IAC-TH-LW-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01578/2014

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 9th March 2016	**On 14th April 2016**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MN
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Miss Johnstone, Senior Presenting Officer
For the Respondent: Ms Mensah, Counsel instructed by Zacharia & Co, Solicitors

DECISION AND REASONS

1. This is an appeal against the determination of the First-tier Tribunal (Judge Bruce) promulgated on 15th July 2015. The judge allowed the appeal

against the deportation of the Respondent on Article 8 grounds. The decision of Judge Bruce found that the Appellant had shown, in line with paragraph 398 of the Immigration Rules, "very compelling circumstances over and above those described in paragraphs 399 and 399A" of the Rules.

2. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a court directs otherwise, no report of these proceedings or any form of application thereof shall directly or indirectly identify the original Appellant or his family members. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. Such an order was made by the First-tier Tribunal and also by the Upper Tribunal in earlier proceedings in order to avoid the likelihood of serious harm arising to the children and family members from the contents of these proceedings.

3. Whilst this is an appeal by the Secretary of State, I propose to refer to the Secretary of State as the Respondent and MN as the Appellant, reflecting their positions as they were before the First-tier Tribunal.

4. The Appellant is a national of Iran who appealed against the decision of the Respondent of 24th July 2014 to make an order for his deportation pursuant to Section 32(5) of the UK Borders Act 2007.

5. The decision of the First-tier Tribunal at paragraphs [2] to [16] set out the background and history of the Appellant and various proceedings. This was indeed a matter with a "long history" as observed by Judge Bruce at paragraph [2].

6. The history demonstrates that in the year 2000 the Appellant and his brother entered the United Kingdom with their father who subsequently left them in the care of a family relative. At that time the Appellant was 12 years of age and he has not seen his father since that date. The Appellant and his brother came to the attention of the local social services and they were placed in their care. When they sought to regularise his immigration status in January 2002 the application was not dealt with, however a subsequent application made in February 2005 resulted in the grant of discretionary leave until he was 21.

7. In May 2008 the Appellant met his partner and on 27th February 2009 he applied for indefinite leave to remain on the grounds of Article 8 family life. Subsequent to this a child was born of their relationship. On 27th November 2009 he was convicted of an offence of the possession of ammunition and was sentenced to twelve months in prison, being released on 26th February 2010.

8. The conviction resulted in the institution of deportation proceedings. On 26th February 2012 a First-tier Tribunal panel (Judge Holmes sitting with Mr Banes) allowed the appeal for the reasons set out at paragraph [7] of Judge Bruce's determination. In summary, the Tribunal held that his

deportation could not be justified on Article 8 grounds and thus allowed the appeal. The result of that decision on 22nd August 2012 the Appellant was granted three years' discretionary leave.

9. At paragraph [9] of the decision of Judge Bruce, she sets out the circumstances in which admissions made by the Appellant were being considered by the prosecuting authorities. As a result he was charged in 2012 with drugs offences and having pleaded guilty on 24th September 2012 was sentenced to a term of imprisonment of six years. Paragraph [9] of the First-tier Tribunal's decision sets out the circumstances of those offences by reference to the sentencing remarks of the judge.

10. The Appellant had, however, applied for indefinite leave to remain which had resulted on 28th October 2013 with a decision being made by the Secretary of State to refuse to vary his leave and to make a decision to remove him from the United Kingdom pursuant to Section 47 of the 2006 Act. The Secretary of State refused to grant leave with reference to paragraph 322(5) of the Immigration Rules. As a result of that decision, which was made in time, he had a right of appeal to the First-tier Tribunal and it came before Judge Cruthers on 2nd June 2014.

11. In a decision promulgated on 2nd July 2014, Judge Cruthers allowed the appeal on Article 8 grounds "outside the Rules". The reasons given for allowing the appeal were set out at length within his determination and summarised at paragraph [12] of Judge Bruce's determination.

12. It is recorded at paragraph[13] that the Secretary of State had sought to challenge the decision of Judge Cruthers, but in a determination of 30th April 2015 Upper Tribunal Judge Lane upheld Judge Cruthers' decision. At paragraph [13] Judge Bruce set out the reasons given by Judge Lane for upholding the decision of Judge Cruthers. At paragraph [14] the judge made reference to the history of the litigation which I have set out above and made reference to the Secretary of State being "under the impression" that there was an application for permission to appeal. However, the judge recorded that the records demonstrated that there was no appeal pending at the date of the hearing which was on 29th June 2015 and the Presenting Officer agreed that for the purposes of the deportation appeal the Tribunal would have to proceed on the basis that the decision of Judge Cruthers had been upheld by the Upper Tribunal and that both parties agreed that those findings insofar as they were relevant, as were those of the Holmes Tribunal, were the starting point applying the decision in **Devaseelan v The SSHD**.

