of Miss Nunez-Trejos. At issue was the Secretary of State's desire to deport Miss Nunez-Trejos. The circumstances are set out more fully in the FTT's determination from paragraph 1 to 11 and we do not intend to repeat them here. However, in essence, although the Secretary of State has taken the decision to deport Miss Nunez-Trejos a deportation order has not been signed and Miss Nunez-Trejos still enjoys indefinite leave to remain (ILR).

2. The operative decision against which the appeal was considered followed on an application for leave to remain made by solicitors acting for Miss Nunez-Trejos on 13 June 2012. That was refused by the Secretary of State in a decision letter dated 12 September 2013. The First Tier Tribunal having initially questioned the position with regard to the deportation order accepted that Miss Nunez-Trejos had a right of appeal against that decision on human right grounds. No issue was taken before us on competency and both parties were content to proceed on the basis accepted by the FTT.

3. We will refer to the appellant in this case as the Secretary of State and Miss Nunez-Trejos as the appellant as she was before the FTT.

4. The appellant is a citizen of Colombia, who was born on 27 May 1968. She entered the UK in 1977 when she was aged 9. She was accompanied by her mother and sister. On 25 September 1980 she was granted ILR. On 26 July 1999, she pleaded guilty at Middlesex Crown Court to the supply of 1kg of cocaine. She was sentenced to 8 years imprisonment. The sentencing judge made a recommendation for deportation. The appellant was released from prison in 2003.

5. On 16 June 2008 the Secretary of State issued a notice of intention to deport. That was withdrawn following an appeal and reissued on 23 July 2008. An appeal was dismissed on 4 March 2009. An application for a High Court review was refused on 22 May 2009 and the appellant became appeal rights exhausted on the same day.

6. On 13 June 2012, the appellant applied for further leave to remain. In doing so her solicitors said that if a deportation order had not been signed, such an application was unnecessary. On 12 September 2013 the Secretary of State accepted that the application amounted to a fresh human rights claim and refused the application.

The Appellant's Circumstances

7. The FTT have found that the appellant has a long established private life in the UK which includes her work and her friendships. She has a relationship with a Mr

Sanchez which the FTT found may in time lead to their marriage. They found that it was an important and developing part of her life. She also plays an important role in the life of her mother who suffers from Dementia as well as in the lives of her sister, her son and daughter-in-law and her grandchildren. The FTT found that those relationships form part of her family life and part of the extended family of her close relatives. They found that Article 8 was engaged.

8. The FTT further found that the appellant was now rehabilitated and she was of low risk of re-offending. She undertakes work of a charitable nature and the FTT referred to various statements which they considered were supportive of her.

The FTT's Determination

9. In reaching their determination the FTT considered that Immigration Rules 396-399A applied. At paragraph 26 the FTT noted, correctly, that 398(a) applied as the sentence imposed was one of more than 4 years. It noted, correctly, that it "will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors" but then incorrectly states that to be the position unless 399(b) applies. IR 399(b) only applies where the sentence is less than 4 years. However the FTT go on in paragraphs 27 and 28 to say why on the facts 399(b) does not apply in this case. As Mr Lee put it, having got themselves into a cul-de-sac, the FTT managed to get themselves out.

10. The FTT also noted that it was inevitable that such social and cultural ties such as the appellant has with Colombia have weakened over the years and would have weakened further in the 5½ years since the 2009 decision. The appellant's immediate family are in the UK save for her father who has remarried. The FTT accepted that she has little contact with him now. The appellant has not been to Colombia for 15 years.

11. The FTT also noted evidence about the aggravation to the appellant's health said to have been caused by those proceedings. They conclude that her clinical symptoms have not deteriorated since 2009 (paragraph 38). We note that the Asylum and Immigration Tribunal in 2009 concluded that there was no evidence that the appellant could not receive mental health support in Colombia. The FTT did not comment on this matter.

12. The FTT then turned to the issue of delay. They rejected the Secretary of State's assertion that the appellant could not be traced; they found that she has lived at the same address for 15 years. The FTT found that there was no explanation, reasonable or otherwise, for the delays in this case. They had considered the case of *EB Kosovo v Secretary of State for the Home Department 2008 UK HL 41*. They considered that the delay firmly impacted on the proportionality of the decision. They then said after paragraphs 43 and 44 the following:

> "If the public interest fell firmly in favour of deportation in 2009 making the decision then proportionate the absence of any action by the respondent to protect the public by deporting the appellant and thereby deterring others, makes deportation now far less

> proportionate. Nothing we have said in this determination should be read as meaning that we have overlooked the seriousness of this offence or the public interest in the deportation of serious offenders. However there must come a time when that public interest is outweighed by particular and individual circumstances relating to an appellant. We are driven to the conclusion that in this case those circumstances, namely her strengthened private and family life and her apparent rehabilitation, combined with the inordinate and inexcusable delay makes this decision clearly disproportionate and that this is therefore an exceptional case which should succeed on human rights grounds."

Submissions for Secretary of State

13. The Secretary of State submitted lengthy grounds of appeal. Mr Jarvis relied on those together with supplementary written submissions. Part of these submissions related to the FTT's approach to the Immigration Rules to which we have already referred. The Secretary of State submitted that the FTT had been in error in its approach to exceptional circumstances. There was nothing in her private life or employment history that amounted to exceptional circumstances. There was no evidence of insurmountable difficulties in the appellant carrying on her relationship in Colombia. Family ties in the UK could be maintained by modern means of communication. The FTT had not placed sufficient weight on the public interest in deporting those convicted of offences of more than 4 years. The FTT had not properly addressed the effects of delay. While it was accepted that the delay allowed the appellant to form deeper ties with the UK, she was always aware that her outstanding claim had not been assessed and that her immigration status was precarious.

