



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/10686/2012

THE IMMIGRATION ACTS

Heard at Field House
On 10 October 2013
Prepared on 17 October 2013

Determination Promulgated
On 5 November 2013
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Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR JEROME CLAYTON

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Saifolahi, Counsel, instructed by Victory at Law Solicitors
For the Respondent: Mr I Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Jamaica, and appears to have been born sometime between 1977 and 1980. His date of birth cannot be stated with any certainty, because at various time he has used different identities, claiming different dates of

birth. It is however agreed by the parties that he first came to this country on 14 February 2002, at that time using a passport in the name of Jerome Clayton (which is the name by which he is referred to in these proceedings). He was removed to Jamaica under that name, having been deemed to be an illegal entrant.

2. The appellant then returned to this country, this time using a passport in the name of Anthony Rowan Douglas, but was refused leave to enter because the Immigration Officer was not satisfied that he only intended to remain for a short visit. However he was granted temporary admission, on the basis that he would return to port on 17 January 2003 for a flight back to Jamaica. He did not do so, and on 20 March 2003 he was listed as an absconder.
3. Then, on 20 August 2004, the appellant was arrested on suspicion of possession of a class A drug with intent to supply. It appears he was granted bail by the Magistrates' Court, but he failed to attend a subsequent hearing, absconding yet again (and, it would seem, being in breach of bail as well).
4. The appellant next came to the attention of the respondent when he was arrested in Slough for criminal damage. He was given an eighteen month conditional discharge at Slough Magistrates' Court on 14 July 2010, but detained under the UKBA's power, removal directions being set for 21 July 2010.
5. The day before he was due to be removed, the appellant claimed asylum, as a result of which removal directions were cancelled. The asylum application was refused, but on 10 August 2010, the appellant lodged an appeal against this asylum decision.
6. Then, on 19 August 2010 the appellant was convicted (this time in the identity of Jerome Clayton, which he had originally used to enter this country, rather than Anthony Douglas, in which he had previously been arrested) at Reading Crown Court of possession of a class A drug with intent to supply. This related to thirteen grammes of crack cocaine. In respect of this offence, on a guilty plea he was sentenced to twelve months' imprisonment. He did not appeal against this sentence. On 18 September 2010 he was detained into immigration custody on completion of his custodial sentence. He was subsequently granted bail.
7. The appellant's appeal against the refusal of asylum was dismissed by Immigration Judge Harmston on 8 October 2010, following a hearing at Columbus House, Newport on 5 October. Thereafter, on 12 October 2010, the appellant was served with a notice of liability to automatic deportation in consequence of his most recent conviction, for which he had received the sentence of twelve months' imprisonment.
8. The appellant's appeal rights were exhausted on 3 December 2010 and a deportation order was signed against him on 7 February 2011. On 18 February 2011 he was served with the letter setting out the respondent's reasons for deportation, in which the appellant's human rights and asylum claims were certified.