13. The judge then went on to apply the new statutory framework to the circumstances of the Appellant. Her findings of fact are set out at paragraphs [20] to [33]. The judge, having considered all the factors was satisfied that the Appellant had demonstrated that there were "exceptional and very compelling circumstances over and above those matters identified in paragraph 399 and/or 399A of the Rules". Thus she allowed the appeal.

14. Permission to appeal that decision was sought by the Secretary of State on 21st July 2015 on two specific grounds; firstly the judge had taken as a starting point the Tribunal's earlier decisions. Ground 1 asserted that "those determinations" remain the subject of a pending application for permission to the Court of Appeal and that by relying upon those previous Tribunal determinations as a starting point was a material error and did not form a "safe or correct starting point". Thus the appeal was unsafe. The second ground was that the judge gave no adequate consideration to Section 117B(3) in relation to financial independence or adequate consideration to Section 117B(4) and (5) in relation to the establishment of his private life at a time when he was in the UK either unlawfully or with precarious status.

15. Permission to appeal was refused by the First-tier Tribunal on 11th August 2015 in which it was stated at paragraph [3] that the judge had specifically dealt with Ground 1 at [14] of her determination and that the Presenting Officer had agreed at the date of the hearing that there was no appeal pending, thus it was correct for the judge to proceed to determine the appeal on the basis that the determination of the previous judge had been upheld. As regards Ground 2, the judge correctly identified that she should have regard to Section 117 at paragraphs [17] to [19] and carried out an analysis of the evidence at paragraphs [20] to [33].

16. The Secretary of State sought to renew that application for permission relying on exactly the same grounds, lodging the application on 26th August 2015.

17. On 21st September 2015 permission was granted by Upper Tribunal Judge Blum stating as follows:-

> "It is apparent from paragraph [14] of Judge Bruce's determination that there was confusion, to say the least, as to whether the Secretary of State had a pending appeal to the Court of Appeal, and that the Home Office Presenting Officer agreed to proceed on the basis that the earlier First-tier Tribunal decision had been upheld by the Upper Tribunal. It is nevertheless arguable that the principles and approach enunciated by **Devaseelan** may need to be modified in such circumstances.
>
> Permission is granted on all grounds."

18. Thus the appeal came before the Upper Tribunal. Miss Johnstone on behalf of the Secretary of State relied upon her written grounds. Ms Mensah relied upon a skeleton argument on behalf of the Appellant which had been provided by her solicitors in 2015 and setting out the chronology relevant to Ground 1. It did not deal with Ground 2 as advanced by the Secretary of State, however Ms Mensah made oral submissions in relation to that ground.

19. Dealing with the first ground, the Secretary of State submits that the judge was wrong to take as her starting point the previous determination promulgated on 2nd July 2014 and that of 30th April 2015 (Judge Lane's

determination). It is said by Miss Johnston that there was an "administrative confusion" that led this judge failing to apprehend that an application had been made to the Court of Appeal to challenge the decision of UT Judge Lane (made on 30th April 2015) who had in turn upheld the decision of Judge Cruthers (the 2014 decision). Thus, it is argued on behalf of the Secretary of State that the starting point was vitiated by legal error and therefore the decision to allow the appeal was unsafe.

20. In order to consider this ground it is necessary to set out the litigation history which is not in dispute and recorded at paragraphs [7] to [14] of the First-tier Tribunal's decision. I have also set it out earlier when making reference to the background of the proceedings. As can be seen, following his conviction in 2009 a deportation order was made on 22nd November 2011. It resulted in deportation proceedings and an appeal before the First-tier Tribunal panel (Judge Holmes and a non-legal member) who allowed the appeal on Article 8 grounds by reference to his private and family life, and his lack of ties to his country of nationality (see paragraph [7] of First-tier Tribunal Judge Bruce's decision). The Secretary of State granted three years' discretionary leave on the basis of that decision.

21. The prosecuting authorities were considering admissions made by the applicant which led subsequently to the Appellant pleading guilty to a number of drugs offences resulting in a lengthy sentence of imprisonment of six years imposed on 24th September 2012.

