Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00272/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 5 September 2013	**On 18 September 2013**
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Before

LORD BANNATYNE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE WARR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR JASON JAMORY SMYTHE

Respondent

Representation:

For the Appellant: Mr S Walker, Home Office Presenting Officer
For the Respondent: Miss Solanki, Counsel

DETERMINATION AND REASONS

Introduction

1. This matter came before us as an appeal by the Secretary of State against a decision of the First-tier Tribunal ("the Tribunal") prepared 11 July 2013. The Secretary of State had on 22 January 2013 made a deportation order in terms of Section 32(5) of the UK

Borders Act 2007. The respondent appealed against that decision to the Tribunal, who allowed the appeal on human rights grounds (Article 8). It was against that decision which the Secretary of State appealed to the Upper Tribunal.

Background

2. The respondent is a citizen of Jamaica who was born on 25 January 1980. He is accordingly 33 years old.

3. The respondent arrived in the UK on 15 December 1997 seeking leave to enter as a visitor. That was refused, but he was granted temporary admission for two days and was requested to report to Gatwick Airport on 17 December 1997 for removal to Jamaica. He failed to report and was considered an absconder. He claimed asylum on 20 January 1998 but that was refused on 19 March 2001. His appeals were dismissed. He applied for leave to remain as the spouse of a settled person in the UK but that was refused in March 2002.

4. On 19 June 2006 he was convicted of wounding with intent to do grievous bodily harm. He was sentenced at the Central Criminal Crown Court to an indeterminate sentence for public protection and to serve a minimum of three years four months' imprisonment. He was served with a notice of liability to deportation on 5 March 2009.

5. The respondent has two children who are British citizens, born on 17 August 2001 and 19 May 2004 respectively. He married their mother in 2001.

6. Their mother is their primary carer although they did make visits to the respondent when he was in prison. On his release in or about December 2012 the respondent had contact every other weekend with his daughters but that had stopped shortly prior to the hearing before the Tribunal.

7. Given the way that the discussion developed before us and the significance of paragraphs 20 to 23 of the determination of the Tribunal to that discussion it is perhaps at this stage convenient for us to set out in full these parts of the determination:

> "20. The appellant set out his history in his witness statement. We have taken that into account as well as the contents of his interview recorded on 12 October 2012. The interview took place because the appellant had claimed asylum. He said at the start that he no longer wanted to claim asylum, but he did want to make clear some issues regarding human rights to put to the Home Office. These were reasons why he would not wish to be removed from the UK. At the hearing he spoke very lucidly about his childhood and his marriage and his children. He gave his account of the incident which led to his sentence. It is clear that he understands his situation. We listened carefully to his oral evidence at the hearing and we

found that he was a very articulate speaker and he showed intelligence in understanding the procedure and his situation. He remained calm and sensible throughout. He has explained how his mother and father left Jamaica when he was 5 years old and left him with his grandmother in Jamaica. He said that he did not have a good education because he did not understand things and he has now learned that in fact he has dyslexia. He was brought to the UK by his aunt when he was 17 in 1997. He has now been in the UK for 15 years. He acknowledged that he lived on a rough estate and he started taking drugs including ecstasy and cocaine. He also smoked cannabis. He describes how his offences took place and it was clear from his evidence that he had a full understanding of how he came to be imprisoned. He informed us that he has been training as an optician and has some experience in that occupation. He has also been mentoring others whilst in prison. He has helped prisoners to read and has given basic teaching. He has also helped other inmates to consider their offences by addressing his own criminal behaviour. He is genuinely upset that his marriage has not succeeded but he continues to have access to his two children. The two witnesses both emphasised that he is now totally different in attitude from the time of his convictions, and he has grown up. He clearly has an insight into his past and his present and he has come to terms with his present situation.

21. We found the appellant to be a truthful witness. He supplied in his bundle copies of several written complimentary comments from prison staff and workers, including a letter stating that he has acted as a mentor in helping people with reading difficulties, since he had learning difficulties himself because of his dyslexia. There is evidence of his collecting money by organising a charity run through his own efforts. The Parole Board recommended his release in December 2012. The Decision Letter following an oral hearing of the Parole Board on 4 December states that he has been drug free for at least 5 years and there was no evidence of violence in custody. The Board also states that he has been learning the work of a spectacle technician with a charitable organisation, and he said he would like to work in an optician's business. It was quite clear from his evidence that he had a genuine understanding of his situation.

