



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/17940/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 20 August 2018

Decision & Reasons Promulgated  
On 18 April 2019

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

N P

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant:

21 August 2017 - Mr T Melvyn, Senior Home Office Presenting Officer

22 December 2017 and 20 August 2018 - Mr S Kotas, Senior Home Office Presenting Officer

For the Respondent:

Ms K Cronin, Counsel, instructed by Birnberg Peirce & Partners Solicitors

**DECISION AND REASONS**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Respondent. Breach of this order can be punished as a

contempt of court. I make this order because this case turns on the welfare of a child which could be compromised by publicity.

2. This case first came before me to determine if there had been an error of law in the decision of the First-tier Tribunal. I found that there was and notice of that decision was sent to the parties. A copy of that notice is appended hereto. By reason of some inexplicable administrative error it was sent a second time. Nothing turns on that but it inconvenienced and confused people and I apologise for that.
3. I repeat part of that decision because it explains what follows and I see no benefit in requiring anyone seeking to understand my decision to have to begin by reading the Appendix. I found that the First-tier Tribunal had erred in law before the Supreme Court gave its decision in KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent) [2018] UKSC 53. No doubt I would have expressed myself differently with the benefit of that learning but, given my findings, I saw no need for further submissions.
4. I said in my “Reasons for Finding an Error of Law” the following:

“2 This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter ‘the claimant’, against the decision of the Secretary of State on 13 July 2016 refusing him leave to remain on human rights grounds.

3 The claimant is a national of Jamaica. He was born in October 1989 but has lived in the United Kingdom since April 2002. He has a criminal record. In September 2004 he was convicted of battery. In November 2005 he was again convicted of battery. In June 2007 he was convicted of robbery before the Crown Court sitting at Basildon. For that matter he was sentenced to detention for eighteen months and the Secretary of State resolved to make a deportation order. In January 2010 he was convicted of causing criminal damage. In September 2010 he was convicted of using threatening and abusive and insulting words and behaviour with intent to cause fear or provoke violence. On the same occasion he was convicted of two counts of criminal damage and being in breach of a conditional discharge. He was sent to a Young Offenders Institution for eight weeks in total. In February 2011 he was fined for disorderly behaviour. In July 2011 he was warned that his behaviour had been noticed by the Secretary of State and she was considering his deportation. In December 2011 before the Crown Court at Basildon he was convicted of assault occasioning actual bodily harm and possessing class B controlled drugs. The offence was committed during the operational period of a suspended sentence and he was sentenced to a total of fourteen months’ imprisonment. This was reduced to ten months on appeal.

4 In short, the claimant is a man who had shown himself to be irresponsible and incapable of behaving even when he knew he was subject to sanctions by the court and the Secretary of State was considering deportation. His offences are numerous and serious and include robbery.

5 It is also right to record that the claimant has had considerable difficulties in his own life. His father was a violent man who beat the claimant and the claimant’s mother and murdered the claimant’s mother, for which offence he was sent to prison and spent some of the sentence in Broadmoor. It is a feature of the

case that the claimant is on extremely uneasy terms with his father, who has been deported to Jamaica.

6 Although Ms Cronin went to considerable lengths to persuade me that any error was entirely technical I have no hesitation in concluding that the First-tier Tribunal erred in law materially. The appellant has established a relationship with a woman who has significant problems. Her IQ, if I may observe this respectfully, is identified as very low and Ms Cronin did not feel able to call her to give evidence in the First-tier Tribunal. She has a child. The claimant and the child's mother do not live together but there is evidence that the claimant plays a significant part in the life of the child (I make it clear that I use the phrase 'significant part' as a general description and this is not intended to be a complete finding about the nature of the relationship).

7 The difficulty with the decision is that the First-tier Tribunal unequivocally took notice of the decision in **MAB (para 399; "unduly harsh") USA [2015] UKUT 435 (IAC)**. The Upper Tribunal had decided that the words 'unduly harsh' did not require any kind of balancing exercise. The problem with this decision is that it is wrong. The Court of Appeal in **MM (Uganda) [2016] EWCA Civ 450** was quite clear that the words 'unduly harsh' had to be looked at in the context of all the circumstances of the case including the criminal's immigration and criminal history. I cannot avoid finding that the First-tier Tribunal applied an incorrect legal test.