22. The Appellant had applied for indefinite leave to remain, in time, which resulted in a decision made on 28th October 2013 to refuse to vary his leave to remain and to make a decision to remove under Section 47. As it was made in time, this generated an in country right of appeal and it led to the appeal before Judge Cruthers on 2nd June 2014. As Judge Bruce recorded at [12] of her determination, the judge allowed the appeal on Article 8 grounds (outside the Rules) for the reasons amply set out within that determination that is within the Tribunal papers and for the reasons summarised by Judge Bruce at [12].

23. The issue relates to the Secretary of State's challenge to that decision. There is no evidence before the Tribunal as to the date upon which any application was made or when permission was granted (either in documentary form or by any reference to it in the subsequent decision of Judge Lane). However, it is common ground that the Secretary of State made a decision to make a deportation order on 24th July 2014.

24. Permission was granted to the Secretary of State to challenge the decision of First-tier Tribunal Judge Cruthers and the appeal came before the Upper Tribunal (Judge Lane) on 14th April 2015. In his decision promulgated on 30th April 2015, he considered the Secretary of State's submissions but rejected them finding that the First-tier Tribunal (Judge Cruthers) had not erred in law for the reasons that he gave at paragraphs [2] to [5] and summarised at paragraph [13] in the decision of Judge Bruce.

25. It is clear from reading the decision of Upper Tribunal Judge Lane at paragraph [6] that he was aware of a further deportation appeal that was pending before the First-tier Tribunal (the proceedings that were to come before Judge Bruce) and made reference to the fact that the representative should ensure that a copy of his decision should be brought to the attention of the First-tier Tribunal who may hear the appeal. It is of relevance and significance that at no time before those proceedings was it ever submitted on behalf of the Secretary of State that Judge Lane should either adjourn the proceedings or list them to be heard at the same time as the deportation proceedings.

26. Thus the deportation proceedings continued and were listed before the First-tier Tribunal (Judge Bruce) on 29th June 2015.

27. The judge set out at the position of the Secretary of State at the hearing (see paragraph [14]) that the Respondent was "under the impression that she had applied for permission to appeal to the Court of Appeal against the decision of Judge Lane". The judge considered the evidence before her and stated that whilst the grounds were received, the Tribunal records showed that there was no appeal pending. It is also clear from the determination that there was no application made for an adjournment by the Presenting Officer who indeed agreed that the judge should proceed on the basis that the findings of Judge Cruthers had been upheld by the Upper Tribunal (applying the well-established **Devaseelan** principles) which is what the judge did.

28. The Secretary of State then applied for permission to appeal the decision of Judge Bruce on 21st July 2015 expressly on the ground that there was a pending application to the Court of Appeal. The application was refused by the First-tier Tribunal on 11th August 2015.

29. On 17th August 2015 Upper Tribunal Judge Lane refused the application for permission to appeal to the Court of Appeal and this was communicated to the parties, including the Secretary of State, on 21st August 2015. However, notwithstanding the refusal of permission by Upper Tribunal Judge Lane, the Secretary of State sought to renew the application for permission to appeal Judge Bruce's determination on the same grounds on the 26th August. By that date, Judge Lane had refused permission to the Secretary of State to appeal to the Court of Appeal and the grounds make no reference to the refusal of the grant of permission. Indeed it is silent as to any information relating to the Court of Appeal.

30. As a consequence of the renewal of that application made on 26th August (which made no reference to the refusal of permission to appeal to the Court of Appeal in-between the two dates by Judge Lane) the Upper Tribunal granted permission on 21st September 2015 on the first ground (although it is right to observe at paragraph [3] he granted permission on "all grounds").

31. At no time either before the grounds being renewed on 26th August or in the period between 26th August and permission being granted by the Upper Tribunal on 21st September, did the Secretary of State inform the Tribunal that permission had been refused by Judge Lane or provide any evidence as to the state of the proceedings. The appeal was previously listed for hearing before the Upper Tribunal in November 2015 and despite directions made by this Tribunal as to documentary evidence, no documents have been provided by the Secretary of State to support her case as to when applications were made, on what basis and the state of knowledge of various parties.