22. There is no suggestion that he has any relatives still in Jamaica. He told us he had no knowledge of any family members still in Jamaica. We believe that he was truthful. He has now been 15 years in the UK. He has ties here and he has children here. All his relatives are in the UK or in the USA. He would have no contacts in Jamaica. He has in the UK many family members including his own two children. He was convicted in June 2006. He was served with a notice that he was liable for deportation in March 2009, which is more than 4 years ago. The respondent did not actually order his deportation until January 2013. Our view is that since the appellant has been in the UK for more than 15 years, the chances are

that the appellant would find it very difficult to integrate. There is no evidence of any potential assistance that might be available on his arrival.

23. We have considered the appellant's rights under article 8 of the ECHR. We follow the guidance provided in the case of ***R v SSHD Ex Parte Razgar [2004] UKHL 27***. We consider the 5 questions identified by the House of Lords. In the circumstances here we find that the appellant's removal will be an interference with the exercise of his rights to respect for his private and family life. The decision does have consequences of such gravity as to engage the operation of article 8. We do not hesitate in finding that the decision is in accordance with the law and is necessary in a democratic society for public safety and for the protection of the rights and freedoms of others. We therefore come down to the question of proportionality. We have already discussed the appellant's circumstances in the UK. To return him to Jamaica would sever his contact with his children and with his aunts and other relations who are living in the UK. His evidence, which we accept, is that he has no known relatives or friends in Jamaica. He has his 2 children in the UK and it is highly unlikely that, if removed, he would be able to see them in the flesh again even though he may, perhaps, be able to speak to them on the phone. He will not have any contact with his aunts and his nieces and nephews. He has also learned skills in this country and will be able to put those to good use in finding employment in the future. We also take into account the fact that there have been some significant delays on the part of the respondent before making the deportation order (almost 4 years). We have come to the conclusion that he has shown that he has the merits of a good citizen and could be of benefit to the community. We therefore conclude that to deport him would constitute a breach of his human rights under article 8. We therefore allow the appeal."

Submissions on behalf of the Secretary of State

8. The submissions on behalf of the Secretary of State fell into three broad chapters.

9. The first challenge to the determination was this: the Tribunal had failed to have regard to the Immigration Rules in making its Article 8 assessment and accordingly had materially erred in law.

In elaboration of that point Mr Walker contended that in making a decision on an application it was necessary for the decision maker to consider all the legislation relative to that decision and give reasons for the way that it applied that legislation to the facts of the case. Applying this to the circumstances of the present case, the Tribunal had had no regard at all to the relevant sections of the Immigration Rules. He submitted that this was not an appropriate approach.

10. It was his position that the Immigration Rules were a detailed expression of government policy on controlling immigration and protecting the public. The Article 8 sections of the Immigration Rules reflected, it was his submission, the Secretary of State's view as to where the balance lay between the individual's rights and the public interest. They reflected the broad principles set out in Strasbourg and domestic jurisprudence. Therefore, when a Tribunal considered an individual appeal it should consider proportionality in the light of this clear expression of public policy and the Secretary of State would expect the courts to defer to her view, endorsed by Parliament, on how, broadly, public policy considerations were to be weighed against individual family and private life rights, when assessing Article 8. He submitted that the failure to do so in the instant case meant that the decision the Tribunal had made on Article 8 was incomplete and therefore unsustainable. It was his position that the Tribunal had failed to consider a key element in the assessment of the case before it.

11. The second broad chapter of Mr Walker's submissions was founded on what he submitted were failures on the Tribunal's part to give reasons, or at least adequate reasons, for findings on material matters. This broad submission fell into a number of detailed sections.