Submissions for Appellant

14. Mr Lee submitted that there was no material error in law. The FTT had directed themselves to the seriousness of the offence and the public interest in deportation. They had directed their minds to what were exceptional circumstances; the Secretary of State's ground of appeal left out the fact that the appellant had been in the UK since 1977. The FTT was correct to say that the public interest in deterrence could be outweighed and one of the factors was where the Secretary of State had taken no action to deport the appellant. The issue was one of proportionality. The appellant had enjoyed ILR to remain in the UK throughout. The Secretary of State had indicated an intention to deport and then done nothing about it.

Decision

15. We accept that the FTT was in error to consider that paragraph 399(b) of the Immigration Rules could apply. However, as we have already indicated, nothing turns on this as, having considered the facts, the FTT found that it did not apply in this case. It then went on to consider the issue of exceptional circumstances. While the FTT do not say in terms what are exceptional circumstances, it is clear that they rely on a combination of three factors; the strengthened private life (since the 2009

decision), the appellant's apparent rehabilitation and what the FTT describes as the inordinate and inexcusable delay.

16. In *EB Kosovo* Lord Bingham of Cornhill in his speech pointed out that there was no specified time within which an immigration decision must be made. There were three ways in which delay may have an effect on the decision. First, the applicant may during the period of delay, develop closer, personal and social ties and establish deeper roots in the community. Secondly, while relationships may have formed during this time, they may at first have been tentative because of being entered into under the shadow of severance by administrative order. It may have a sense of impermanence. However, as time passed without a decision being taken, that sense of impermanence would fade and give way to an expectation that if the authorities intended to remove the applicant, they would have done so earlier. Thirdly, if the delay is shown to be the result of a dysfunctional system that yields unpredictable, inconsistent and unfair outcomes, then that would be relevant in reducing the weight to be accorded to the requirements of a firm and fair immigration control.

17. The FTT concluded that during the further 5½ years since the 2009 decision, the appellant's personal and social ties to the UK had strengthened. They were entitled to reach that conclusion on the evidence. They were also entitled to have regard to what they saw as the appellant's rehabilitation.

18. The third factor which forms part of the FTT's finding of exceptional circumstances is another aspect of delay; what they describe as an inordinate and inexcusable delay. It is this combined with the two other factors which the FTT find to form exceptional circumstances. There is no doubt that there was a very substantial period of delay between the appellant's release from prison in 2003 and the serving of the notice of intention to deport in 2008. If, however, that is a factor, it would have been taken into account in the 2009 determination. The FTT reject, as they were entitled to do, the suggestion that during the period of 5½ years between the 2009 decision and the application for leave to remain she could not be found. Accordingly they were entitled to reach the view that the delay between those two events was inexcusable. They were also entitled to come to the view that the delay was inordinate particularly as, during this time, the appellant continued to have ILR.

19. The issue is whether or not they were entitled to come to the view that it was properly a factor to be taken into account. It should be observed that the FTT had already found that one of the three factors was a strengthened private and family life which came about as a result of the delay. Accordingly the FTT clearly took the view that the inordinate and inexcusable delay was a factor in itself which in combination with the other factors could be set against the public interest in deportation.

20. We consider that the FTT was in error in stating that the absence of action by the Secretary of State to protect the public by deporting the appellant and thereby deterring others makes deportation now far less proportionate. While delay as a result of what Lord Bingham described as a dysfunctional system can be a factor, it is only where such delays may throw up results which are unpredictable, inconsistent

and unfair. In *EB Kosovo* the appellant's cousin, who had entered the UK at the same time as the appellant had some time previously been granted ILR on the same facts and circumstances and within a reasonable period. It was that comparative unfairness which was struck at.

21. The public interest in deportation is not the same as the State's interest. While the State may articulate and enforce that interest, the public interest does not wither merely because the bureaucracy of the State fails to take timeous decisions. The interest goes beyond the protection of the public but also marks public abhorrence at such offending and the needs to maintain public confidence in the system of immigration control. The appellant in this case was convicted of a very serious drugs offence for which she was sentenced to 8 years imprisonment.

22. We do not consider that the decision here can be said to be unpredictable or inconsistent or unfair. The only issue is a delay in taking it. The FTT have already made an allowance for delay in finding that the appellant's persona and family ties have strengthened during this period. They were not entitled in this case to make a further allowance for the delay because they disapproved of the Secretary of State's handling of the case.

23. We consider that this error was material. We note that it was the strengthening of the appellant's private life and her apparent rehabilitation combined with the inordinate and inexcusable delay that formed the basis of the FTT's determination. We cannot say what their view might have been had they confined the consideration to the two other factors and set these against the public interest. Accordingly we will allow the appeal.

Future Progress

24. Mr Lee informed us that he would wish to consider calling further evidence. He was neutral as to whether it would be better to keep it in the UT or remit back to the FTT. Mr Jarvis considered that it would better to retain it within the UT. We agree and we will set it down for a further hearing to remake the decision before the UT.