10 Although I have no hesitation in coming to this conclusion I found it much more difficult to consider the best way forward. Obviously I wanted to deal with the case without a further hearing if that was a proper thing to do. That must be in everyone's interests. I have found it very difficult to identify clear findings that can be used as a basis for re-determining the case. As the grounds of appeal to the First-tier Tribunal complain, there are many general phrases in which it is made clear that certain strands of evidence are 'accepted' but I have not been able to narrow those down into clear findings that can be used as a basis to re-determine the appeal. It follows that I am driven to the conclusion that the appeal has to be heard again.

11 Given its history, I have decided to retain the appeal in the Upper Tribunal and list it before me."

5. I then gave directions and subsequently there was a hearing.
6. I heard evidence from the claimant and I consider that below.
7. However I also heard from Christine Brown who is an independent social worker. She has qualifications of BSc (Hons), CQSW, PGDip Social Work, MA Social Work Studies. After hearing the evidence and considering the case as a whole, I found Ms Brown a competent and honest expert who expressed her considered professional opinion.
8. I find it helpful to begin by considering her evidence as it sets out the background to the circumstances of the claimant, his former partner and their child.
9. I begin with her report dated 25 May 2016.

10. She explained that she met the claimant with his partner, JM, to interview them and also observe how they interacted. The appellant's child, "EJP", is a daughter who was born in June 2014. Ms Brown was told that the claimant met his partner in 2010. She was then aged 19 and he was aged 21. Ms Brown considered documentary evidence concerning the claimant's partner, JM and précised that in her own report. JM's IQ is recorded in the range of "63 - 73". It was described as "extremely low to borderline". The consequence is she will "require higher levels of support in many areas of her life". Ms Brown then looked at the reports concerning the claimant and drew attention to many positive signs that he had learnt from his experience and was benefiting from advice. She considered and clearly endorsed views of other experts that the claimant and his former partner intended to re-establish cohabitation if he was allowed to settle in the United Kingdom and that would be good for their relationship and good for the child. Ms Brown could not contemplate JM removing to Jamaica where she would have no support. She also commented positively on the relationship between the claimant and his daughter. I find paragraph 4.5 particularly relevant, where Ms Brown said:

"As expressed earlier in this report, [JM] told me how difficult she had found motherhood to be, the changes that it had brought to her life and, also, to [the claimant]. [JM] said that it had been difficult of late as [the claimant] was now staying with his aunt, a decision that they had made together, but she remained very reliant upon him and [EM], at 20 months of age, is now very aware of her father. This was evident from the moment I entered [JM's] home; [EM] ran excitedly towards her father, holding his knees and indicated that she wanted to be picked up by him, then smothered him with kisses."

11. Ms Brown commented on the child's need for the relationship with her father and drew attention to the enormous difficulties that had been experienced by the claimant, which had no doubt contributed to his criminality, because of his own horrible home circumstances. She suggested that was an example of what happens when children do not have a good relationship with their parents and it is something about which I must reflect.
12. Whilst there is much that can be said to the claimant's detriment arising from his criminal behaviour the evidence of the independent social worker is that he was playing an important part in the life of his child and removing him would do harm.
13. It is also relevant that EM is "mixed race" (if I might be permitted a convenient but inaccurate phrase) and benefits from contact with her "black" parent.
14. There is an addendum to that report, dated 27 March 2017.
15. There Ms Brown said that the claimant continues to live with his aunt and JM and their daughter lives nearby. The claimant and JM have some contact most days. The claimant sees his daughter almost every day.
16. Their daughter, EM, was clearly growing up in a pleasing way. She was described as "a delightful, inquisitive and outgoing little girl".

17. Ms Brown again saw and described appropriately tender interaction between the claimant and his daughter, which she interpreted as indicative of a strong relationship that was beneficial to the child. They discussed how the relationship might continue in the event of the claimant's removal. JM indicated how it would be very unsettling for her. Describing the claimant's partner, she said that: "[JM] is a shy and hesitant young woman, anxious of those she perceives to be in authority, and I understand too, fearful of being judged in some inadequate way."
18. Ms Brown explained that JM has no family but the claimant has an extended family that help support her. She said at paragraph 4.3:

"[JM] is a loving mother but she does not have the same resources on which to draw emotionally and practically that [the claimant] is currently able to access. Unlike [the claimant] [JM] alone would, in my view, be reluctant to ask for support or help and would not willingly approach [the claimant's] family members. This is not because [JM] is in any way shunned or ostracised by [the claimant's] family, on the contrary, they appear to be very welcoming of [JM] but [JM] is not open in her feelings and I feel anxious that she should remain close to them in order to avoid further pain and hurt in her life."
19. She continued:

"Being so closed to one's feelings and reluctant to seek help from a third party would have implications for [EM] in time. Should [the claimant] be removed, [JM] would be left to manage the emotional debris as well as practical issues left by his going which, in this instance, will be a desperately upset little girl for whom no amount of soothing words will give her the reassurance that she will want, that of her father returning to her and questioning those around her when he does not do so."
20. Ms Brown made further observations in the same vein.
21. In short, she did not think that EM's mother had the wherewithal to cope properly with the wrench of removal. Ms Brown recognised that removing a parent is almost always a disturbing event in a child's life. She suggested that "most children" "never really adjust fully to a thing so fundamental taking place in their lives" but noted that the child here is particularly bonded to her father and the mother has particular difficulties in managing without support.
22. Ms Christine Brown gave evidence. She adopted her reports, including the addendum dated 27 March 2017. She believed that she had sufficient contact to form a proper professional judgment before expressing her opinion.
23. She confirmed that JM did not want to talk to her. She was frightened that Ms Brown would judge JM to be a poor parent. That was not something that she had to consider but she regarded JM's reluctance to engage with her as indicative of the difficulties JM might have in getting help.

24. She was satisfied that EM was “securely bonded” to the claimant. She emphasised the important role the claimant has in the life of both JM and EM. She said, by way of illustration, that because JM is illiterate she does not respond appropriately to messages from school. The claimant looks after her in that regard.
25. Ms Brown understood that JM had no meaningful contact with her family. She saw her own mother about once a year. She did not regard JM’s mother as a source of support.
26. Ms Brown said that it was “very hard for the mother to intellectualise her children’s needs”.
27. She was cross-examined. She confirmed that she was not aware of any safeguarding issues for the child. She made the obvious observation that the claimant is supporting JM and EM. She believed EM to have a good relationship with the claimant’s family.
28. I asked her if, in her judgment, the mother would be able to cope without the claimant’s presence. She replied: “In a nutshell, no.”
29. As indicated, Ms Cronin did not feel able to call JM and this necessarily reduces the weight I can give to her evidence but there is an unsigned statement in my papers. I outline what she has to say. I do not regard it as controversial. It either says things that are likely to be right and innocuous or which are supported elsewhere.
30. JM explained that she became friendly with the claimant in 2010 but restrained from becoming deeply committed because of his uncertain status. He was subject to the possibility of deportation. She did not intend to get pregnant but was pleased when EM was born in June 2014. The claimant spent a lot of time with EM when she was tiny because he was not able to work. Although pleased to be a mother she was surprised at how much work was involved and found EM challenging. She did not know how she could cope on her own. However, she could not go to Jamaica. The change and uncertainty would be too much for her.
31. The claimant did give evidence.
32. His first statement for these proceedings is dated 28 March 2017. There, he explained that he was born in Jamaica October 1989 but came to the United Kingdom with his sister and brother when he was aged 12. By then, his father had murdered their mother. He was given indefinite leave to remain.
33. He was candid about his criminal record but he last committed an offence in August 2011.
34. He spoke of his deep love of his mother and his frustration at the way his father treated her. There was rejoicing when their father left them in Jamaica to go to the United Kingdom. He did not know why his mother went to see her husband in the

United Kingdom but she did and he murdered her. He then went to live with an aunt.