12. He first submitted that the Tribunal had erred in law at paragraph 21 where it had noted the respondent's various actions since his offence. However, what he submitted the Tribunal had failed to do was to give any reasons for the view it had formed regarding the respondent's risk of harm and re-offending. It was his position that the respondent still remained at risk and that this was demonstrated by him being assessed as a medium risk of further offending, as he is managed as a MAPPA offender and that whilst he had resided in the UK since 1997, when he was 17, he was not a homegrown criminal as was noted at paragraph 8 of the determination and that his drug habit had begun in Jamaica and continued shortly after arrival in the UK. Moreover, he pointed to paragraph 10 where it was stated that the respondent's aunt had confirmed that she knew of his drug habit but was unable to prevent him from continuing to take drugs. It was submitted that there was no evidence that this aunt would be able to exert any sufficient influence over him now. Accordingly, in relation to these matters, he submitted that no adequate reasons had been given and there was accordingly a material error of law.

13. He turned next to a finding of the Tribunal at paragraph 22 which was to this effect: the respondent had no ties to Jamaica and would have no support there. He submitted that the Tribunal had failed to provide adequate reasons for these findings. His position was that the respondent had spent the first seventeen years of his life in Jamaica and thus his formative years there and would be used to the culture and customs of that country. Therefore, although he may encounter some initial difficulties, he would be in a position to fully adapt to life there. Furthermore, during his time there he would have established friendships who could help support him and even if he did not, as stated in the Secretary of State's reasons for deportation letter, there were various agencies offering assistance to those returning

to Jamaica who could support the respondent and the Tribunal had ignored this evidence in their consideration. He submitted that the Tribunal had further failed to take into account that the respondent's residence here had been unlawful and that he had known throughout his time here that he could be returned to Jamaica at any time. Again he submitted that this amounted to a material error of law.

14. The next detailed argument under this head related to the Tribunal's findings at paragraph 23 that deporting the respondent would sever his contact with his children. Again, it was his position that the Tribunal had failed to provide adequate reasons for such a finding. He drew to our attention that within the determination at paragraph 13 it was noted the respondent no longer had contact with his children and had not seen them since April of that year. Further, even if the respondent did have contact with his children, he submitted that the respondent's wife had been their main carer since their birth and the respondent had been in prison for most of the children's lives without direct contact with them. He went on to contend that if in the future contact was resumed with the children, and there was no evidence to suggest that it would, he could maintain contact with them through modern methods of communication as he had demonstrated he could for the majority of their lives whilst he had been in prison. His position was that the Tribunal had failed to provide any reasons as to why it was in the children's best interests for him to remain in the UK. Nor, in his submission had the Tribunal provided any reasons as to why the children's best interests, in the circumstances of this case, should outweigh the public interest to deport him. Given that he no longer had any contact with them and for the majority of their lives had had no contact with them and given the nature of his offending and his risk, he submitted that the public interest to deport him clearly outweighed the children's interests. However, no consideration of this particular matter had been made by the Tribunal.

15. The third chapter of his challenge related to a finding of the Tribunal at paragraph 23 of the determination to this effect: that there had been significant delays on the part of the Secretary of State in making the deportation order. He submitted that this finding was wrong in law. It was his position that the Secretary of State had been unable to make a deportation decision until a decision was made in regard to the parole position of the respondent and, had the Secretary of State made a decision prior to this, her decision would have been unlawful. The respondent was granted parole in December 2012 and the Secretary of State made a deportation order on 22 January 2013, therefore he submitted that the Secretary of State had made her decision as soon as possible after a decision was made regarding the respondent's parole and it was not an appropriate finding that the respondent had been subjected to any form of delay by any actings of the Secretary of State.

16. For the foregoing reasons he submitted that there had been material errors of law requiring the decision of the Tribunal to be set aside.

Reply on behalf of the Respondent

17. It was Miss Solanki's broad submission that the determination did not contain any material errors of law.

18. Her position was this. As regards the Secretary of State's first challenge to the decision and in particular regarding the alleged failure to consider the Immigration Rules: regardless of the Immigration Rules the conclusions reached by the Tribunal were open to it.

19. As to the approach to the new Rules which the Tribunal should have taken she referred to **Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC)**. From the said case she took the following:

    (a) The procedure adopted in relation to the introduction of the new Rules provided a weak form of parliamentary scrutiny; Parliament had not altered the legal duty of the judge determining appeals to decide on proportionality for himself or herself.

    (b) There could be no presumption that the Rules would normally be conclusive of the Article 8 assessment or that a fact-sensitive enquiry was not normally needed. The more the new Rules restricted otherwise relevant and weighty considerations from being taken into account, the less regard would be had to them in the assessment of proportionality.

