



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00863/2012

THE IMMIGRATION ACTS

Heard at Birmingham
on 8th April 2014

Determination Promulgated
On 10th April 2014

Before

UPPER TRIBUNAL JUDGE HANSON

Between

N A R
(Anonymity order made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ahmed instructed by Peer & Co.

For the Respondent: Mr Mills – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of the First-tier Tribunal, promulgated on 24th January 2014, following a hearing before First-tier Tribunal Judge Snape and Mr G.F. Sandall (hereinafter referred to as 'the Panel') who dismissed the Appellant's appeal against refusal of the Secretary of State to revoke a deportation order made against him as a result of his conviction and sentence for the supply of controlled drugs.
2. The Appellant is a Jamaican national born in June 1987.
3. The deportation order is dated 20th August 2010 and was made pursuant to section 32 (5) UK Borders Act 2007. An appeal against that order was heard by Designated Judge Murray and Mrs Morton sitting as a panel at Stirling Sheriff Court on 14th February 2011 ('the Murray panel'). That panel concluded that the

Appellant's history meant it must be considered that he is likely to reoffend [55], that there were a number of discrepancies in his evidence [56], but in relation to his relationship with his son; that he had not seen his son for fifteen months and not seen his partner for eleven months. It was not believed his alleged partner was his fiancée and no arrangements had been made by his partner or his own father for his son to visit him in prison [60]. The crimes committed by the Appellant are serious and it is in the public interest to deport him to Jamaica [61]. The Murray panel did not find it was in the best interests of the child for the Appellant to remain in the United Kingdom [62]. They found the Appellant to be a serial offender [65] and his claim to have no one in Jamaica was not accepted [66]. It was found that any interference with his family and/or private life would not breach Article 8 ECHR.

4. That determination was challenged and resulted in a hearing before me in the Upper Tribunal sitting at Birmingham on 14th July 2011. Having heard argument it was found there was no material error of law and that the determination of the Murray panel shall stand. There is no evidence that finding was successfully challenged to the Court of Appeal.
5. In relation to the refusal to revoke the deportation decision; the Panel considered an adjournment application made on the basis the Appellant was seeking to obtain direct contact with his son and that proceedings in the Family Court remained ongoing which was refused for the reasons set out in paragraphs 6 to 8 of the determination.
6. The Panel note in paragraph 41 of the determination that the Appellant was not only convicted and sentenced to thirty months imprisonment on 16th April 2010 but also has twelve previous convictions, having been convicted on eight occasions since 2005 of offences relating to the police, courts, possession with intent to supply controlled drugs, possession of an offensive weapon and motoring offences.
7. It is recorded at paragraph 43 of the determination that it was accepted by the Appellant's representative at the hearing that he cannot meet any of the requirements of the Immigration Rules in relation to leave to remain and the appeal on this basis was dismissed.
8. In relation to Article 8 ECHR it was accepted by the Panel that the Appellant has both family and private life in the United Kingdom and that the issue under this ground was one of proportionality. The Panel clearly considered the Social Workers report produced following a direction from the Family Court of the 24th April 2013 and noted that the Appellant had been inconsistent in maintaining contact with his son [53]. The Panel noted that according to that report there has been no direct contact since December 2012. The Family Court, on 30th January 2013, ordered indirect contact "in the form of cards/brief letters once monthly" although only one card was received in April 2013 and no documentary

evidence was produced at the hearing of any other indirect contact between the Appellant and his son [54]. As a result the Panel concluded that although family life exists between the Appellant and his son the application for physical contact made in December 2012 was a cynical attempt to avoid deportation.

9. The Panel considered section 55 of the Borders Citizenship and Immigration Act 2009 but given the lack of evidence that the Appellant has established social and/or familial ties with his son and in light of the finding the Appellant's application for contact is a cynical attempt to avoid deportation, they were satisfied that the current arrangements in which the child is cared for by his maternal grandparents, and had been since twelve weeks of age, are in the child's best interests [58]. This is a finding fully open to the Panel on the facts.
10. The Panel found that the compelling public interest justified deportation based on the fact he had been convicted of serious offences, for the purpose of preventing further offences, and the deterrent element [61].
11. The Panel noted the submission that the Appellant had not committed further offences for some time but found that his acts of criminality and likelihood of reoffending weighed heavily in favour of removal.
12. In paragraph 64 the Panel found:
 64. Furthermore, as stated above, we do not find that the strength of any relationship that existed or the welfare or needs of the Appellant's son were such that his continued presence in the United Kingdom was necessary or desirable. Although we were invited by the Appellant's Counsel to allow the appeal until the Family Court proceedings are determined, given our findings in respect of the relationship between the Appellant and his son as outlined above, we do not think that to be a reasonable option available to us.

