Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01560/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 20 May 2014	**On 20 June 2014**

Oral determination given following the hearing

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

TEF
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Paul Draycott, Counsel instructed by Paragon Law
For the Respondent: Ms Alice Holmes, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who is a citizen of Jamaica who was born on 1 June 1982, has appealed against a decision of a panel of the First-tier Tribunal

promulgated on 4 February 2014 following a hearing at Nottingham Magistrates' Court on 9 January 2014 in which the panel had dismissed his appeal against a decision of the respondent dated 23 July 2013 to make a deportation order against him by virtue of Section 32(5) of the UK Borders Act 2007. The decision followed the appellant's conviction on 12 June 2012 at Nottingham Crown Court for affray and possessing an offensive weapon for which he was sentenced to 30 months' imprisonment. Although his original application for permission to appeal against this decision was refused by the First-tier Tribunal, on a renewal of that application before the Upper Tribunal, Upper Tribunal Judge Chalkley granted permission to appeal on 24 March 2013.

2. I heard submissions on behalf of the appellant on 7 May 2014 but because there was insufficient time available to hear the reply on behalf of the respondent it was necessary to adjourn the hearing until today when I heard further submissions from Mr Draycott representing the appellant and also heard submissions on behalf of the respondent which were made by Ms Holmes. Before today's hearing Ms Holmes prepared a skeleton argument on behalf of the respondent setting out the respondent's case in some detail. I have found this a very helpful document.

3. I recorded all the submissions which were made to me contemporaneously and these submissions are contained within the Record of Proceedings. Accordingly I will not set out below everything which was said to me during the course of the hearings but shall refer only to such of the submissions as are necessary for the purposes of this determination. I have, however, had regard to everything which was said to me during the hearings as well as to all the documents contained within the court file and all the authorities put before me whether or not the same is specifically set out and referred to below.

4. The appellant's immigration history is set out within the decision letter of 23 July 2013. According to the respondent's record the appellant first entered the United Kingdom on 9 July 1998 as a visitor and was granted leave until 9 January 1999. It would seem that he left the country before his leave expired on that occasion. He then entered this country again on 29 March 2000 as a visitor having been granted leave to remain until 29 September 2000. On 29 August 2000 he applied for leave to remain as a student which was granted until 31 October 2001.

5. Again, it appears that the appellant left the country in accordance with the terms of his visa. On 8 September 2002 the appellant re-entered the United Kingdom and submitted a human rights claim. He was granted leave to enter until the following day and given temporary release but he then absconded. On 14 March 2003 he was served with overstayer papers.

6. On 22 April 2005 his human rights claim was refused. The appellant's appeal against this refusal was dismissed on 30 June 2005 and his appeal rights were exhausted on 15 July 2005. Thereafter, on 25 July 2005 he

was administratively removed to Jamaica. On 24 May 2006 the appellant's application for a spouse visa to come to the United Kingdom was refused (it is said that this was principally on the grounds of the sponsor having insufficient income and the appellant had little prospect of finding employment in the UK). The appellant appealed against this decision but his appeal was dismissed on 25 January 2007 and his appeal rights exhausted on 23 March 2007.

7. On 5 October 2007 he applied again for a visa as the spouse of a settled person and on 17 January 2008 he was granted a two year visa valid until 17 January 2010. The respondent said in the decision letter that the exact date of his re-entry into the United Kingdom was not known but he claimed to have arrived in February 2008.

8. The spouse who was named in both visa applications was a Ms NF but the respondent is not aware of the date or location of the wedding. On 14 January 2010 the appellant applied for indefinite leave to remain in the United Kingdom as the spouse of a settled person, again Ms F. His application was refused on 14 July 2010 in light of his criminal history of which details will be set out below. His appeal against this decision was allowed on 23 September 2010 following a hearing before First-tier Tribunal Judge Plimmer and the respondent did not seek permission to appeal against this decision. In light of Judge Plimmer's decision on 25 November 2010 the appellant was granted discretionary leave to remain until 25 November 2013.

9. The appellant has committed a number of criminal offences which will be referred to below and most seriously on 12 June 2012 at Nottingham Crown Court following a trial he was convicted of affray and possessing an offensive weapon in a public place for which he was sentenced to 30 months' imprisonment. The appellant did not appeal against either the conviction or the sentence. I set out the comments of the sentencing judge which are contained in the decision letter and which are also referred to within the panel's determination. The sentencing judge commented as follows:

> "Chasing that man from the betting shop, in the way that you did, in the way that we saw on CCTV, I have absolutely no doubt that you were, had you been able to get hold of him at that stage, intent on causing him injury. You were swiping that knife down at his back as he fled and I do not see that there is any other interpretation that can be put on that. That makes this about as bad a case of possession of an offensive weapon as it is possible [to] conceive of, without a greater charge being laid".