9. On 18 May 2011 the Jamaican High Commission agreed to issue a travel document to the appellant, this time in the name of Jerome Otis Clayton, which is apparently the name in his original birth certificate.
10. Thereafter, following consideration of further representations made on behalf of the appellant, and DNA evidence submitted on his behalf, showing that he was the biological father of two children, on 18 April 2012, the respondent, having reconsidered whether the appellant fell under any of the exceptions from automatic deportation in Section 33 of the UK Borders Act 2007, found that he did not.
11. The appellant appealed against this decision, and his appeal was heard before a panel consisting of First-tier Tribunal Judge Callender Smith and Mr C B O'Brian (Lay Member), sitting at Taylor House on 23 July 2012.
12. In a determination promulgated on 6 August 2012, the panel dismissed this appeal.
13. The appellant was granted permission to appeal on 21 August 2012, and following a hearing before Deputy Upper Tribunal Judge Lewis on 12 November 2012, Judge Lewis found that the panel had made an error of law such that its decision fell to be set aside, in the following terms:
 - “1. It is at least well arguable that the panel should have granted the requested adjournment and that it did not determine the appeal under Article 8 of the 1950 Convention. At the hearing I said that it was unarguable that they have determined it without regard to Immigration Rules 398, 399 and 399A which applied to all deportation appeals irrespective of the date of the decision, was an error of law. This is less clear in the light of **MF (Article 8 - new Rules) Nigeria** [2012] UKUT 00393 (IAC). In any event I set the determination aside and direct that the appeal be re-heard on all issues.
 2. The hearing has to await the outcome of the custody proceedings in the Family Court. To ascertain this, I direct a Case Management Review Hearing on the first available date after 1 February 2013. This can be before any judge and does not need to be before me as I am not seized of the case.”
14. It had been asserted in the grounds that an adjournment should have been granted, both in order to obtain medical evidence regarding this appellant, but also in order to await the outcome of proceedings in the family court relating to his young son. It was also asserted that the panel had erred by not considering Article 8 in accordance with the new Rules, although in light of what is set out below, it is not entirely clear how this could possibly have had a material effect on the decision. However, permission to appeal was granted, although it does not appear that there was any finding that the panel's findings of fact with regard to the credibility of the various witnesses should not be retained. In light of my clear findings below, it is of academic interest only whether or not the panel actually made any material error of law. I should however note that the application for an adjournment had only been

made the day before the hearing, and the panel noted, at paragraph 19 of its determination, that “there had been plenty of time to have addressed the issues being raised today [because] the appellant had known of the appeal hearing date for six weeks...”. The panel was very concerned that “there was a danger that the matter would simply go off into limbo if not addressed today”. In the event, it would seem the panel’s fears were justified, because it is now some fifteen months after that hearing, and the appeal has still not been concluded.

15. In accordance with Judge Lewis’s directions, the appeal was listed before an Upper Tier panel consisting of The Hon. Mr Justice McCloskey sitting as a Judge of the Upper Tribunal and Upper Tribunal Judge Goldstein, on 1 May 2013. Prior to that hearing, which was a for mention hearing, the appellant’s then solicitors, Mackesys, had applied for an adjournment, on the basis that care proceedings which were before the Principal Registry of the Family Division had been adjourned until 23 August 2013. It was said that the appellant had an outstanding application for parental responsibility (which was in effect an application for contact) and that the issue of contact between the appellant and his son would be decided on that date.
16. This application for an adjournment was refused, it being considered by Upper Tribunal Judge O’Connor that a for mention hearing would serve a useful purpose in progressing the appeal to a substantive hearing. The appellant’s solicitors were notified that they should attend the hearing with three copies of any relevant disclosable documentation relating to the progress of the family matter.
17. At the hearing on 1 May 2013 the Tribunal issued directions, which were noted by Judge Goldstein as follows:

“Parties Agree (mindful of the guidance in **RS (Immigration and Family Court Proceedings) India** [2012] UKUT 00218 (IAC) that it would be appropriate, pending the outcome of the present parental responsibility proceedings/contact before the Family Division – to be heard on 23 August next – to re-list for mention and directions after 1 September 2013...”.
18. Judge Goldstein also made the following directions, “of which both parties have made a careful written note”:

“Appellant to serve upon the Tribunal and the respondent no later than 7 days before the next... hearing a bundle comprising all documents upon which he presently relies and a further bundle comprising any relevant disclosable documents relating to the progress/outcome of the Family Division proceedings, including medical evidence in relation to the appellant”.
19. The appeal was then listed before me for mention on 3 September 2013, at which hearing the appellant was represented by Mr Lot, a legal representative of his current solicitors, who had also been representing the appellant at the previous for mention hearing. No bundle had been served in accordance with the directions which had previously been made but Mr Lot informed the Tribunal “that there must have been a misinterpretation of the order, because his firm had understood that the files would

not be needed until the substantive hearing". This is plainly not what Judge Goldstein had directed, and as he noted, the parties had made a careful note of his directions at the time.