35. He explained how he was greatly distressed by the whole experience although was careful to say he accepted responsibility for his criminal behaviour. He also said how he valued some of the opportunities in prison that assisted him to reorder his life. He paid tribute to his aunt and spoke of his appreciation of his sister and her family, his social worker and how he cared for his brother.
36. His story about his relationship with JM supported hers. He wanted to support her and their daughter. He said in his statement that EM needs his support and JM was frightened to manage without him.
37. One of the many reasons he did not wish to return to Jamaica is that he did not want to come across his father, who had been removed there.
38. There is a further statement, dated 22 December 2017.
39. There, he explained his happiness at succeeding in the First-tier Tribunal. He expressed his sense of shame and frustration that he could not play a more useful part in the life of his child and child's mother.
40. He gave details of their relationship. He talked about the games they played together and the time they spent together and his reading stories to the child. In short, he does things that a father could be expected to do with a happy little girl.
41. He repeated his concerns that JM would not manage. He also was concerned how EM would manage. She would not understand why he could only contact her by telephone or other similar means from Jamaica. He reiterated his fear of his father and his appreciation of the support of his former youth worker.
42. He gave evidence to the court, adopting his statements.
43. He was cross-examined by Mr Kotas. He said that since his case was last considered in 2013 his circumstances had changed by reason of his daughter being born and his father having been deported.
44. He continued to live with his aunt and regarded JM as his friend. He was uncertain about whether he described her as a partner in 2015.
45. He said that JM's family did not offer her any useful help. He was not sure how much she saw her relatives but it was not very often.
46. When he was not looking after his daughter she was in the care of her mother or a nursery.
47. He was re-examined. The re-examination mainly concerned his relationship with Mr John McDonald, whose evidence I consider below. He accepted that his relatives provided some help with EM care and provided money but he told me, without

reference to Ms Brown's report, that he did not expect JM to have the confidence to ask if he was not about.

48. I then heard from Mr John McDonald. Mr McDonald had written a letter and an email and provided witness statements dated October 2012 and then March 2017. I considered all of these things. His first involvement with the claimant was because of his employment with Integrated Youth Support Services. He was aware of the considerable difficulties the claimant faced as a young person. It was his opinion, supported by reference to academic material, that the claimant's own difficult upbringing had contributed to his criminal behaviour. He was aware of the relationship between the claimant and his partner, JM. Without in any way being sentimental about the claimant's professions towards good behaviour, he regarded him as work in progress and had seen great improvement.
49. The most recent witness statement repeated things that had been said about the claimant earlier. He was aware of the good relationship between the claimant and his daughter and was also aware of JM's circumstances. He referred to her "vulnerability" and her having "learning difficulties" and "limited family support". He would expect it to be "very difficult" for her to parent EM on her own. It was his view that the claimant was on course to reorder his life.
50. In his oral evidence before me, he confirmed that the claimant had changed. He was aware of the report from Dr Bell but he had not seen it. Neither had he actually seen the claimant with JM although we understood that he saw her several times a week. He was not well-informed about contact between the claimant and his other relatives.
51. He was cross-examined.
52. He confirmed that the claimant was frustrated that he was not able to work. He made it plain that although his initial involvement with the claimant was professional he continued to see him in his own time. He was acting with the full knowledge and cooperation of his employers but the claimant was now too old for their care.
53. There is then a detailed witness statement from Icilda Henry, who is the aunt of the claimant. She is providing him with accommodation. Much of the statement relates, uncontroversially, to his desperately unhappy family history. She also spoke about his transformation in attitude following the birth of his daughter. She expressed worries about how the claimant would cope in the event of return to Jamaica, particularly because of his fear of his father.
54. I have also considered and read the reports of Dr Bell, who is a consultant psychiatrist. He has known the claimant for some time and is aware of his circumstances and the possibility of his being deported. He was concerned of the possibility of suicide but did not regard that as a present risk although there was elevation with uncertainty on the prospect of return.



55. The witness statement of [KP], the claimant's sister, is particularly interesting. She is younger than the claimant. She was aware of their father murdering their mother and commented on how difficult it was to come to terms with what had happened. She commented on a change in attitude on the part of the claimant after his last detention and his good work as a parent.
56. I have considered the witness statement of [DP], the claimant's brother. He confirms the claimant's role as a parent and explained also how much he depended on the claimant.
57. I note that he is a young man intent on a university career and clearly has been able to survive the hardships of a difficult childhood like the claimant's but with a different outcome.
58. The appeal was listed for further hearing on 20 August 2018. There was new material and the claimant was now getting better counselling.
59. That said, I agree with Mr Kotas's submission that there was little new material. It seems that the claimant has been able to gain work and that is to his credit but is of limited value.
60. I have to remind myself that this is a human rights appeal which relies on an Article 8 balancing exercise. This is illuminated by Part 5A of the Nationality, Immigration and Asylum Act 2002.
61. I confirm that I have read the evidence before me although I have not found it necessary to comment on all of it specifically.
62. I appreciate that in January 2009 the claimant appealed successfully against a decision to deport him and in December 2013 he appealed unsuccessfully a similar decision. These things are of little relevance to the decision in this appeal. The claimant's child was born in 2014 and this is clearly a new fact of potentially great importance. Her birth occurred after his appeal was dismissed by the First-tier Tribunal and so clearly had not been considered.
63. However his failure to establish a human right remain based on his own professed fears of return, is, in the absence of new material, a pertinent reason to dismiss the appeal.
64. Based on a quick glance at the papers it would be easy to think that this appeal is entirely about the misfortunes in the life of the claimant. He has had horrible experiences and deserves respect and sympathy. However, he is in trouble because he has chosen to commit criminal offences on more than one occasion, including an offence of robbery, which is always viewed seriously by the courts. He is the author of his own misfortune. I accept that his sister was not as badly affected by their mother's murder as was the claimant and she was a bit younger but she has managed to organise her life so that she has been able to study law at university. It is