10. The judge continued as follows:

> "I reinforce the observation that this is about as bad a case for possession of an offensive weapon and affray, once all the children, and the ladies and the other members of the public who were out

> shopping when this altercation swept in the direction of Medina Stores. It is about as bad as it can get".

11. The respondent gave consideration as to whether or not the deportation of this appellant would be proportionate such as not to be in breach of the appellant's Article 8 rights and considered that it would. The respondent considered first whether or not the appellant would be entitled to remain on Article 8 grounds in accordance with the provisions of paragraphs 398 and 399(a) of the Rules or paragraph 399(b) and then considered whether or not there were other exceptional circumstances such that it could still be said to be disproportionate to deport this appellant but considered that there were not. The respondent considered the appellant's family circumstances, that he was almost 33 years of age and in good health and that his convictions are ones which would be regarded as serious and which compelled the respondent to give significant weight to the question of protecting society against crime and the risk of harm to others.

12. Having considered all the issues the respondent made the decision to deport this appellant. As already noted above the appellant appealed against this decision and his appeal was heard before a panel of the First-tier Tribunal consisting of Designated First-tier Tribunal Judge Coates and Mr G H Getlevog, non-legal member, sitting at Nottingham Magistrates' Court on 9 January 2014. In a determination which is dated 27 January 2014 and promulgated some eight days later on 4 February 2014 the panel dismissed the appellant's appeal. It directed that the identity of the children referred in the determination should not be revealed and that no report of these proceedings should directly or indirectly identify the children. This tribunal considers it appropriate to continue that direction.

13. The appellant now appeals against this decision. As already noted he has permission to do so which was granted by Judge Chalkley on 24 March 2013. The very long grounds set out a number of arguments some of which regrettably have little or now merit. For example, it is suggested at paragraph 5 of the renewed grounds as follows:

> "It is also emphasised that when the present FTT's determination was only typed up by the FTJ on 27 January 2014 and promulgated by the respondent on 4 February 2014, it was in breach of Rule 23(3) of the AIT (Procedure) Rules 2005 which requires the Tribunal to serve a copy of its determination upon the respondent within ten days of the hearing, when in the present proceedings it was more than a week and a half late. As a result of this delay, pursuant to [11] of (Ghorbani) v Immigration Appeal Tribunal [2004] EWHC 510 (Admin) in determining this application, it is an accepted principle that the UT should *'more readily draw the inference where there is no reference to certain factors that they have simply been forgotten by a (First-tier Judge) who has prepared his case some time after the hearing, than it would where the preparation was hard on the heels of the hearing itself. Plainly, the longer the delay the more credible is the*

contention of the applicant that certain evidence may have been forgotten, particularly if it is not mentioned by the (First-tier Judge)'".

14. This is in my judgment simply unarguable and although strictly within the Rules the determination was promulgated late it cannot seriously be contended that for this reason the inference should be made that any omission within a determination must be or should be inferred as being due to the fact that the panel forgot the factors which were relevant in this appeal.

15. I do not propose for the purposes of this determination to go through every single argument advanced on behalf of the appellant in the same detail as they were put both in the grounds and also in oral argument before me. To her credit Ms Holmes has in her very detailed skeleton argument set out the arguments advanced and rebutted them where she can in detail. As she put it in oral argument before me, in view of the fact that Mr Draycott on behalf of the appellant had argued his case so fully she felt it was incumbent on her as the representative of the Secretary of State to argue the Secretary of State's decision fully as well. She did that and I have taken into account fully all the arguments which have been advanced on behalf of both parties in this appeal.

16. I shall summarise the basis upon which the panel dismissed the appeal. First of all, the panel set out the provisions contained within Section 32 onwards of the UK Borders Act at paragraphs 4 to 8 of its determination as follows:

> "4. Section 32 of the UK Borders Act 2007 provides for the making of an automatic deportation order in respect of foreign criminals. A foreign criminal is defined as a person who is not a British citizen, who is convicted in the UK of an offence and has been sentenced to a period of imprisonment for at least twelve months.
>
> 5. Sub-Section 32(4) of the 2007 Act states that the deportation of a foreign criminal is conducive to the public good. Therefore there is no balancing of factors. It is conducive to the public good to deport a person who is a foreign criminal. Thus the requirement of Section 35(5)(a) of the 1971 Immigration Act that removal be conducive to the public good is satisfied. Sub-Section 32(5) states that the respondent must make a deportation order in respect of a foreign criminal, subject to the exceptions mentioned below.
>
> 6. The Immigration Rules now reflect the statutory provisions introduced by the 2007 Act. Paragraph 364(A) of the Immigration Rules provides that paragraph 364 does not apply where the Secretary of State must make a deportation order in respect of a foreign criminal under Section 32(5) of the UK Borders Act 2007.