20. In any event, as I recorded in a note of hearing and further directions settled following this hearing, Mr Lot handed to the Tribunal a copy of a letter from the appellant's family solicitors, Mackesys (who would appear to have previously made representations on behalf of the appellant in respect of his immigration status), dated 2 September 2013 which summarised what the outcome of the contact and parental responsibility proceedings were said to have been, and which said in terms that "a copy of this order is herewith attached". However, the order was not attached to the copy of this letter which was handed up to the Tribunal (and, I can add, has never been subsequently produced either).
21. In any event, although the respondent's representative had not seen this letter, having read the letter, she considered there was no reason why the substantive appeal should not be re-listed for a full hearing, now that the outcome of the family proceedings was known. The Tribunal would now be in a position to consider any Article 8 submissions in light of the decision that contact (described as parental responsibility) had been granted to the appellant in respect of his son.
22. Accordingly, I gave directions, which were stated to the parties at the hearing, and subsequently set out in writing, that the appeal was to be listed for a substantive hearing before me on Thursday, 10 October 2013. I also recorded that a time estimate of four hours had been agreed by both representatives, on the basis that there would be at least three witnesses (the appellant, his mother and his sister) and possibly a fourth (the appellant's brother) (in the event there were four, because another sister of the appellant gave evidence; his brother was not able to be present).
23. I directed that the respondent was to notify the appellant's solicitors by no later than Friday 13 September 2013 of all the documents the respondent required to be contained within a consolidated bundle which was to be prepared on behalf of the appellant and that "the appellant" **must** file with the Tribunal and serve on the respondent, by no later than Friday 27 September 2013, a consolidated bundle, containing **all** the documents upon which the appellant intends to rely, as well as all the documents notified by the respondent" in accordance with my earlier direction. I also directed that the bundle must in respect of each witness it was intended should give evidence, contain a witness statement capable of standing as evidence-in-chief and that it must contain all documents relevant to the family proceedings which it was said was concluded on 23 August 2013 "including in particular the order which was said to be attached to the letter from Mackesys Solicitors dated 2 September 2013".
24. The bundle was not served in accordance with the directions which I had given, and on 9 October 2013, the day before the hearing was due to take place (for which four hours of court time had been allocated) the appellant's solicitors wrote to the Tribunal in the following terms:

“We are concerned as we have not yet received the required authority to disclose documents from the family proceedings in the hearing of this appeal as listed for tomorrow 10 October 2013.

We are anxious to save costs both to the court and the parties and would ask in the circumstances for the matter to be adjourned to the first available date after four weeks. We anticipated that the required consent/authority would have been granted by then.

The court should kindly note that we have the papers copied and indexed but are unable to serve and file them without the authority of the family court.”

25. This application was put before me, but I refused it, in the following terms:

“It is proposed to hear the appeal tomorrow. This application for an adjournment is made far too late. The court time has already been allocated.

The Tribunal will expect the appellant to produce the bundle which should have been prepared by 27/09/2013 in accordance with directions given on 03/09/2013 for use at the hearing.”

26. Following receipt of my decision, refusing the adjournment, bundles were prepared on behalf of the appellant, and copies were made. They were delivered to the Tribunal about 30 minutes before the hearing. Considerable credit must be given to the appellant’s Counsel for the efficient manner in which she ensured that clean copies of the bundles were prepared at a very late stage for use by the Tribunal. She should also be commended for producing a skeleton argument, containing a chronology, in circumstances where she was instructed very late. The Tribunal is extremely grateful to Ms Saifolahi for this, and also for the efficient manner in which she presented the appellant’s case throughout the hearing.