Discussion

13. Mr Ahmed relied upon the four grounds as pleaded but in addition challenged the lawfulness of the refusal to adjourn the hearing. I find his submission that there was a mandatory requirement for the Panel to adjourn in the circumstances of this case to be without arguable merit and unsupported by any authority.
14. The relationship between immigration and family proceedings has been the subject of much discussion and it is accepted that it is not the role of the judges in either jurisdiction to predict the outcome of proceedings in the other jurisdiction. It is accepted that where a decision in the Family Court is likely to be a weighty consideration in an immigration decision it is anticipated that it will normally be necessary for the Tribunal to wait until the Family Court has

reached a decision on the issue relevant to the immigration appeal. This can be achieved by either the appeal being allowed in anticipation of a short period of leave being granted or the hearing being adjourned, depending upon the anticipated timescale of the family proceedings. The above does not make an adjournment the only possible outcome and does not seek to fetter the exercise of the discretionary case management power a judge has when considering an adjournment request. It only provides guidance on the way in which such a power should be exercised.

15. The request made at the hearing was not the first such request. This appeal was initially listed for the 7th December 2012 before First-tier Tribunal Judge Ford and Mr J Eames ('the Ford Panel') who, it appears were advised that the Appellant's son R was living with him. The child's mother had been imprisoned for drug related offences for which she received a twenty month custodial sentence. The Ford Panel were also advised that it was unlikely there were sentencing remarks or a pre-sentence report as the initial conviction had been in Scotland.
16. The Ford Panel adjourned the hearing with specific directions which included a direction that "Written evidence as to the case management arrangements currently in place for [R] and confirmation that Social Services are aware of the arrangements and have no concerns and that [R's] mother agrees the arrangements" was to be filed.
17. Mr Ahmed represented the Appellant at the next hearing on the 29th January 2013 before First-tier Tribunal Judge Robertson and Mrs S Hewitt ('the Robertson Panel'). At that hearing it was said the Appellant had not experienced difficulties in exercising contact when R was with his mother but as the child lives with his grandmother who will not allow him to have contact he has instituted family proceedings. A court order dated 27th December 2012 was handed in. Mr Ahmed requested an adjournment on the basis (i) there was no Pre-sentencing report or sentencing remarks and (ii) because he submitted a CAF/CASS report would be helpful in assessing the best interest of the children, although no time scale for the production of such a report was available. The Presenting Officer was unaware of there being any such proceedings and having taken instructions opposed the application on the basis there was no need for an adjournment to consider the outcome of the proceedings as per RS [2012] UKUT 00218. It was also submitted that the Panel were entitled to consider whether the proceedings have been instituted to frustrate removal.
18. Having risen to consider the application the Robertson Panel noted some evidential discrepancies regarding contact between the Appellant and R and that it was not clear that this was a case in which proceedings had been instituted to frustrate removal although the adjournment was granted on the basis a report would be helpful to the Tribunal. Directions were given for the Appellant, no later than 1st February 2013, to provide the Tribunal with a copy

of the country court order made pursuant to a directions hearing on 30th January 2013 in relation to the contact application and to provide a realistic timescale within which a CAFCASS report will be made available. At a later date the period in which to provide this evidence was extended.

19. On 27th February 2013 the case was listed for a directions hearing before First-tier Tribunal Judge Chohan at which it was noted that a CAFCASS report had been ordered on the 30th January 2013 which would take 12 weeks to complete. The hearing was adjourned for a further case management review hearing which took place on 10th June 2013 before Judge Chohan. At that hearing Mr Ahmed advised the court that the family proceedings had been further adjourned with no date being fixed. Judge Chohan has recorded on his record of proceedings the following:

“I pointed out to Mr Ahmed that on this occasion I will list this matter for a further PHR in two months time. However, the matter cannot be adjourned indefinitely. A point will come when even if the Family Court matter is not concluded this appeal will have to be listed for a hearing.”