7. Section 33 of the 2007 Act contains the exceptions whereby the provisions of Section 32(4) and (5) do not apply. Exception (1) is where deportation would breach either the appellant's protected ECHR rights or his rights under the Refugee Convention. In this appeal the appellant claims that deportation would breach his protected rights under Article 8 of the ECHR.

8. The burden of proof is on the appellant to demonstrate that he comes within one of the exceptions set out in Section 33. Where human rights issues fall to be considered the lower standard of proof applies, that is to say a reasonable degree of likelihood."

17. The panel might have added that in this case by virtue of Section 32(2) the appellant, who has been sentenced to a period of imprisonment of 30 months (that is of at least twelve months), is defined as a "foreign criminal" and accordingly and by virtue of Section 32(4) it is the will of parliament that "the deportation of a foreign criminal is conducive to the public good".

18. Also, the panel was not correct to state at paragraph 8 of its determination as it did that "where human rights issues fall to be considered the lower standard of proof applies, that is to say a reasonable degree of likelihood" because where it is argued that the removal of an applicant would be in breach of his Article 8 rights this needs to be established on the balance of probabilities. However, if indeed the panel considered the appellant's position on the basis that he had to establish his case to an even lower standard of proof that in fact he did that cannot be an error of law capable of rendering its decision less safe. If anything, it would make the appellant's task in this appeal harder.

19. The panel set out the appellant's immigration history but then set out at paragraphs 12 and 13 the appellant's criminal history which clearly is a relevant factor in this appeal. I set out paragraphs 12 and 13 of the panel's determination as follows:

"12. The appellant's record of convictions shows that he has been sentenced on seven separate occasions for a total of fifteen offences. He has also been cautioned on two occasions. His PNC record shows that he first offended within two years of his arrival in the United Kingdom. In May 2002 he was convicted of handling stolen goods and conditionally discharged. The following year he was convicted of driving whilst disqualified, possessing a controlled drug and resisting or obstructing a police constable. All these offences were in breach of the conditional discharge. Later the same year he received a further conviction for driving whilst disqualified and possessing a controlled drug which resulted in a four month sentence of imprisonment. He was also convicted of failing to surrender to custody. In 2009 the

appellant was committed to the Crown Court for sentence for possessing a knife or pointed article in a public place. This resulted in a community order for twelve months' unpaid work. He was convicted again of theft in 2010 and common assault in 2011. Finally, on 12 June 2012 he was sentenced to 30 months for affray and possessing an offensive weapon, as already mentioned.

13. We think it is important to look closely at the appellant's record and in our opinion it demonstrates a persistent offender who shows little regard for orders of the court. He has breached a conditional discharge, a community order, an order of disqualification and a requirement to surrender to bail. All of this demonstrates scant regard for the rule of law. Even while serving his recent prison sentence the appellant has continued to re-offend. He admitted during his oral evidence that he has received two adjudications, one of which was for smoking cannabis in his cell."

20. The panel also took into account the previous appeals made by the appellant before the Tribunals and applied *Devaseelan* principles to these. In particular it took into account the determination of Judge Plimmer dated 23 September 2010 as referred to above who had allowed the appellant's appeal against the refusal of indefinite leave to remain as Ms F's spouse. At paragraphs 17 and 18 the panel continued as follows:

"17. By the date of Judge Plimmer's determination the appellant had already been convicted of a number of offences and had served a four month custodial sentence. He then spent a long period in immigration detention before being removed to Jamaica in 2005. Notwithstanding that removal, the appellant was ultimately granted a visa to enter the United Kingdom as a spouse in January 2008 and since that date he had resided with his wife and three children. Judge Plimmer records that during the time the family lived together they had survived mainly on the wages earned by Mrs F who was employed as a care assistant. Judge Plimmer took the view that whilst there remained a real risk of offending, the risk of harm to others was at the lower end of the spectrum. The judge also found that, on the available evidence, it was more likely than not that the appellant would re-offend, albeit that the nature of the re-offending was unlikely to be at the serious end of the spectrum.

18. Judge Plimmer was correct in predicting that the appellant would re-offend but she was wrong in considering that such re-offending was unlikely to be at the serious end of the spectrum. The appellant's most recent conviction, which has resulted in these proceedings, demonstrates offences of violence which are far more serious than anything for which the appellant had previously been convicted. In this context, we refer to the

> sentencing judge's remarks" [which I have already set out above].