    (c) When considering whether a decision was in accordance with the law, it had been authoritatively established by the Higher Courts that the test to be applied was not exceptional circumstances or insurmountable obstacles.

    (d) The weight to be attached to any reason for rejection of the human rights claim indicated by particular provisions of the Rules would depend both on the particular facts found by the judge in the case in hand and the extent that the Rules themselves reflected criteria approved in the previous case law of the Human Rights Court at Strasbourg and the higher courts in the United Kingdom.

20. Applying the foregoing to the circumstances of this case she submitted that the Tribunal should have considered whether the claimant complied with Rule 194 and Appendix FM. She accepted that the Tribunal had not done so. However, she pointed out that it was accepted in this case that the respondent did not comply with the Rules. However, any error of law in failing first to assess the claim under the Rules would be immaterial if the assessment of the Article 8 case as a matter of law apart from the Rules were satisfactory and she submitted that it was satisfactory. She reminded us under reference to **Green (Article 8 – new Rules) Jamaica [2013] UKUT 254** that the existence of an error of law was a necessary condition to setting aside a decision but not a sufficient one. Where any error was not material to the outcome,

the Upper Tribunal would not normally set aside the decision below and re-make it. She submitted that the only arguable error of law in this case was the failure to explain how paragraph 399A(b) applied to the facts of this case. It was her position that any such failure was not material and that it was not capable of having any effect on the conclusions.

21. She went on to look at **MF (Article 8 – new rules) Nigeria [2012] UKUT 393**. She took the following points from that case:

(a) The new Immigration Rules set out a number of mandatory requirements relating to claims reliant on Article 8 which make clear that if such requirements are not met, the Article 8 claim under the Rules must be refused. They also contained related provisions which confer discretion but it was discretion to grant leave in response to an Article 8 claim only if the new mandatory requirements are met.

(b) However, the new Rules only covered Article 8 claims brought under some, not all, parts of the Rules and only accommodated certain types of Article 8 claims.

(c) Even if a decision to refuse an Article 8 claim under the new Rules was found to be correct, judges must still consider whether the decision was in compliance with a person's human rights under Section 6 of the Human Rights Act and, in automatic deportation cases, whether removal would breach a person's Convention rights. Thus in the context of deportation and removal cases the need for a two-stage approach in most Article 8 cases remained imperative because the new Rules did not encapsulate the guidance given in **Maslov v Austria App no.1683/03 [2008] ECHR** 546 which had been endorsed by the higher courts.

(d) When considering Article 8 in the context of a respondent who failed under the new Rules, it would remain the case, as before, that "exceptional circumstances" was not to be regarded as a legal test and "insurmountable obstacles" was to be regarded as an incorrect criterion.

22. She went on to contend that the Tribunal had applied the correct test, namely that set out in **R v Secretary of State for the Home Department ex-parte Razgar [2004] UKHL 27**. She in particular referred to paragraphs 19 and 23 of the determination.

23. Moving on, she submitted that the Tribunal had exercised proper judgment in taking into account all the relevant factors in the case between paragraphs 20 and 23 of its determination.

24. In summary, it was her position that the assessment of the respondent's case under Article 8 was more than satisfactory. The Rules were not conclusive of the

respondent's Article 8 case. It could not be said in these circumstances that they reflected the criteria approved in the case law of the higher courts.

25. Turning to the second broad chapter of the Secretary of State's argument regarding the alleged lack of a reasoned determination she replied as follows: the Tribunal had written a nine-page, single spaced detailed determination. The oral, documentary and background evidence were set out in detail as were the submissions and the Tribunal's findings.

26. In detail she said this: the Tribunal did deal with risk of harm and offending in this case. She referred to paragraphs 2, 8, 9, 10, 11, 13, 20 and 21. It was clear that they had had these issues in mind throughout the determination but found for the respondent. They were entitled to do this.

27. Findings on the respondent's lack of ties to Jamaica were detailed and adequate and not in reality contested in this case. She referred us to paragraphs 9, 10, 11, 16, 20 and 22 of the determination.