32. Indeed at this hearing before the Tribunal no further evidence was forthcoming. I gave the Presenting Officer time to take further instructions to clarify dates and to provide further evidence. The only document that was provided was a letter to the Upper Tribunal dated 30th June 2015 and was therefore after the hearing before Judge Bruce that referred to proceedings before the Court of Appeal and referred to this as a "resubmission of the last application" and thus was out of time. The letter referred to documents being attached, but none were attached to the letter. The grounds assert that Judge Lane was in error by failing to exercise case management powers to adjourn the case and link it with the deportation proceedings. However, as Judge Lane went on to state when refusing permission to the Court of Appeal, no such application was made at the hearing by the Presenting Officer for the two appeals to be managed together. Secondly, he found that it was not clear as to how:-

> "the existence of a second set of proceedings (relating to matters arising after the immigration decision which is the subject of the appeal) might have rendered the decision of the First-tier Tribunal which is under examination by the Upper Tribunal wrong in law."

No further documents were provided and the only information Miss Johnstone could give me was that a permission application had been made, but she could not confirm any date on which it was made, the grounds or any copies of the application made. Thus the Presenting Officer was not able to produce any further evidence and could only state that it was always the intention to appeal the decision of Judge Cruthers.

33. I remind myself that it is for the Secretary of State to make out her grounds and thus to file evidence in support of her submissions. As set out above, notwithstanding the application for permission being made on 26th August by which time Upper Tribunal Judge Lane had refused to grant permission to the Court of Appeal, a renewed application was made relying on the same grounds. However, I agree with Ms Johnstone that there is no evidence to suggest that the author of the second grounds had knowledge of the refusal of permission. The position before me is that there is no evidence of any kind to establish that an application has been made or what the outcome has been.

34. Ms Mensah submits that had the Upper Tribunal known that Judge Lane had refused permission to appeal to the Court of Appeal that it is likely that Judge Blum would not have granted permission. In her skeleton argument she made reference to reviewing the grant of permission in that light. However, in my judgement it is difficult to reach that assumption. It is right that the renewed application made no reference to the refusal of the grant of permission made on 11th August by Judge Lane. It is further right that Judge Blum in granting permission placed reliance and emphasis on Ground 1 and that it was arguable for the reasons that he gave at paragraph [2]. However, he did state at paragraph [3] that "permission is granted on all grounds" and therefore referred to Ground 2 which does not rely upon ground 1 and is entirely separate. I therefore see no ground upon which I should review the grant of permission and as I am hearing the error of law hearing such a course is, in my view, academic.

35. There is no evidence before this Tribunal to support the Secretary of State's case as to the history and chronology she seeks to rely upon. The only document provided was a letter of 30th June 2015 which postdates the hearing before Judge Bruce in which she accurately recorded that there was no appeal outstanding on the Tribunal records. Furthermore the Presenting Officer agreed that it was right to begin as a starting point with the decision of Judge Cruthers. There is still no evidence before this Tribunal as to the present circumstances and it is for the Secretary of State to prove her case and provide evidence in support. There has been sufficient time in my judgment to provide evidence since the original application was made for permission and in that interim period. Thus it has not been demonstrated that the judge was wrong to treat the findings of Judge Cruthers as a starting point for her determination applying the well-established **Devaseelan** principles.

36. In any event, a careful reading of the determination demonstrates that the judge, whilst recording that the starting point was the previous decisions of Judge Holmes and Judge Cruthers, she nonetheless went on to consider the evidence at the hearing and to reach her own conclusions in accordance with the new legal framework. It is not a case that the judge simply adopted those findings with no more, but she analysed the evidence herself and reached her own conclusions. The Secretary of State has not sought to challenge any of the findings of fact made by the judge in this respect. Consequently Ground 1 is not made out.

37. Dealing with Ground 2, Miss Johnstone submitted that the judge had failed to have regard to the Section 117 factors, in particular whether the Appellant was financially independent and whether his private life was established at a time that he was in the UK, either unlawfully or with precarious status, and therefore little weight should be attached to that.

38. No further submissions were made, and no case law had been relied upon by either advocate before me.

39. By way of reply, Ms Mensah submitted that the judge set out the relevant provisions at paragraphs [17] to [19] of the determination. At paragraph [20] the judge had regard to the public interest considerations set out at Section 117C and the judge's findings at paragraphs [28] and [32] were relevant to the issue of financial independence. She reminded the Tribunal that the earlier findings of Judge Cruthers at paragraph [60] of his determination found that he was able to financially support his family through legal activities without recourse to public funds.

40. As a question of status, she submitted that the relationship with his partner was established in 2008 at a time when he had leave, having been granted discretionary leave in 2006 until 2009. She submitted the judge was aware of the chronology and history when reaching the overall conclusion as to whether or not there were very compelling circumstances to outweigh the strong public interest identified by the judge.