20. Under cover of a letter dated 29th July 2013 Peer & Co provided a copy of an order made in the Birmingham County Court on 22nd May 2013 in relation to two named children, one of whom is the Appellant's child R. That order provided, inter alia,:

- i. That the children in the interim continue to reside with the maternal grandparents.
- ii. That the children be joined as parties to the proceedings.
- iii. That a nominated solicitor is appointed as a Rule 16.4 Guardian on behalf of the children.
- iv. That the matter be adjourned to 9th August 2013 for a directions hearing.

21. Other ancillary directions were made relevant to the family proceedings.

22. As the date of the County Court hearing was exactly the same as that listed for the further hearing before the First-tier Tribunal, that hearing was adjourned until 16th August 2013 when the matter came before First-tier Tribunal Judge Cox. The Judge was advised that the children's proceedings were ongoing in the County Court, that the hearing on 9th August had been adjourned with a new listing anticipated, and that no current contact had been agreed. Judge Cox noted that the proceedings were "no further on" although it was agreed by the advocates that the matter be listed for a further prehearing review on Monday, 11 November 2013.

23. The hearing on the 11th November 2013 was listed before First-tier Tribunal Judge C Lloyd who noted that the Appellant attended a meeting the previous week but that the mother failed to attend and that it was anticipated that the next hearing before the Family Court will be in early 2014. Judge Lloyd enquired as to the whereabouts of the CAFCASS report which Mr Peer, who appeared on behalf of the Appellant, claimed not to have seen stating the Appellant had a different solicitor representing him in the family proceedings although he claimed not to know who it was. Having heard submissions Judge Lloyd made specific directions in the following terms:
- i. The Appellant's representative to supply documentary proof of court orders to show what had happened at Birmingham County Court family proceedings on 09.08.2013 and 06.11.2013, and any other hearings since 22.05.2013.
 - ii. The Appellants representative to supply a copy of the CAFCASS report and/or information re progress of the CAFCASS report.
 - iii. The Appellant's representative to disclose name of Appellant's Family Court solicitors and the information from them on progress of family case.
 - iv. The Appellant's representative to confirm name and date of birth of Appellant's child/children.
24. On 25th November 2013 the First-tier Tribunal received a further letter from Peer & Co indicating that the Appellant was representing himself at the Family Court, enclosing copies of orders made by the Birmingham County Court, a copy of the preliminary letters sent by CAFCASS dated 4th January 2013, and a copy of the Section 7 report prepared by the Birmingham City Council Social Worker dated 24th April 2013.
25. The author of the Section 7 report noted that the Appellant had brought R and his sibling, of whom he is not the father, to the maternal grandmother's home when their mother was taken into custody in 2009. The Appellant had made his application for contact on 27th December 2012 following which the maternal grandparents made an application for a Residence Order. It is recorded in the report that the children's mother supports the Residence Order application but not the Appellant's application for direct contact due to concerns about R's safety in his father's care. It is further noted that both the children's mother and maternal grandparents state they have attempted to facilitate contact between the Appellant and R although he has been inconsistent, only visited approximately five times since 2009, and had failed to contribute to R's care. The Social Worker records that the maternal grandparents report that they have spoken to the Appellant and attempted to support him and set expectations in

terms of his involvement with R, although they do not feel he has demonstrated appropriate behaviour.

26. In the section of the report detailing the background situation, the Appellant's immigration history, including his failed attempts to oppose the deportation decision, is noted and it is recorded that both R's mother and maternal grandparents stated that they believe the Appellant is currently pursuing contact with R due to his current immigration status and that he approached R's mother and asked her to say that they had been living together to aid his appeal against his deportation order.
27. In the section of the report dealing with current care and contact arrangements it is recorded that the maternal grandparents were directed on 30th January 2013 to allow indirect contact although they reported only receiving one card in April 2013 from the Appellant since that direction was made although the Appellant states he had sent two cards. It is also noted that R's mother would not oppose indirect contact but opposes any direct contact.
28. It is also noted in the section of the report dealing with the likely effect on the child of any change in his circumstances that R is aware that the Appellant is his father although the level of contact has been inconsistent and R has not had the opportunity to form a sufficient attachment with his father. The same section refers to the Appellant not acknowledging that his relationship with R's mother was anything out of the ordinary whereas information gathered suggested that his behaviour towards her was aggressive and violent. It is said that if R was to witness such aggression and violent behaviour this is very likely to have an impact upon R and cause distress, upset, and confusion.
29. The report recognises there is no evidence that the Appellant has ever harmed R directly although his capacity to meet R's needs remains un-assessed.
30. In her conclusion section the author of the report states:

Conclusions

[The Appellant] has expressed his wish to have contact with [R] and to be part of his daily life. [The Appellant] feels that contact with [R] is being prohibited by [maternal grandparents] due to the perception of him as a result of having a criminal record. However information given by [maternal grandparents] and [R's mother] suggests that [the Appellant] has not shown his dedication to [R] and has been inconsistent in his involvement. It is also a concern that [the appellant] does not acknowledge any violence within his relationship with [R's mother] and gives a very different account of this. Additionally, [the appellant] has not been open and honest with the UK Border Agency in relation to [R's] living arrangements or with the Social Workers completing the Initial Assessment in January 2013.

In the past, [the Appellant] has been allowed contact with [R] by [R's mother] whereas [maternal grandparents] have been more reluctant to facilitate this due to their ongoing concerns. Since December 2012 however, [R's mother] and [maternal grandparents] have been in agreement that direct contact with [the Appellant] is not in the best interests of [R] due to concerns about [the Appellants] potentially aggressive behaviour and his lifestyle. [Maternal grandparents] and [R's mother] do not feel that, if direct contact was granted, [the Appellant] would be a consistent figure in [R's] life. They are also of the opinion that the application of contact appears to be for the benefit of his appeal against his deportation order.

31. The Local Authorities recommendations are (i) that [R] remains in the care of his maternal grandparents and that they consider their options of making an application for a Residence Order or a Special Guardianship Order, (ii) that the Local Authority have concerns about the Appellant having direct contact with [R] due to the Appellant's history and issues around domestic violence in which he remains in denial and therefore has not completed any work in relation to the risk he poses to R. The Local Authority therefore recommends that the monthly indirect contact by way of brief cards or letters directed by the court on 30th January 2013 continues for a period designated by the Court. It is said that given the concerns regarding the motivation behind the Appellant's request for contact, continuing with indirect contact will provide additional information about the Appellant's level of commitment to having contact with R. This will assist any future reviews of the contact arrangements. The Local Authority is of the opinion that if the Appellant is inconsistent in his indirect contact the impact of this upon R will be far less than if direct contact had been recommended and the Appellant did not attend.
32. The case was listed for what was described as a final prehearing review which occurred on 2nd December 2013 before First-tier Tribunal Judge Ford at which directions were given for the matter to be listed for the substantive hearing on 13 January 2014 before the Panel.
33. The Appellant was represented at the hearing and in relation to the adjournment application the Panel record the following in their determination:
 4. At the commencement of the hearing, Miss Revill applied to adjourn the case on the basis that the Appellant was seeking to obtain direct contact with his son, and that proceedings in the Family Court remained ongoing. Mr Box on behalf of the Home Office objected to the application because there was "little evidence" of what was taking place in the Family Court, and no documentary evidence had been supplied by the Appellant at the hearing as to the current position with regard to Family Court proceedings.

5. A Social Workers report which had been produced in April 2013 had concluded that the Appellant had not been open and honest with Social Workers and given the lack of evidence concerning the relationship between the Appellant and his child, the Tribunal should continue with today's hearing irrespective of any proceedings pending in the Family Court.
 6. We retired to consider Miss Revill's application and decided not to allow her application for an adjournment on the basis that the Appellant's case had previously been adjourned, a hearing listed on 9th August 2013 was vacated. Furthermore, we noted that we had not been provided with any specific information; neither had any documents being provided with regard to the current status of proceedings in the Family Court.
 7. Additionally, we had not been provided with any evidence that there was any indirect contact by card or letter between the Appellant and his son; neither had the carers of the child provided any evidence to that effect.
 8. Finally, we noted that there was no evidence that the Appellant played any role in his son's life; neither was there any evidence that the Appellant had established a relationship with his son which would be prejudiced by the continuation of these proceedings.
34. There have been a number of authorities which have considered the relationship between immigration and family proceeding. In RS (immigration and family court proceedings) India [2012] UKUT 00218(IAC) it was held that:
- (i) 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 IAC should first consider:
 - a) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision?
 - b) 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?
 - c) 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?
 - (ii) 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?