28. As regards its findings so far as the severing of the ties with the respondent's children, the Tribunal she submitted had acknowledged that as at April 2013 his contact had been stopped but prior to this there was a large amount of evidence of contact and he was seeing lawyers about further contact. The finding was that his removal would mean he would not see them in the flesh again, against the background of the evidence of a large amount of contact even whilst in prison by visits, their findings in this matter were adequately reasoned.

29. She reminded us by reference to **R (Iran) & Others v Secretary of State for the Home Department [2005] EWCA Civ 982** that the Court of Appeal warned that "an appellate court (was) not to overturn a judgment at first instance unless it really cannot understand the original judge's thought processes when he/she was making material findings."

30. She in addition referred us to **Shizad (sufficiency of reasons: set aside) Afghanistan [2013] UKUT 85 (IAC)**. In that case it had been held that: although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, these reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge. Further, although a decision may contain an error of law where the requirements to give adequate reasons were not met, the Upper Tribunal would not normally set aside a decision of the First Tier Tribunal where there has been no misdirection of law, the fact-finding process could not be criticized and the relevant country guidance had been taken into account, unless the conclusions of the judge drew from the primary data were not reasonably open to him or her.

31. Overall it was her position that the findings were adequate and reasoned when the determination was read properly and together and not in the selective manner carried out by the Secretary of State.

32. She accepted that the Tribunal's findings on delay were an error of law but, it was her position that it was not a material error of law when placed in the context of the other findings made by the Tribunal which, in her submission were unchallengeable.

Discussion

33. We turn to the first broad ground of appeal put forward on behalf of the Secretary of State. The reasons for the Tribunal's decision in relation to its Article 8 assessment of proportionality are entirely contained within paragraphs 20 to 23 of the determination. That is clear from a reading of the determination as a whole, from the way it is structured and from the heading above paragraph 20:

> "Our Findings and Reasons".

34. The following had been submitted to the Tribunal on behalf of the Secretary of State:

> "Mr Bose in his submissions relied on the refusal letter. The starting point is the public interest. There was a serious incident in which the appellant had used significant violence. He produced a machete; the offence occurred within four months after an offence which involved a bladed instrument. The Parole Board in December reduced the perception of harm to 'medium' but the risk was certainly not extinguished." (see: paragraph 16 of the determination).

35. It is trite law to say that in a deportation case, in carrying out its assessment of proportionality in terms of Article 8, a decision maker must have regard to the public interest. In carrying out that assessment the decision maker must have regard to various facets of the public interest including, among others: the seriousness of the offence, the question of risk of harm to the public, risk of re-offending and deterrence, as defined by Aikens LJ at para 43 of **RU Bangladesh [2011] EWCA Civ 651**. With respect to the importance of public policy and public good, the importance of that aspect in the Article 8 assessment and its effect on the margin of discretion of the decision maker the following guidance has been given by Laws LJ in **SS (Nigeria) v SSHD [2013] EWCA Civ 550** at paragraph 55:

> "At the same time H (H) shows the impact of a powerful public interest (in that case extradition) on what needs to be demonstrated for an Article 8 claim to prevail over it. Proportionality, the absence of an "exceptionality" rule, and the meaning of "a primary consideration" are all, when properly understood, consistent with the force to be attached in cases of the present kind to the two drivers of the decision-maker's margin of discretion: the policy's source and the policy's nature and in particular to the great weight which the 2007 Act attributes to the deportation of foreign criminals".

36. When the reasoning of the Tribunal on the issue of proportionality is examined there is no reference to, and no consideration of, the public interest. There is no reference to, and no consideration of, the seriousness of the offence and that the offence occurred within four months of an offence which involved a bladed instrument. There is no reference to, and no consideration of the Parole Board finding regarding likelihood of harm. There is no consideration of deterrence. Public interest far from being given the importance which in terms of the case law it must be accorded in the course of the proportionality assessment appears not to be considered.

37. From the point at which the actual consideration of proportionality commences in paragraph 23, when the Tribunal says:

> "We therefore come down to the question of proportionality"

to the point at which the Tribunal says there would be a breach of the respondent's human rights, if he were to be deported the position put forward on behalf of the Secretary of State regarding the public interest far from being considered is not even alluded to.