41. The correct approach in an appeal on human rights grounds which has been brought to seek to resist deportation is to consider whether the Appellant is a foreign criminal as defined by Section 117D(2)(a), (b) or (c); and if so, does he fall within paragraph 399 or 399A of the Immigration Rules, if not, are there very compelling circumstances over and beyond those falling within paragraph 399 or 399A relied upon, such to be informed by the seriousness of the criminality of the Appellant and taking into account the factors set out in Section 117 (see **Chege (Section 117D Article 8 approach) [2015] UKUT 165**).

42. The First-tier Tribunal at [17] considered that the Appellant was a foreign criminal by virtue of the length of his prison sentence and set out the appropriate statutory provisions at length at paragraphs [17] to [18]. In particular, the judge identified at [19] at the present proceedings she was deciding were of a different character to those previously heard by the Tribunal as there was a "different legal framework" and thus there was a material difference in her approach. In this respect she expressly referred to the "particular provisions Parliament has enacted to deal with foreign criminals in Section 117A-D" and properly identified that having received a sentence of over four years he could not simply point to family life with his wife and child but must establish that there were "very compelling circumstances" over and above those which he recited.

43. Thus the judge's self-direction is in accordance with the decision of **SSHD v AJ (Angola) [2014] EWCA Civ 1636** at paragraphs [39] to [40] that she did not seek to carry out a freestanding Article 8 analysis but took account of the Convention rights through the lens of the new Rules.

44. When carrying out the exercise of considering whether there were "very compelling circumstances" over and above those described in paragraphs 399 or 399A the judge considered whether or not the Appellant's case did fall within paragraphs 399 or 399A (see **Greenwood (No 2) (paragraph 398 considered) [2015] UKUT 629** and **SSHD v JZ (Zambia) [2016] EWCA Civ 11** at paragraphs [29] to [30]).

45. Thus the judge proceeded to consider the relevant issues under Section 399A (his length of residence, the extent of his social and cultural integration and whether there would be very significant obstacles to his reintegration to his country of nationality (see findings at paragraph [21])). The judge went on to consider at paragraphs 22 to 33 the relevant issues under paragraph 399(a) and family life and did so by having regard to the earlier findings of the Tribunal which led to the question as to whether there were "very compelling circumstances" (notwithstanding the strong public interest in deportation (see [24])).

46. The judge set out her analysis of the issues at paragraphs [24] to [33]. The Secretary of State does not challenge any of those factual findings made by the judge save for what is said at Ground 1 which I have dealt with earlier in this determination. Furthermore, the legal framework that I have set out in the earlier paragraphs has also not been challenged by the Secretary of State.

47. The challenge comes by way of the provisions of Section 117. Those provisions of the Act apply where the Tribunal is required to consider whether a decision breaches Article 8 rights (see 117A), and in cases where there is an interference of such rights, the Tribunal in determining proportionality must have regard to the considerations listed in Section 117B and to the additional considerations in Section 117C in cases involving the deportation of foreign criminals.

48. It is plain from reading the determination that the judge at paragraph [17] made express reference to applying the "Section 117 factors" and at [18] set them out in full, and again at [19] made a self-direction that "I must apply the particular provisions Parliament has enacted in order to deal with foreign criminals in Section 117A-D."

49. Whilst there was no express reference to those factors, it is not an error of law to fail to refer to them, but what matters is that they were considered in substance (see **Dube (Sections 117A-117D) [2015] UKUT 90**). Furthermore, the statutory duty to consider the matters set out in Section 117B of the 2002 Act are satisfied if the Tribunal's decision shows that it has regard to such matters which are relevant (see **AM (Section 117B) [2015] UKUT 260** at paragraph [8]).

50. The judge did not make any reference to the Appellant's ability to speak English (see Section 117B(2)) as she had found at [21] that he did not speak his mother tongue and was culturally integrated in the UK. It was common ground between the parties that he spoke English, thus it was not necessary to make any further reference to that factor.