- (iii) Having considered these matters the judge will then have to decide: a) Does the claimant have at least an Article 8 right to remain until the conclusion of the family proceedings? b) If so, should the appeal be allowed to a limited extent and a discretionary leave be directed as per the decision on MS (Ivory Coast) [\[2007\] EWCA Civ 133](#)? c) 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? d) 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?

35. In Mohan v Secretary of State for the Home Department [2012] EWCA Civ 1363 the Appellant was being deported for drugs offences. Family proceedings had been instituted in relation to his contact with his children here. The Court of Appeal said that the general approach of the Upper Tribunal in RS (immigration and family proceedings) India [2012] UKUT 00218 (IAC) and Nimako- Boateng (residence orders – Anton considered) [2012] UKUT 00216 (IAC) represented the correct reconciliation of the conflicting concepts of automatic deportation and Article 8 in immigration and family proceedings (para 21). There was little evidence to support the UT's finding that the Claimant had revived the family proceedings belatedly and with the intention of delaying or preventing his removal. He had instituted the residence application long before he was arrested for the drug offence. Although the proceedings had moved slowly, it could not be said that the inception of the application was a cynical ploy or an attempt to thwart removal by reference to a crime that the Claimant had not yet committed. It was not surprising that he could not pursue the residence proceedings while he was in custody (paras 24 – 28). The real legal flaw in the instant case was the Upper Tribunal's treatment of the relationship between the deportation appeal and the family proceedings. Its determination amounted to a finding that the case had only one possible outcome, being that it was inevitable that whatever the findings of the family court, the Claimant's offending and immigration history were such that his deportation would be found to be proportionate. The Court rejected that submission as it considered there to be sufficient material before the Upper Tribunal to compel the conclusion that the family court could, when considering the best interests of the child, make an order for her to reside with the Claimant. As the Tribunal said in **Nimako-Boateng**, the family court was best placed to make those necessary evaluations. In **Nimako-Boateng** there was material before the Tribunal to justify the conclusion that it would be unnecessary to delay determination of the deportation appeal in order to await the judgment of the family court because

the material in favour of the claimant lacked substance and the public interest in deportation was overwhelming. That was not the situation in the instant case (paras 29 – 31). □ The judgment of the family court, with all of the tools at its disposal (including the assistance of CAFCASS and the opportunity to assess the adults involved) could and should inform the decision-making of the Tribunal on the issue of the proportionality of deportation, in relation to the best interests of the child.

36. The fact the appeal had been adjourned on previous occasions as a result of the existing proceedings is not, in itself, determinative as whether a hearing needs to be adjourned is a matter that has to be considered on each and every occasion that the question arises. The First-tier Tribunal accepted that the Appellant may have at least an Article 8 right to remain until the conclusion of the family proceedings earlier in the case as otherwise the previous adjournments would not have been granted. It is also clear that notwithstanding the Appellant being given a number of opportunities to provide information regarding the Family Court proceedings he failed to do so. There is specific reference in the determination to the lack of details regarding the ongoing proceedings which was amply demonstrated by Mr Ahmed at the hearing before the Upper Tribunal producing a statement from the Guardian which pre-dated the date of the hearing before the Panel, but which had not been disclosed to them. That statement referred to the need for a fact-finding hearing to determine whether there was any merit in the assertions regarding the Appellant's conduct and his denial of the same.
37. It cannot be said that on the basis of the material the Panel had available to them that the outcome of the family proceedings was likely to be material to the immigration decision. This is a case involving a refusal to revoke a deportation order in relation to which the previous challenge failed and it was not found to be in R's best interests for the Appellant to remain in the United Kingdom. The Social Worker's report sets out the likely outcome of the proceedings which is that R will continue to reside with his maternal grandparents with his parents having ongoing contact appropriate to the needs and welfare/safety of the child. For the reasons set out in the report the Local Authority believe that a period of indirect contact is suitable. This can be maintained from abroad. It was said before the Upper Tribunal that there is another hearing in May 2014 to ascertain the truth of the allegations regarding the Appellant's conduct which, if, they are not substantiated may lead to the possibility of some form of direct contact.
38. The preserved findings of the Murray Panel meant that 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, existed as also found by the Panel in their determination.