21. The panel then referred to the family life which the appellant claimed to have in this country. It recorded the appellant's claim that he and Mrs F had three children together, born respectively in 2006, 2007 and 2009. It was also recorded that the appellant claimed to have a stepchild as well. The appellant and Mrs F are now divorced and the appellant has claimed to have another partner, Ms T, with whom he has a daughter who was born while the appellant was serving his most recent prison sentence. The panel also recorded that during the hearing it emerged that the appellant had another child in Jamaica about whom the panel had been given virtually no information. The panel considered the appellant's claim that despite the breakdown of the relationship with his wife he still had a genuine and subsisting parental relationship with five British children (that is the three biological children by his wife, his stepchild by his wife and his child with Ms T) and that his removal to Jamaica would not be in their best interests. The panel considered the appellant's claim that until his recent conviction he remained closely involved in the upbringing of his wife's four children with whom he and the mother lived in a family unit. It was argued before the panel that the respondent had failed to consider the effects of his proposed deportation upon this very young child despite evidence of paternity having been provided before the decision was made. It was also claimed that the respondent had failed fully to consider the effect of the deportation upon the older four children such that a proper proportionality test had not been applied. It was the appellant's case which the panel considered that as the panel recorded at paragraph 20:

> "The public interest in deportation does not outweigh the right to a family life he shares with his five children and partner nor the best interests of his other children."

22. Having considered all the evidence the panel was unimpressed with the appellant's case. As already noted at paragraph 28 it is recorded that:

> "The appellant confirmed that he had received two adjudications while serving his present sentence. He said that one was for possessing a prohibited item and the other was for smoking cannabis in his cell".

It was also noted that the appellant had agreed that he had never lived with his current partner and when asked why his ex-wife had moved to Liverpool this was because she had moved in order to get away from him.

23. At paragraph 30 the panel records that an application for an adjournment had been made by Mr Draycott (who had represented the appellant before the First-tier Tribunal and before this Tribunal) on the basis that the appellant had made an application in the family court for contact with his older children and in this context Mr Draycott relied on the decision of the Upper Tribunal in *RS (immigration and family court proceedings) India*

[2012] UKUT 00218. At paragraph 31 the panel sets out the head note to this decision and I shall refer to this below.

24. The panel refused the application for an adjournment and considered that on the basis of the guidance given by the Upper Tribunal in *RS* it was not necessary to await the decision of the family court within that application. Having heard evidence subsequently the panel formed a decision also (which is set out at paragraph 54) that "the appellant's recent application for contact was made with a view to preventing or impeding his removal from the United Kingdom".

25. The panel noted that it had not had the benefit of an OASys or pre-sentence report, but considered at paragraph 50 that "to some extent the appellant's criminal record speaks for itself". The panel noted further that:

> "The number and nature of his convictions, the repeated breaches of orders of the court and his insistence on having a jury trial despite overwhelming CCTV evidence causes us to conclude that he is someone who poses a significant risk of harm to the general public".

26. The panel also had regard to the recent guidance given by the Court of Appeal in *SS (Nigeria)* [2013] EWCA Civ 550. Having considered all the evidence in the case the Tribunal then took into account the best interests of the children at paragraphs 53 and 54, as follows:

> "53. We are required to take into account the best interests of children likely to be affected by the decision under appeal as a primary consideration. The appellant has not seen his children by [Ms F] for approximately eighteen months. As already mentioned, [Ms F] has given a fairly strong indication of her attitude towards contact by moving to Liverpool, severing all connection with the appellant's family and withholding her telephone number and address. So far as the appellant's relationship with [Ms T] is concerned, this is a relationship which appears to have started while the appellant was still married to [Ms F]. It seems obvious to us that [Ms T's] pregnancy by the appellant has had a significant bearing on his ex-wife's behaviour and attitude. [Ms T's] daughter was born while the appellant was in prison. They have never lived in the same household and it is highly unlikely that the child even knows the appellant.
>
> 54. We find that the appellant's recent application for contact was made with a view to preventing or impeding his removal from the United Kingdom. We do not believe his explanation that he did not know how to go about making such an application. We are satisfied from the available evidence that it would be in the best interests of all the children concerned for them to remain in the United Kingdom in the care of their respective mothers. We appreciate that [Ms T] is a British citizen who has lived in this country all her life. However, she is of Jamaican background and

> her parents are Jamaican. She has visited Jamaica in the past and we are satisfied that there would not be insurmountable obstacles which would prevent her relocating to Jamaica with her very young daughter in order to pursue family life with the appellant in that country if she were so inclined".

27. Then, the panel having considered all the factors, the conclusion is set out in paragraph 55 that

> "any interference there may be in the appellant's Article 8 rights, or those of his children and partner, is proportionate to the legitimate aim of protecting the public and prevention of crime"

such that his deportation is not in breach of his Article 8 rights.