38. The only reference to the Secretary of State in that particular part of the determination is in relation to delay on the part of the Secretary of State, which it is accepted at all hands is wrong in law. It is perhaps interesting to note that this point on delay has been included in the determination although on looking to the submissions made on behalf of the respondent at paragraph 17 of the Tribunal's determination we can find no submission that there had been any delay on the part of the Secretary of State which the respondent wished to found upon. Thus, the issue of delay has wrongly been raised *ex proprio motu* by the Tribunal.

39. The assessment of proportionality by the Tribunal in our view is not proper or adequate. It entirely fails to engage with the duty to consider proportionality in any way which could be described as meaningful. It has entirely failed to take into account all relevant matters in that it completely fails to have regard to the Secretary of State's position as regards the issue of public interest.

40. Looking to paragraphs 20 to 23 of the determination, these amount to little more than a recitation of findings regarding the respondent. The only part of this section of the determination which looks at all at the position of the Secretary of State is when in paragraph 23 the third and fourth questions which the Tribunal was required to answer in terms of **Razgar**, are answered in favour of the Secretary of State. These questions, of course, the Tribunal was bound to answer in favour of the Secretary of State.

41. The result of these failures is to produce a wholly unbalanced assessment of proportionality, which cannot be upheld.

42. In holding that the Tribunal has failed to carry out the assessment of proportionality properly we have considered the whole of the Tribunal's determination. We have not sought to select particular parts of the determination and then not read them in the context of the rest of the determination. It is true that in the first nineteen paragraphs of the determination the Tribunal has set out the background, both the appellant's and the respondent's cases, what happened at the hearing and both parties' submissions. However, it does not follow that it has therefore taken into account all of these matters when it has turned to make its decision. What then requires to be examined is that part of its decision in which it sets out its reasoning and that is between paragraphs 20 and 23 and it is where it sets out that reasoning that as we have said we can detect no consideration of the various factors to which we have referred. In paragraphs 20 to 23 when one should see consideration of both sides of the case and the weighing up of the factors relied upon by the Secretary of State and the factors relied upon by the respondent, all that one sees is a setting out of the respondent's position and no consideration of the Secretary of State's position and thus no consideration of the public interest.

43. We are reinforced in our view that the assessment of proportionality has not been properly undertaken by the Tribunal when we have regard to **MF (Nigeria)**.

44. It is clear from **MF (Nigeria)** and from **Izuazu** that the approach the decision maker must follow in a case of this type is a two-step one: first consideration should be given as to whether the applicant fulfils the requirements of the Immigration Rules and secondly there should be a separate and freestanding consideration of the applicant's Article 8 position. However, in considering the issue of proportionality in terms of Article 8 we note the following observations of the Upper Tribunal in **MF (Nigeria)**:

At paragraph 43 the Upper Tribunal says:

> "Whereas previously it has been open to judges within certain limits to reach their own view of what the public interest is and the weight to be attached to it, the scope for doing so now is more limited."

At paragraph 48 the Upper Tribunals says that the new Rules have:

> "enhanced judicial understanding of the public interest".

Finally, at paragraph 70 the following is said:

> "that (the appellant) has failed to meet the requirement of the new Rules is a very significant consideration when conducting our proportionality assessment."

45. The foregoing reinforces our view that it was critical for the Tribunal in carrying out its proportionality exercise to have regard to the nature and weight of the public interest and that this it failed to do.

46. We are clear that the foregoing amount to material errors of law. The issue of the assessment of proportionality was the core task being carried out by the Tribunal and these errors go to the heart of their carrying out of that task and wholly undermine the assessment which it carried out.

47. Turning to the second broad branch of the appeal: whether there was a reasoned determination? To some extent this ground overlaps with ground 1.

48. As regards its reasons for its views on risk of harm and re-offending we have already commented that the Tribunal did not have regard to the Secretary of State's position on this and accordingly their reasoning is flawed and inadequate.

49. As regards its findings that the respondent has no ties to, and would have no support in Jamaica, we do not believe that there are adequate reasons for these findings.

50. These findings are contained in paragraph 22 of the determination. This paragraph again refers to the delay in serving the deportation order on the part of the Secretary of State. The whole paragraph in our view is coloured to a material extent by this error of law.

51. The paragraph takes no account of the fact that the respondent lived in Jamaica until the age of 17.

52. There is also a specific finding in this paragraph:

> "There is no evidence of any potential assistance that might be available on his arrival."