39. The Panel also make a finding that the contact proceedings have been initiated by the Appellant to delay or frustrate removal and not to promote the child's welfare. There is specific reference to this being the view of others too in the Social Workers report and of the lack of evidence of the Appellant taking opportunities available to him to enjoy the indirect contact that has been granted by the court. This and the timing of the application does not mean that this is a finding that in any way be described as being perverse or irrational.
40. The chronology also clearly shows that the Tribunal were expressing concern regarding the delay in these proceedings and, whilst delay in civil proceedings cannot be the fault of the Appellant, it was not found by Panels that any reason had been established to justify any further delay when considering the best interests of the child. This was specifically considered by the Panel as evidenced by the phrase "neither was there any evidence that the Appellant has established a relationship with his son which will be prejudiced by the continuation of these proceedings."
41. The decision by the Panel to proceed has not been shown to be a decision infected by any material legal error. The Panel decided to exercise their discretionary power to adjourn in the way that they did and it has not been shown that in proceeding with the hearing they acted irrationally or unfairly.
42. In relation to the pleaded Grounds; the first of which is that the Panel erred in finding that the Appellant had initiated family proceedings to avoid deportation. I find no material error proved in relation to this decision which is supported by adequate reasons. The fact the Appellant had been in prison and immigration detention is an understandable explanation for why he could not visit his son but it is also relevant that his son was not taken to visit him. The entry in the Social Services records that it was only in late 2012 that the Appellant experienced problems seeing his son, having attended the maternal grandparents home at which time the Police were called to remove him, is noted. The fact there was no need to initiate proceedings to obtain contact before this event may provide a credible explanation for any delay in issuing proceedings but not in relation to the history of contact since. The Appellant's oral evidence was that he had been sending cards and presents but this was clearly not accepted by the Panel who gave greater weight to the report from the Social Worker. There was no evidence of other forms of indirect contact from the Appellant and the Panel were only able to deal with the evidence before them. It is clear they considered that evidence with the degree of care required in an appeal of this nature and gave adequate reasons for the findings they have made. As such the weight to be given to that evidence was a matter for them and no legal error has been established. It has not been shown that such a conclusion is a decision so devoid of any plausible justification or so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

43. Ground 2 alleges the Panel erred in its assessment of the best interests of the child. It is alleged that the approach by the Panel was incorrect as it should have been found as a starting point that the best interests of the child is to be with both his parents. It was not disputed that the child in fact lives with maternal grandparents and it has been accepted that this is in the child's best interests. The grandparents must therefore be seen as those with de facto care and preserving the status quo and the care arrangements that have been found to be in the child's best interests to date is the correct starting point. It is accepted that if a child lives with other than his or her natural parents maintaining contact with the natural parents is important and it is not suggested that the child should leave the home in which he currently lives. There is in fact now a Residence Order in force in favour of the maternal grandparents who have acquired parental responsibility as a result. The Grounds accept that it was not disputed that it is in the child's best interests to continue living with the grandparents and I reject the submission the Panel failed to consider what was in the child's best interests generally and whether this was for the Appellant to remain in the United Kingdom. It was specifically found by the Murray Panel that this was not in the child's best interest and the Panel clearly found that the Appellant's continued presence in the United Kingdom was not necessary or desirable [64]. There is no evidence indicating that it will harm the child's best interests if his father was to be removed and any contact limited to indirect contact at this stage in the child's life. On the basis of the information before the Panel no legal error is established.
44. Ground three alleges the Panel failed to consider the Article 8 rights of the Appellant's partner and her son but such a claim has no arguable merit. The findings of the Panel are within the range of those the Panel were entitled to make on the evidence especially as it was conceded that the Appellant was not able to satisfy the requirements of the Immigration Rules. Even if family life recognised by Article 8 existed, it is necessary for the merits of the case to be considered within the structure set out in recent case law. It has not been shown the Panel failed to consider relevant material or failed to apply the correct legal principles. An Article 8 assessment must now be considered in accordance with the approach set out by the Court of Appeal in *MF (Nigeria)* [2013] EWCA Civ 1192, the High Court in *Nagre* [2013] EWHC 720 (Admin) and by the Upper Tribunal in *Gulshan* [2013] UKUT 640, as confirmed by [Shahzad \(Art 8: legitimate aim\)](#) [2014] UKUT 00085 (IAC). The starting position for the Panel was to look at the Rules and see whether the Appellant was able to meet their requirements. If not, the question arises whether the decision would lead to a breach of Article 8 but in the context of whether there are factors not covered by the Rules which give rise to the need to consider Article 8 further. The Panel considered the merits of the case outside the Rules and found there was no reason established to warrant the appeal being allowed on this basis. In light of the material the Panel was asked to consider it has not been arguably made out that the decision will result in compelling circumstances giving rise to