28. As I have already stated, the grounds are very long, and I will summarise them as follows. The main argument which is advanced on behalf of the appellant is that he should have been permitted to remain until such time as his outstanding contact application before the county court had been determined (although as stated in the grounds "albeit it has been generally adjourned so as to await his release from immigration detention") on the grounds that it would be a violation of his Article 8 rights for him to be removed before his application has been determined (reliance here was placed upon the European Court of Human Rights' decision in *Ciliz v. The Netherlands* [2000] 2 FLR 469 ECtHR) and also that he should be granted a short period of discretionary leave and permission to work for the duration of the contact proceedings (reliance here is placed on the decision of this Tribunal in *RS* and also of *Mohan* [2013] 1 WLR 922 (a decision of the Court of Appeal)). In the alternative it is said that the Tribunal should have adjourned the appellant's appeal to await the result of his outstanding contact application before reaching a decision.

29. It is said also that the Tribunal was in error by assessing the strength of the appellant's Article 8 rights with regard to his children on the basis that he had not seen his children by his wife for about eighteen months because it had been expressly stated at paragraph 5 of the respondent's decision dated 23 July 2013 that in respect of the four children by his wife "it is accepted that you are in a genuine and subsisting relationship with … a child who is under the age of 18". It is said that the panel should not have gone behind this concession without giving the appellant an opportunity of addressing it on this point.

30. It is also argued that the panel had erred by finding that the outstanding contact application had been instituted to "delay or frustrate removal and not to promote the child's welfare" because this was contrary to the earlier determination made by Judge Plimmer at paragraph 30 that:

> "I have no doubt having heard and seen Mrs F and placed her evidence in context and against the other supporting evidence that the interests of the four children in this case would be adversely

affected by their father's removal to Jamaica [and that she accepts] the evidence before me that since 2008 he has played a full and active part in their daily lives".

31. It is then said that the panel either misdirected itself or failed to act rationally when finding at paragraph 54 that the appellant's current partner Ms T and her daughter could relocate to Jamaica if they wished and in particular that as both she and her daughter are British citizens, such a finding was contrary to the respondent's general concession at paragraphs 94 to 95 of *Sanade and others (British children - Zambrano - Dereci)* [2012] UKUT 00048 that to expect children in such cases to relocate outside the European Union would be "unreasonable".

32. It is then argued that the panel also materially erred by holding that the youngest child could relocate to Jamaica by failing to consider whether such a step would be in her best interests for the purposes of Section 55 of the Borders, Citizenship and Immigration Act 2009.

33. Also it is said that the panel had erred by not considering with whom the child would live in addition to the arrangements for looking after the child in another country.

34. Then it is said that the panel erred by referring to evidence that the appellant's stepfather had a large house in Jamaica while failing to refer to that witness's oral evidence which did not reject the appellant's claim to have no-one in Jamaica and so on.

35. As noted, these contentions were dealt with by Ms Holmes in her skeleton argument comprehensively but it is not necessary for the purposes of this determination to go into huge detail with regard to these claims. In oral argument before me essentially the crux of Mr Draycott's submissions was that there was a significant error of law which can be seen from a proper analysis of what is set out in the panel's determination at paragraphs 53 and 54 because there is no actual finding as to whether or not it would be in the best interests of the children to have some form of contact with their father. I shall deal with this below. In this regard Mr Draycott also asked the Tribunal to have in mind the guidance given by the Court of Appeal in *IA (Somalia)* [2007] EWCA Civ 323 where at paragraph 15 Keene LJ set out that in public law cases, an error of law will be regarded as material unless the decision-maker must have reached the same conclusion without the error. Keene LJ affirmed as correct what was said by Moses LJ at paragraph 18 of *Detamu v Secretary of State for the Home Department* [2006] EWCA Civ 604 which was that: "The question for us is whether the error of law was material in the sense that the Adjudicator *must* have reached the same conclusion (emphasis added)".

36. It is right that I also record Mr Draycott's submission that the Court of Appeal's decision in *SS (Nigeria)*, in his words "unduly skews the application of the *Boultif* criteria". Mr Draycott wished me to record this submission because although he appreciated that the decision of the Court

of Appeal is binding on me if he wished to advance an argument on appeal he did not want it to be said that this argument had not been raised before the Upper Tribunal. I shall refer briefly to this argument below.