27. At the outset, Ms Saifolahi informed the Tribunal that she had been instructed to renew the appellant’s application for an adjournment. However, it became clear from a perusal of the chronology which Ms Saifolahi had prepared, and this was confirmed during the hearing, that the appellant’s solicitors had not sought disclosure of relevant papers in respect of the family court proceedings until 24 September 2013, which is some three weeks after I had given directions that the bundles must be with the Tribunal by 27 September 2013, in circumstances where clearly, as a result of this delay it would not be possible to ensure that any relevant documents in relation to the family proceedings could be included in the bundle. Also, I was entirely satisfied that the appellant and his family were in a proper position to inform the Tribunal as to the effect of what had been ordered. Accordingly, I did not consider any of the documentation which, as a result of the failure of the appellant’s solicitors to comply with the directions I had given, would not be before the Tribunal, were capable of having a material effect upon my decision. I was entirely satisfied that I could deal justly with this appeal without these documents, and I accordingly maintained my original decision not to grant yet a further adjournment.

28. In addition to the skeleton argument which Ms Saifolahi had prepared, she also relied on the appellant's bundle, which contained witness statements of the appellant, his sisters Nerva Clarke and Claudia Williams, his mother, Pearline Williams and his brother, Jeffrey Clayton. All these witnesses, apart from his brother, attended and were cross-examined. I was also provided with a copy of all the documents contained in the respondent's bundle.
29. Ms Saifolahi produced a copy of the recent Court of Appeal decision in *MF (Nigeria)* [2013] EWCA Civ 1192, while Mr Jarvis, on behalf of the respondent, relied upon four authorities which he produced, *Baghli v France - 34374/97* [1999] ECHR 135, *r V Benaddas* [2005] EWCA Crim 2113, *JO (Uganda)* and *JT (Ivory Coast) v SSHD* [2010] EWCA Civ 10 and *SS (Nigeria) v SSHD* [2013] EWCA Civ 550. The respondent also relied upon a bundle which was produced at the hearing.
30. As indicated above, I heard evidence from four of the witnesses (the appellant, two of his sisters and his mother) who were all cross-examined. I also heard submissions on behalf of both parties. I recorded the evidence and the submissions contemporaneously and this is contained in my Record of Proceedings. I shall not set out below everything which was said during the course of the hearing, but shall only refer to such of the evidence and submissions that is necessary for the purposes of this determination. I have, however, taken full account of everything which was said to me as well as all the documents contained within the file, whether or not the same is specifically referred to below.

The Appellant's Case

31. The case of both parties can be summarised briefly. The appellant's case is essentially that insufficient weight was attached to the best interests of his very young son, who was referred to during the hearing as Jerome Junior. Although the appellant has three other children whom he does not see (one of whom, a daughter, by a woman in this country from whom he is estranged) it is said he has a very close relationship with Jerome Junior, and that if he is to be removed from this country, that removal will have a serious effect on his son. Jerome Junior currently lives with the appellant's sister Nerva, and her family, and she is his guardian. His mother now has no contact with him, which, it is said, would make the appellant's removal from his life even more significant.
32. As already noted, in support of the appellant's claim I heard evidence from various members of his family, including in particular his mother and sister Nerva, the purpose of which evidence was to persuade the Tribunal that the appellant's relationship with his son was extremely close, and also that his removal would be disproportionate. I refer to this evidence in a little detail below.
33. Essentially, it was argued before me that although, because the appellant's son was being brought up now by his sister, he could not succeed under paragraphs 398 and 399 of the Immigration Rules, nonetheless when considering the appellant's Article 8 position in the second stage of the two stage process which the Court of Appeal in *MF* had confirmed should be carried out, the panel should have accorded greater

weight to the son's best interests. If it had, it is argued, the removal of the appellant would have been found to be disproportionate.