not the case that the claimant is the victim here. He faces deportation now because he chose to commit crimes.

65. I satisfied that he is a “foreign criminal” within the definition in Part 5A of the Nationality, Immigration and Asylum Act 2002. This is because he has been sent to custody for at least twelve months. This is all that is necessary. It is immaterial that that was some time ago and he has been in trouble since and received a lesser sentence. The definition is straightforward and is satisfied by a sentence of eighteen months’ detention.
66. I am therefore required to apply part 5A of the Nationality, Immigration and Asylum Act 2002.
67. This informs me that the deportation of foreign criminals is in the public interest and the more serious the offence committed the greater the public interest in deportation.
68. However, provided that the foreign criminal is not been sentenced to at least four years imprisonment, and the claimant has not, the public interest does not require deportation if the statutory exceptions 1 or 2 apply (see section 117C(3)).
69. Ms Cronin relies on both of the exceptions applying. She says that there would be very significant obstacles to the claimant’s integration into the country to which he would be deported and the effects of removal would be unduly harsh. The appellant was born in 1989 and arrived in the United Kingdom in 2002. It has been accepted here that the claimant has been lawfully resident in the United Kingdom for most of his life and so, by statute, there is a need for there to be “very significant obstacles” to integration into the country to which he would be deported.
70. I have reflected on these things. This part of the claim is not made out.
71. I am very aware of the medical evidence of mental instability on the claimant’s part and his horror at the thought of return. Although I have not found it necessary to consider the medical evidence in great detail in this Decisions, I accept that there is a well-founded medical opinion to be concerned about the effect of removal on the claimant.
72. Although Jamaica is a small country not every citizen necessarily meets every other citizen. The claimant would try to avoid his father rather than find him. However, although the claimant’s distaste for his father is both palpable and understandable there is no basis for saying that there is any well-founded fear of his being at serious risk at the hands of his father.
73. Further the medical evidence falls short of establishing a claim to remain on human rights grounds. The likelihood of serious harm by reason of return is not sufficiently great.
74. The claimant is employable and is justly proud of his improving education. These are qualities that would assist him there.

75. He does not want to go to Jamaica but I do not accept that he could not. There are not very significant obstacles to his integration.
76. Neither am I particularly interested in the claimant's efforts to rehabilitate himself when I conduct the required balancing exercise.
77. Mr MacDonald's continuing support for the claimant is clearly to his credit and his cautious optimism about the claimant's future conduct is supported by the claimant not having been convicted of further offences. However, for the purpose of the balancing exercise, expected future behaviour amounts to little, if anything, more than the absence of a further reason to dismiss his appeal. There is nothing in the apparent change of heart that comes close to being a "very compelling circumstance" within the rules which, following NA (Pakistan) v Secretary of State for the Home Department [2017] 1 WLR 207, should be "read in" to the Part 5A to give effect to the Rules. Deportation is about protecting the public and about reflecting public disapproval and future good behaviour does not answer the second limb of public concern.
78. I am much more concerned about the effect of deportation being unduly harsh. Section 117C(3) and (5) together provide that the public interest does not require deportation if the effect on the partner or child is unduly harsh.
79. Although the claimant is emotionally close to the child's mother I do not accept that she is a "partner" for the purposes of the Act. They are not married and do not cohabit. Even if JM is the claimant's partner her concerns are so interrelated with her daughter's concerns that they do not add anything that is not considered with the interest of EM.
80. I have no doubt that the best interests of the child EM are that her father remains in the United Kingdom and continues to provide care. That is not determinative but it is something that must be a primary consideration and it goes in the claimant's favour.
81. I have to consider carefully not only the evidence before me but the fact that it has been carefully prepared and presented to maximum effect by experienced lawyers. Removing a father from a nuclear family is a horrible thing to do. In many contexts, it would be seen as something that is deeply undesirable and contrary to public policy but it is sometimes necessary. Imposing a sentence of imprisonment may well be the paradigm example of that.
82. Parliament has decided that the deportation of foreign criminals is in the public interest and I do not seek to ignore that direction of shirk my responsibility to uphold the law.
83. That said there are features of this case that concern me greatly. In many ways it is regrettable that I was not able to hear from JM. She would almost certainly have been a vulnerable witness and I hope the Tribunal in general would be able to show