Discussion

37. I now deal with those arguments advanced on behalf of the appellant which have been pursued before me by Mr Draycott. I shall first of all deal with the argument which he makes regarding the lack of a finding by the panel as to whether or not it is in the best interests of the appellant's children to continue to have some form of contact with their father. I agree with Mr Draycott that on a close analysis of what is set out within paragraphs 53 and 54 of the panel's determination the panel does not in fact make a finding as to whether or not it is in the best interests of the children to continue to see their father. It would certainly have been open to the panel in my judgment to find on the basis of the other findings which it made that it would not be in the interests of these children to continue to have contact with a man who would be likely to be in and out of prison all his life if he remained in this country, whose influence would be poor and whose continued sporadic presence in his children's lives would be unlikely to be a positive factor. However, it is fair to say that that would not have been the only conclusion open to the panel and had the panel addressed this point specifically it could have taken the view that albeit marginally it would be in the best interests of the children to have some contact with their father and that that contact would be greatly reduced if their father were deported. However, and I return to this below, I have in mind as Mr Draycott urged I should, the observations of the Court of Appeal in *IA (Somalia)* which are well-understood by this Tribunal that an error would only be material if a Tribunal could have come to another conclusion or could come to another conclusion if that error had not been made. In my judgment the highest that the appellant's case can be put is that it would have been open to this Tribunal to find in the circumstances of this case that there was at least a possibility that had there been a proper consideration of the best interests of the children and in particular a report from CAFCAS, the recommendation might have been made that it would be preferable for the children to continue to see their father. However, I reject the suggestion that has been advanced on behalf of the appellant by Mr Draycott that it was possible that a CAFCAS report would suggest that the failure to have contact with their father would in the circumstances of this case have drastic consequences for the children. In my judgment anybody considering this case in light of the evidence could not possibly come to this conclusion and the suggestion that such a conclusion might be arrived at would fly in the face of common sense.

38. I also have regard to the guidance given by the Upper Tribunal in *RS* when considering whether or not the Tribunal should either adjourn an appeal to await the outcome of any contact proceedings or allow the appeal such that limited leave could be given to an applicant to remain

until the conclusion of those proceedings. The head note provides as follows:

> *"1. Where a claimant appeals against a decision to deport or remove and there are outstanding family proceedings relating to a child of the claimant, the judge of the Immigration and Asylum Chamber should first consider:*
>
> *i) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision?*
>
> *ii) Are there compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interest of the child?*
>
> *iii) In the case of contact proceedings initiated by an appellant in an immigration appeal, is there any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare?*
>
> *2. In assessing the above questions, the judge will normally want to consider: the degree of the claimant's previous interest in and contact with the child, the timing of contact proceedings and the commitment with which they have been progressed, when a decision is likely to be reached, what materials (if any) are already available or can be made available to identify pointers to where the child's welfare lies?*
>
> *3. Having considered these matters the judge will then have to decide:*
>
> *i) Does the claimant have at least an Article 8 right to remain until the conclusion of the family proceedings?*
>
> *ii) If so, should the appeal be allowed to a limited extent and a discretionary leave be directed as per the decision in MS (Ivory Coast) [2007] EWCA Civ 133?*
>
> *iii) Alternatively, is it more appropriate for a short period of an adjournment to be granted to enable the core decision to be made in the family proceedings?*
>
> *iv) Is it likely that the family court would be assisted by a view on the present state of knowledge of whether the appellant would be allowed to remain in the event that the outcome of the family proceedings is the maintenance of family contact between him or her and a child resident here?"*

39. The panel clearly considered the questions set out within this decision and although as I have found it did not specifically make a finding as to

whether or not it would be in the best interests of the children to have some contact with their father it is quite clear from the findings which the panel made that the panel's view was that at best such contact would be of only marginal value to the children. The panel noted (and notwithstanding Mr Draycott's argument it is in my judgment clear) that Ms T's daughter who had been born while the appellant was in prison was unlikely to even know the appellant. That is of course not the end of the matter because it might still be in her best interests to have some contact with her father but that finding is not on its face wrong. The panel also noted that the appellant had not seen his children by Ms F for approximately eighteen months and that she did not wish to have any further connection with the appellant and had been withholding her telephone number and address.

40. The panel also found, and in my judgment it was entitled so to find, and again notwithstanding Mr Draycott's argument that a prisoner was in a "catch 22" situation in such circumstances, that the real motive for the contact application was not actually to obtain contact but was rather to prevent or impede his removal from the United Kingdom. In this regard it is notable that since the contact proceedings were adjourned (I accept that this was not the fault of the appellant because he had apparently been produced at court in circumstances where the one room which might have been available for him to be placed in was being used by another prisoner) he has taken no steps whatsoever to pursue this application. The proceedings have been adjourned generally and whether or not legal aid was available for him it was incumbent upon him to take steps to progress the application which he has failed to do.