The Respondent's Case

34. The respondent's starting point is that (subject to the second stage assessment which the Court of Appeal in *MF* has confirmed should be carried out) the appellant cannot succeed under the relevant Immigration Rules which apply where a person claims that his or her deportation would be contrary to the UK's obligations under Article 8. These are paragraphs 398 and 399 of the Rules. The appellant could not succeed because he would have to establish under paragraph 399(a)(i)(b) that there was "no other family member who is able to care for the child in the UK". As has been accepted on behalf of the appellant, his sister is looking after Jerome Junior at the moment and will continue to do so. Accordingly, the Tribunal would have to consider whether, in light of the guidance given not only in *MF*, but also in other cases upon which the respondent would rely, the removal of the appellant would be proportionate.
35. Mr Jarvis referred the Tribunal to various discrepancies in the evidence which had been given on which he relied, and did not accept on behalf of the respondent that the appellant even had a family life with his son in this country. Nor did he accept that it would necessarily be in that child's best interests to continue to have a relationship with a person who had, by his previous conduct, shown himself to be such a bad father. In any event, the Tribunal was reminded that the purpose of removal was twofold; in addition to the prevention of crime and disorder, it was also necessary for the purpose of maintaining a fair and effective immigration system. Mr Jarvis reminded the court of the appellant's immigration history which, in the view of the respondent, was appalling. Even if, which was not accepted, it was said that it was in Jerome Junior's best interests for him to remain in this country, this factor, while a primary consideration, was not paramount and was substantially outweighed by the other factors which suggested he should be removed.

Discussion

The Law

36. I can summarise the way in which a decision regarding deportation in circumstances where it is claimed that this would be in breach of an applicant's Article 8 rights should be taken, briefly, in light of the guidance which has now been given by the Court of Appeal in *MF*. The first step to be taken is set out in that decision at paragraph 35, as follows:

"35. It is common ground that the first step that has to be undertaken under the new Rules is to decide whether deportation would be contrary to an individual's Article 8 rights on the grounds that (i) the case falls within para 398(b) or (c) and (ii) one or more of the conditions set out in para 399(a) or (b) or para 399A(a) or (b) applies. If the case falls within para

398(b) or (c) and one or more of those conditions applies, then the new Rules implicitly provide that deportation would be contrary to Article 8.”

37. In this case this is an easy exercise. The appellant’s case falls within paragraph 399(b) that is that his deportation is deemed to be conducive to the public good because he has been sentenced to a term of imprisonment of less than four years, but at least twelve months and none of the conditions set out in paragraph 399(a) or (b) or paragraph 399A(a) or (b) applies. Paragraph 399(b) is not material in this case, and nor is it suggested that paragraph 399A(a) or (b) applies. With regard to paragraph 399(a) is concerned, this does not apply, as already set out above, because the appellant does have another family member present in this country who is able to care for his son in the UK.
38. In circumstances where deportation would not be contrary to an individual’s Article 8 rights on the specific grounds set out above, a Tribunal nonetheless has to go on to consider whether in any event, removal would not be proportionate, because if it is not, and the removal of an applicant would be in breach of his or her Article 8 rights, then he cannot be removed.
39. However, when undertaking the second part of the two stage approach which the Court of Appeal in *MF* has said must be adopted, the Tribunal should have in mind that although it should not adopt a test of exceptionality, where it is said in the Rules (at paragraph 398(c)) that if an applicant cannot succeed under the first stage “it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors”, what was meant was that “in approaching the question of whether removal (in those circumstances) is a proportionate interference with an individual’s Article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be “exceptional”) is required to outweigh the public interest in removal” (at paragraph 42 of *MF*). The Court of Appeal went on to state, at paragraph 43 that “the general rule in the present context is that, in the case of a foreign prisoner to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation”. It is these compelling reasons which are said to be the “exceptional circumstances”.
40. In my judgment, this is entirely consistent with what the Court of Appeal was stating in the earlier decision of *SS (Nigeria)* [2013] EWCA Civ 550.
41. Accordingly, in this case, when considering the second stage of the two stage approach, I must ask myself whether the reasons why this appellant should not be deported (which are said to be largely the harmful effect this will have on his young son) are so compelling as to outweigh the public interest in deportation. When considering the weight to be given to the public interest in deportation, I must consider not only that the deportation of foreign criminals has been deemed by Parliament to be conducive to the public good, but also that in this case there is a further need to maintain fair and effective immigration control. I must also bear in mind that the deportation of this appellant is conducive to the public good not just

because of whatever risk he might pose of continuing to offend but also because of the need both to deter other potential foreign criminals and also to express the revulsion felt legitimately by members of the public towards foreign criminals who commit serious offences, particularly, but not exclusively, towards those who have been convicted of dealing in class A drugs.