51. As to Section 117B(3) and the issue of financial dependence, that was an issue that had been considered by the previous Tribunal and in particular Judge Cruthers. As Ms Mensah submits, Judge Cruthers reached the conclusion in 2014 that he had been involved in legitimate enterprises and found on the evidence that "It is my assessment that the Appellant is someone

who, if he chooses to, could financially support his family through legitimate activities, and without recourse to public funds" (see paragraph [60]). The determination also set out the qualifications that he obtained in prison (see paragraph [63]). Consequently Judge Bruce was entitled to rely upon those findings as she recorded at [14]. She recorded that she should not depart from them if there was new evidence before her. At [15] she recorded that there was no new evidence, thus it was open to the judge at [28] to make further reference to those findings which in essence she adopted, thus there was sufficient evidence to demonstrate the ability of financial independence. As the Appellant was in custody, it would have to have been considered in that light.

52. As to the Appellant's private life, Sections 117B(4)(a) refers to "little weight" being given to its establishment at a time when the person is in the UK unlawfully. The findings of the judge and the previous Tribunal were that the Appellant had lived in the UK since the age of 12 and therefore well over half his life in the UK. The judge was not able to quantify what proportion of the time was "lawful", although the judge had regard to the chronology when he had had discretionary leave. Section 117B(4)(a) was therefore considered in substance. However, Section 117B(5) also makes reference to little weight being given to a private life established at a time when the person's immigration status was precarious. In this context, notwithstanding the length of his residence in the UK, the Appellant's status could be viewed as precarious (see **AM (Section 117B)** (as cited) and therefore in the balancing exercise must be given little weight.

53. The submissions of the Secretary of State have not sought to engage with the judge's determination as a whole and the analysis reached by her on the proportionality balance and has simply repeated that no adequate consideration was given to whether private life was established at a time when he was in the UK unlawfully or with precarious status. However, when the determination is read as a whole, it is plain that the judge did take those matters into consideration, even if not expressly stated, and that the leave was not lawful for the entire period of his stay and therefore by analysis must have been precarious (see paragraph [21]).

54. Section 117C begins with two statements of principle; firstly the deportation of foreign criminals is in the public interest (Section 117C(1)) and secondly, the more serious the offence committed by the foreign criminal, the greater is the public interest in his deportation (Section 117C(2)). The First-tier Tribunal Judge properly applied those considerations at [31] when setting out in detail the issues that she had to decide, recording that she had to weigh the identifiable factors against deportation and in her words "against the very great weight that must be placed on the public interest".

55. The judge went on to state at [31]:-

> "When assessing the deportation under the Rules it is all too easy to adopt a formulaic approach, ticking off the requirements of the checklist and paying what might be described as lip service to the public interest. I stress this is not what I have done here."

56. The judge went on to give weight and consideration to his serious criminality and it can be said that the judge therefore took into account that little weight was necessarily attached to the establishment of private life in the light of that criminality. However, that had to be viewed against the findings made by the judge (which are not challenged) concerning the strength of his cultural integration in the UK (at [21]), his lack of identification with culture in his country of nationality ([21]), the lack of family relatives there ([21]) and the "alien culture" ([21] and [30]). The judge gave detailed consideration to his background at [25] to [27] and that the best interests of the children were to live with both parents ([23]) and the reasons that she also gave relating to the strength of family life at [23], [30] and [31].

57. When identifying those factors, the judge made a number of references to the "strong public interest" and his criminality and reached the conclusion that "the weight set against this interest is substantial".

58. Consequently I accept the submission made by Ms Mensah that the Secretary of State has not demonstrated that the judge fell into legal error that was material in the sense that it would not have made a difference to the outcome in the light of the factors that she had identified. It is difficult to see in the light of the strong factors identified by the judge that even allowing for little weight attributable to any precarious status that that would have outweighed the other factors taken cumulatively as identified by the judge.

59. The First-tier Tribunal Judge carried out an analysis and whilst applying the **Devaseelan** principles to the earlier findings, went on to make an analysis of her own. This was an unusual case and rendered more so by the chronology as observed by the First-tier Tribunal Judge at [33]. Whilst it might be said that this was a decision that may not be reached by every judge, the decision reached was one that was open to the Tribunal on its own particular facts and on the facts as found whereby the judge regarded them to amount to "very compelling circumstances" within the meaning of paragraph 398.

60. Consequently the grounds do not demonstrate any arguable error of law and therefore the determination shall stand.

61. At the hearing Ms Mensah made a reference to the issue of costs although there is no formal application made in writing before the Tribunal. Therefore if an application is to be made, it must be made in writing, supported by grounds and served upon the Tribunal and the Secretary of State within 7 days of service of this determination. The Secretary of State

has 7 days thereafter to make any submissions to the Tribunal by way of response.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Upper Tribunal Judge Reeds