41. A Tribunal would also have to consider the other two questions posited by the Upper Tribunal in *RS* which are first whether the outcome of the contemplated family proceedings was likely to be material to the decision and secondly whether there were compelling public interest reasons to exclude the claimant from this country irrespective of the outcome of the family proceedings with regard to the best interests of the children. In my judgment the outcome of the contemplated family proceedings would not be likely to be material to this decision and there are extremely compelling public interest reasons to exclude this appellant from the United Kingdom irrespective of the outcome of the family proceedings or the best interests of the children. I have in mind my finding as to the most a Tribunal could find with regard to the best interests of the children. As I have already noted, the most beneficial finding that could be made with regard to this appellant is that it would be marginally in the best interests of the children to see their father; on the facts of this case it cannot possibly be said that it is overwhelmingly in the best interests of the children to see their father and it is also clear given the findings made with regard to the risk that this appellant poses that there are very compelling reasons indeed why he should be excluded from this country.

42. It is suggested by Mr Draycott that the burden is on the respondent to establish that the appellant poses a risk and that in the absence of an

OASys or pre-sentence report the most that a Tribunal could properly say is that it cannot make a finding one way or the other as to whether he poses a risk. Mr Draycott even went so far as to suggest that as he had not yet been released from prison it could not yet be said whether or not the prison sentence had been effective so as to deter him from committing further offences. In my judgment, this is another argument which flies in the face of the evidence and common sense. What is undeniable in this case is that the appellant's history of offending has escalated even beyond what Judge Plimmer regarded as likely when she made her determination in 2010. The panel was entirely entitled to take the view as it did that the appellant had shown that he had simply no desire to obey any rules at all. As the panel said at paragraph 13 of its determination, the appellant's record "demonstrates a persistent offender who shows little regard for orders of the court". The panel noted and any Tribunal would in my judgment be bound to take account of the fact that "he has breached a conditional discharge, a community order, an order of disqualification and a requirement to surrender to bail" and that "all of this demonstrates scant regard for the rule of law". It is not even arguable in my judgment that the Tribunal would have to wait until he is released from prison to see whether prison has had any effect that it was intended to have because as the appellant admitted in evidence before the panel he had continued to re-offend even while in prison by smoking cannabis in his cell and having an article he was not allowed under prison rules to have.

43. In these circumstances I regard the suggestion that the Tribunal could not do any more than say that it was unknown whether or not he would be a risk as untenable. The panel was entitled to find that this appellant poses a significant risk. In my judgment any Tribunal considering the position of this appellant would be bound to come to the same view.

44. Before dealing with the effect of the decisions of the Court of Appeal in *SS (Nigeria)* and *MF (Nigeria)* I shall deal briefly with the argument advanced on behalf of the appellant that the Court of Appeal in *SS (Nigeria)* did not deal properly with the decision of the European Court in *Boultif*. Ms Holmes dealt comprehensively with this argument in the context of this appeal in the course of her oral submissions and I am grateful to her. She referred me to paragraph 48 of *Boultif* where the guiding principles are set out as follows:

> "The court has only a limited number of decided cases where the main obstacle to expulsion was that it would entail difficulties for the spouses to stay together and, in particular, for one of them and/or the children to live in the other's country of origin. It is therefore called upon to establish guiding principles in order to examine whether the measure in question was necessary in a democratic society.
>
> In assessing the relevant criteria in such a case, the court will consider the nature and seriousness of the offence committed by the applicant; the duration of the applicant's stay in the country from which he is going to be expelled; the time which has elapsed since

> the commission of the offence and the applicant's conduct during that period; the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage; other factors revealing whether the couple lead a real and genuine family life; whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage and, if so, their age. Not least, the court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin, although the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself preclude expulsion".

45. As Ms Holmes demonstrated, whatever criticism Mr Draycott might seek to make of the decision of the Court of Appeal in *SS (Nigeria)* in this particular appeal the panel dealt with every aspect which was said in *Boultif* itself to be relevant, and it did everything it was called upon to do within the guidelines set out in *Boultif*. So, for example, the panel clearly considered the nature and seriousness of the offence committed by this appellant. At paragraph 48 it was as the panel noted a violent offence and was the most serious in a line of offences but it is also made clear at paragraphs 12 and 13 of the determination that the duration of the appellant's stay in this country was also taken into consideration by the panel, as was the time which had elapsed since the commission of the offence and the applicant's conduct during that period. The time was minimal because the decision to deport this applicant had been made shortly after the conviction and the applicant's conduct was as the panel noted that he had not even kept out of trouble while in prison. The panel acknowledged that the nationality of the appellant was Jamaican but the nationality of the other persons concerned was British. The panel also had full regard to the appellant's family situation and such evidence was material as to the family life which he actually led. I would note in this regard that although he did not make any concessions in this regard Mr Draycott did not dispute that the panel had taken into account some of those factors it would be required to take into account (even without such glosses as provided within the Court of Appeal decision in *SS (Nigeria)* and in *Boultif*.