her proper consideration. However the decision was made not to call her and was made, I am sure, with great care by her experienced representative.

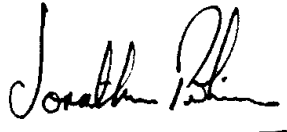
84. Certain things are supported by the independent evidence of a social worker. The evidence shows that JM is a well-intended mother but her abilities are limited. That is not to her discredit. Indeed, the evidence appears to be that she is doing rather well with considerable personal disadvantages although that is not something I have to determine in great detail. Her IQ is very low. No-one is quite sure of the significance of an IQ other than it being an accurate assessment of an ability to do IQ tests but I accept that there is a broad correlation between a person's IQ and that person's ability to cope in life. The average IQ is 100. JM is a long way below that.
85. I found it a particularly insightful part of the evidence when it was explained that JM cannot read notes from nursery and relies on someone else to do that for her. I am also entirely satisfied that I have been told the truth about the role of the claimant. It is not just his own evidence, which might have had to be treated with a degree of circumspection, or indeed written evidence of his partner. It is the professional observation of the social worker and was supported to a limited extent by Mr MacDonald. The fact is the claimant is making the family work. If he was removed there would be a calamity unless he was replaced.
86. I also acknowledge the evidence that he would be difficult to replace because the claimant's partner does not trust Social Services. I am not saying for a moment that such ill feelings are in any way justified but they are there. She is frightened that she will lose control and, given her limitations, that is an understandable fear.
87. The child clearly has a close relationship with her father and it is going to hurt that child greatly if that relationship is broken and it is nonsense to pretend that it would be other than broken by his removal. There is no serious suggestion of the partner trying to establish herself in Jamaica. She does not have the wherewithal for that and it has never been anyone's case.
88. However the "unduly harsh" test necessarily implies that in determining that deportation is in the public interest, it is acknowledged that deportation will be harsh for a child. It would be wrong to allow the appeal because deportation would be harsh for EM.
89. I have decided that there is an additional element here that makes the expected harshness "undue". I am satisfied there is a real risk in this case of a complete family breakdown. Not only would EM would lose the (almost) daily support of a father figure, she would be reliant entirely on a mother who cannot cope without some support and who, for the reasons explained above, cannot be expected to get the necessary support if the claimant was removed.
90. I do not know what would happen to EM and JM if the claimant was removed. I am satisfied that the likely outcome would be a collapse of EM's ability to cope. That would be unduly harsh and that is why I allow this appeal.

91. I add that this case is about as finely balanced as it could be and still be allowed but for all the reasons given I have decided to allow the appeal.

**Notice of Decision**

92. This appeal by the Secretary of State is allowed. I set aside the decision of the First-tier Tribunal. However I remake the decision and I allow the appeal against the Secretary of State's decision to refuse leave on human rights grounds.

Signed  
Jonathan Perkins  
Judge of the Upper Tribunal



A handwritten signature in black ink, appearing to read 'Jonathan Perkins', written over a horizontal line.

Dated 17 April 2019

**APPENDIX**

**Upper Tribunal  
(Immigration and Asylum Chamber)**

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**Decision & Reasons Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE PERKINS**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

**and**

**N--- P---**

**(ANONYMITY DIRECTION MADE)**

**Respondent**

**Representation:**

For the Appellant: Mr T Melvyn, Home Office Presenting Officer

For the Respondent: Ms C Cronin, Counsel instructed by Birnberg Pierce

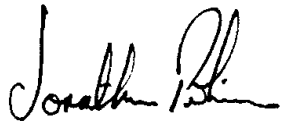
**REASONS FOR FINDING ERROR OF LAW**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent. Breach of this order can be punished as a contempt of court. I make this order because the case touches on the welfare of a child and woman who may be vulnerable and publicity could harm them. The Applicant also fears a resident in his country of nationality and publicity could harm him. I invite submissions on the need for this order when the case is heard again.
2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the appeal of the respondent, herein after "the Claimant" against the decision of the Secretary of State on 13 July 2016 refusing him leave to remain on human rights grounds.