53. This finding is clearly wrong. From the notice of decision of the Secretary of State at pages 6 to 8 there are set out the services which would be available to the respondent in relation to his return. These are under four headings: Facilitated Returns Scheme; Support for Needy or Vulnerable Adults in Jamaica; Emergency Accommodation for Men and Resettlement Services. The foregoing appears to have been entirely overlooked by the Tribunal.

54. We believe, having regard to their failure to consider these matters, their reasons for reaching their decision regarding his ties to Jamaica cannot be said to be adequate.

55. With respect to the Tribunal's reasoning as regards the severing of the link that the respondent has with his children we agree with Mr Walker's submissions that this has not been adequately reasoned.

56. This finding is at paragraph 23. Clearly it was a significant factor in the Tribunal reaching its decision that it would not be proportionate for the respondent to be removed. However, in reaching its conclusion as to its significance the Tribunal does not appear to have taken into account the following: that the respondent had been in prison since 2005 (paragraph 7 of its determination) and was not recommended for parole until December 2012. Thus, for most of the children's lives he has been in prison and other than contact during prison visits could have had no real relationship with these children. Nor does it appear to us that any account was taken by the Tribunal of the fact that at paragraph 13 of the determination it was noted that such contact as he had had since his release from prison had stopped. In our view the Tribunal had to explain, if they were to attach significant weight to the ties being severed with the children, what it made of this evidence. It entirely failed to do this.

57. It is clear in this case that the link between the respondent and the children is not a strong one. The family life aspect of the case is accordingly a weak one. However the Tribunal gives no adequate reasons why in these circumstances the children's interests outweigh what is equally clearly a pressing public interest in the deportation of the respondent. There is no analysis of this question contained within the reasoning of the Tribunal.

58. Overall, it appears to us that the reasons given by the Tribunal for reaching its decision are not adequate. The thought processes of the Tribunal on key issues in the proportionality assessment in our view cannot be understood. The inadequacy of the reasons is such we believe as to separately amount to a material error of law.

59. Lastly, we turn to the Tribunal's reliance on delay on the part of the Secretary of State as a factor which favours holding that it is disproportionate to remove the respondent. The only issue in relation to this is: did it amount to a material error of law? In our judgment, when looked at on its own, it amounted to a material error of law.

60. Looking to the determination delay was clearly a significant factor in the Tribunal's decision. It was mentioned expressly on two separate occasions within the determination (see: paragraphs 22 and 23). In particular it was mentioned in that section of paragraph 23 when the Tribunal specifically states that it has turned to the consideration of the question of proportionality. It was, as we have earlier noted, a consideration which the Tribunal had regard to *ex proprio motu* and therefore must have been a matter which particularly concerned it. We also note that the delay is described by the Tribunal as "significant".

61. We hold that given the significance attached to this factor by the Tribunal it is when looked at separately a material error of law.

62. In summary, we hold that each branch of the argument advanced on behalf of the Secretary of State was well-founded and amounted in itself to a material error of law. In any event, when taken cumulatively, they clearly amounted to material errors of

law. In light of the above the decision of the Tribunal cannot stand and must be set aside.

Further Procedure

63. With respect to the issue of further procedure we heard submissions from both parties. The broad position of the Secretary of State was that we should re-make the decision and if not it should be remitted to the First-tier Tribunal without any preserved findings in fact. The position of the respondent was that we should not re-make the decision and should return the case to the First-tier Tribunal with certain preserved findings of fact, which failing we should return the case to the First-tier Tribunal but with no preserved findings of fact.

64. Having considered the matter we have decided that the case should be remitted to the First-tier Tribunal with no preserved findings in fact for a hearing *de novo*.

65. We believe that the extent of the imbalance in the proportionality assessment renders it inappropriate that we should seek to re-make the decision on the findings in fact as they presently stand.

66. Equally, the same considerations rendered the remitting of the case with preserved findings in fact an option which was not attractive.

67. We believe in the whole circumstances that the extent to which this determination is flawed as set out above renders the only proper course to be a hearing *de novo* before the First-tier Tribunal.

Signed Date

Lord Bannatyne
Sitting as a Judge of the Upper Tribunal