46. So in my judgment, even if there was open to the appellant an argument which could properly be raised in a higher court than the Upper Tribunal that the decision in *SS (Nigeria)* does not properly take into account the guidance given in *Boultif* (which I do not accept, but this is not a matter for me), in my judgment, even if such an argument were to succeed it would not avail him on the particular facts of this appeal.

47. I turn now to the guidance which has been given by the Court of Appeal in the decisions in *SS (Nigeria)* [2014] 1 WLR 998 and *MF (Nigeria)* [2013] EWCA Civ 1192. It is clear from the decision in *SS (Nigeria)* that the Court of Appeal was concerned to ensure that the Tribunals understood that when dealing with the deportation of foreign criminals under the 2007 Act they gave due weight to the fact that it was in the public interest that such

persons be deported. I set out what is stated by Laws LJ at paragraph 53 as follows:

> "The importance of the moral and political character of the policy shows that the two drivers of the decision-maker's margin of discretion – the policy's nature and its source – operate in tandem. An Act of Parliament is anyway to be specially respected; but all the more so when it declares policy of this kind. In this case, the policy is general and overarching. It is circumscribed only by five carefully drawn exceptions, of which the first is violation of a person's Convention/Refugee Convention rights. (The others concern minors, EU cases, extradition cases and cases involving persons subject to orders under mental health legislation). Clearly, parliament in the 2007 Act has attached very great weight to the policy as a well-justified imperative for the protection of the public and to reflect the public's proper condemnation of serious wrongdoers. Sedley LJ was with respect right to state that '[in the case of a 'foreign criminal'] the Act places in the proportionality scales a markedly greater weight than in other cases'".

48. At paragraph 55, Laws LJ then stated as follows:

> "… Proportionality, the absence of an 'exceptionality' rule, and the meaning of 'a primary consideration' [when dealing with the interests of children who might be involved] are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision-maker's margin of discretion: the policy's source and the policy's nature, and in particular to the great weight which the 2007 Act attributes to the deportation of foreign criminals".

49. Then in *MF (Nigeria)* the Court of Appeal in the judgment of the court, given by the Master of the Rolls, stated as follows, in paragraph 43, when considering the circumstances in which an Article 8 exception could be applied:

> "43. The word 'exceptional' is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, **very compelling reasons** [my emphasis] will be required to outweigh the public interest in deportation. These compelling reasons are the 'exceptional circumstances'".

50. Accordingly the position with regard to appeals of this type which are founded upon an argument that deportation would be in breach of an applicant's Article 8 rights can be summarised as follows.

51. Although an applicant cannot be deported if his removal would be in breach of his Article 8 rights, if his deportation is in the public interest, as it will always be if he has committed an offence for which he has been

sentenced to at least one year in prison, it is only where there are very compelling reasons that the decision to deport will be disproportionate. So in order for this appellant to have any prospect of succeeding a Tribunal must have material before it such that it could properly be found that the reasons why this appellant should not be deported are very compelling. In my judgment, as I have said, the most that could be said on behalf of this appellant is that there could be a finding that it was marginally in the best interests of the appellant's children to continue to have some contact with him but this could not be said to be a "very compelling" reason why he should not be deported. This is even more so when one considers the extremely serious nature of this appellant's offending. Although because he was only charged with possession of an offensive weapon he did not receive a sentence larger than 30 months' imprisonment I must have regard to just how serious this offence actually was in the view of the sentencing judge. As the judge remarked he had "absolutely no doubt" that "had [the appellant] been able to get hold of [the potential victim] at that stage" he was "intent on causing him injury". A Tribunal would have to have in mind the judge's finding that he was swiping the knife down at the potential victim's back as he fled and that this was "about as bad a case of possession of an offensive weapon as it is possible [to] conceive of, without a greater charge being laid".

52. When one considers this appellant's history of offending both before the offence and even after, while he was still in prison, the finding of this panel that he posed a significant risk of harm to the public was not only not irrational but was in my judgment inevitable. Any panel considering the evidence properly would have been bound to make the same finding. In these circumstances it follows that this appeal could not possibly succeed. The factors in favour of deporting this appellant are in my judgment overwhelming while such limited factors as there may be against deporting him (which is that there could be a finding that it is marginally in the best interests of the appellant's children that they should continue to have some contact with their father) are very far indeed from being "very compelling" as they would be required to be. In my judgment this decision is not finely balanced at all but on the facts of this case, even were the family court ultimately to find (in the event that the appellant decided to pursue his application which he has not done to date) that the children would be better off seeing their father than not his application could still not possibly succeed. It follows that this appeal must be dismissed and I will so find.

Decision

There being no material error of law in the panel's determination, this appeal is dismissed.

Signed: Date: 18 June 2014

Upper Tribunal Judge Craig