unjustifiably harsh consequences for the Applicant or any family member, such as to establish an arguable case at this time.

45. The specific finding made by the Panel regarding other family members who gave oral evidence at the hearing is to be found in paragraph 57 of the determination, namely that the decision will result in interference sufficiently serious to engage Article 8 but that it was necessary for that to be balanced against the legitimate aim relied upon by the Secretary of State. The Panel record the evidence that was given at the hearing where it was noted at paragraph 20 that the Appellant's current partner gave evidence that she and the Appellant had been living together for just over twelve months and that prior to this they lived with the Appellant's stepmother and then her mother's house. The partner confirmed she was aware of the Appellant's previous conviction and that were he to be to be deported to Jamaica she would be prepared to go to Jamaica to live with him. She has no family in Jamaica and accepted she may experience problems living there because of her son. He is a British citizen aged 12 years. Mr Ahmed submitted that notwithstanding such a clear statement of intention the Panel should have looked behind the evidence and considered the reasonableness of the proposal although when asked whether there was evidence to support a claim it was not reasonable or whether this was a matter raised at the hearing, Mr Ahmed was unable to adequately assist. Even if it is arguable the Panel should have gone further, in Gulshan it was held that the term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount They concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh. The material provided to the Panel did not arguably establish that such circumstances existed.
46. The situation of R was considered in relation to section 55 aspects in the determination and no legal error is proved.
47. Ground four alleges the Panel erred in concluding that the Appellant was likely to reoffend but their reasons for this are set out above and even if a report had been provided showing that the risk of reoffending was low this is not determinative. The previous findings of the Murray Panel and the Appellant's history of criminality justify the conclusion he is an habitual offender. If he maintains there is no risk or a low risk of reoffending it is arguable that the burden is upon him to prove it. The Grounds refer to the fact that no pre-sentence report was available at this or any previous appeal and nor was there any evidence from any other source relating to this issue. This is correct but I note in the Tribunal file a letter from Peer & Co dated 23rd January 2013 in which they state (when writing in response to the directions order dated 10th December 2012):

"In regards to our efforts to adhere to the Directions at point C we have requested details concerning sentencing remarks and presentence report for the incident offence from our client's previous solicitor. They were unfortunately delayed in responding to us and requested a £50 charge to obtain the required file from storage. We have made this payment and are now awaiting the full history regarding these events. As soon as we [sic] receive this information we will serve it on the relevant parties."

No such information was provided even though there is no evidence Peer & Co did not receive the file from the Scottish advocates. If the requested documentation was not provided because it did not exist there can be no criticism of the Secretary of State for not providing that information. If that evidence did exist the Appellant and/or his representative can be criticised for failing to file it in accordance with directions.

48. There is no obligation upon the Tribunal to seek material of its own accord in all but exceptional circumstances – see SS (Nigeria). In this appeal the Panel clearly considered the history and noted the lack of reoffending since release from prison two years previously but found that other reasons justified the deportation as set out in the determination. Those findings are within the range of findings the Panel are entitled to make on the evidence and accordingly no legal error is proved. The risk of reoffending is not determinative in any event and has not been shown to be an element that is likely to tip the balance of the decision in the Appellants favour.

Decision

49. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

50. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I continue that order, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, to protect the identity of the child.

Signed.....
Upper Tribunal Judge Hanson

Dated the 9th April 2014