3. The appellant is a national of Jamaica. He was born in October 1989 but has lived in the United Kingdom since April 2002. He has a criminal record. In September 2004 he was convicted of battery. In November 2005 he was again convicted of battery. In June 2007 he was convicted of robbery before the Crown Court sitting at Basildon. For that matter he was sent to detention for eighteen months and the Secretary of State resolved to make a deportation order. In January 2010 he was convicted of causing criminal damage. In September 2010 he was convicted of using threatening and abusive and insulting words and behaviour with intent to cause fear or provoke violence. On the same occasion he was convicted of two counts of criminal damage and being in breach of a criminal discharge. He was sent to a young offenders' institution for eight weeks in total. In February 2011 he was fined for disorderly behaviour. In July 2011 he was warned that his behaviour had been noticed by the Secretary of State and she was considering his deportation. In December 2011 before the Crown Court at Basildon he was convicted of assault occasioning actual bodily harm and possessing class B controlled drugs. The offence was committed during the operational period of a suspended sentence and he was sent to a total of fourteen months' imprisonment. This was reduced to ten months on appeal.
4. In short the claimant is a man who had shown himself to be irresponsible and incapable of behaving even when he knew he was subject to sanctions by the court and the Secretary of State was considering deportation. His offences are numerous and serious and include robbery.
5. It is also right to record that the claimant has had considerable difficulties in his own life. His father was a violent man who beat the claimant and the claimant's mother and murdered the claimant's mother for which offence he was sent to prison and spent some of his sentence in Broadmoor. It is a feature of the case that the appellant is on extremely uneasy terms with his father who has been deported to Jamaica.
6. Although Ms Cronin went to considerable lengths to persuade me that any error was entirely technical I have no hesitation in concluding that the First-tier Tribunal erred in law materially. The appellant has established a relationship with a woman who has significant problems. Her IQ, if I may observe this respectfully, is identified as very low and Ms Cronin did not feel able to call her to give evidence in the First-tier Tribunal. She has a child. The claimant and the child's mother do not live together but there is evidence that the claimant plays a significant part in the life of the child (I make it clear that I use the phrase "significant part" as a general description and this is not intended to be a complete finding about the nature of the relationship).
7. The difficulty with the decision is that the First-tier Tribunal unequivocally took notice of the decision in **MAB (para 339, "unduly harsh") USA [2015] UKUT 435 (IAC)**. The Upper Tribunal had decided that the words "unduly harsh" did not require any kind of balancing exercise. The problem with this decision is that it is wrong. The Court of Appeal in **MM (Uganda) [2016] EWCA Civ 450** was quite clear that the words "unduly harsh" had to be looked at in the context of all the circumstances of the case including the criminal's immigration and criminal history.
8. I cannot avoid finding that the First-tier Tribunal applied an incorrect legal test.

9. Although I have no hesitation in coming to this conclusion I found it much more difficult to consider the best way forward. Obviously I wanted to deal with the case without a further hearing if that was a proper thing to do. That must be in everyone's interests.
10. I have found it very difficult to identify clear findings that can be used as a basis for re-determining the case. As the grounds of appeal to the First-tier Tribunal complain there are many general phrases in which it is made clear that certain strands of evidence are "accepted" but I have not been able to narrow these down into clear findings. That can be used as a basis to re-determine the appeal. It follows that I am driven to the conclusion that the appeal has to be heard again.
11. Given its history I have decide to retain the appeal in the Upper Tribunal and list it before me.
12. I estimate that the hearing will need 3 hours. If either party considers that to be an erroneous estimate then the party should notify the Tribunal forthwith.
13. I find the Secretary of State's case is made out. I set aside the decision of the First-tier Tribunal and I direct the case be heard again in the Upper Tribunal.

Signed



Jonathan Perkins, Upper Tribunal Judge

Dated: 3 November 2017