42. In order to consider what weight I can attach to the various factors in this case, I must first make findings with regard to the evidence I have heard. I do not propose to engage in a forensic analysis of all the evidence I heard, but shall restrict myself to giving my reasons why I cannot accept that any of the main witnesses, that is the appellant himself, his sister Nerva (who is his son's guardian) and his mother can be relied upon as witnesses of truth. Their evidence on important aspects of the appellant's case was so inconsistent as to cause me to conclude that the motivation of all of them was to advance the appellant's case rather than to give honest evidence.
43. I start with the evidence which was given with regard to whether or not the appellant would have a home available to him in Jamaica should he be deported. In a previous hearing, the appellant had claimed that his mother's house in Jamaica (which might otherwise have been available to him) had burned down. In cross-examination, when asked how he knew, he replied that his sister Nerva had told him that, after she had gone there for a holiday. When it was pointed out to him that his sister had previously said that this house had fallen into disrepair, and had not said that it had burned down, he eventually said this:

"I swear I heard she said it had burned down".
44. When the appellant's sister Nerva gave evidence, in cross-examination she agreed that it was correct that she had said the house had fallen into disrepair. Her mother had left Jamaica about fifteen years ago, she could not remember exactly how long, and so the house had fallen into disrepair because no one was there to look after it. She also thought that they (presumably being the authorities because it was what is known as a "capture home") had taken it away because no one was there. When asked why her brother had thought that the house had burned down, she said she did not know why he had said this, but she knew that they did not have a house there anymore. She did not know what had happened to it.
45. When asked why she thought that it had been taken over, she said that her mother had left so long ago and she heard this from people there, that it had been taken over. She had heard this from a friend of hers.
46. When asked whether she had been back to see the house for herself, she said that she had not because she had a life in this country now, and when asked, said she had been told over the phone from contacts in Jamaica that it had been taken over.
47. When it was put to her that she had gone back to Jamaica in December 2012, she confirmed that that was correct, and that she had been there for two weeks, but she had stayed at a hotel in Kingston, which was a good distance away from the house and had not visited it.

48. When the appellant's mother, Mrs Pearline Williams, gave evidence and was asked about this house, she gave yet another account. According to her, when asked, she claimed that she had never had any other property in Jamaica.
49. Although the issue of whether or not the appellant's mother had a house in Jamaica, or even whether it might still be available, is not of itself of any great importance, because the appellant could be returned to Jamaica whether or not that house was available to him, the discrepancy in the evidence of the witnesses is a matter of which I must take note.
50. The foundation of the appellant's claim that his deportation would be disproportionate is based on the relationship he claims to have with his young son, and on this point also the evidence of the appellant, and that of his sister Nerva and his mother was also seriously inconsistent. The appellant, when asked, began by saying that he saw his son every day. He maintained that this was so even when asked when was the last time he had seen his son before the date of the hearing (which was on a Thursday).
51. When the question was repeated, he conceded that the last time he had seen his son was the previous Sunday and said that this was at his mother's house. He claimed, when asked, that he had taken his son to the park, next to his house, although he could not name the park. He said it did not have a name, it was just next to the house where the kids go. He said he had spent about three hours with him.
52. When then asked to think back to the previous week, and tell the Tribunal on how many days that week he had seen his son, he said he thought it was about three, but he could not actually remember the days. When asked how long his son had been living with his sister, Nerva, he first said "a couple of months now", then when asked what he meant by that said that it was "since last month".
53. When asked on average roughly over the last month how often he had seen his son every week, he then replied that his sister lived near his mother, and during the week he would go to his sister's home but over the weekend she brought his son to his mother. When it was put to him what he had been asked was how often he saw him every week, he replied "every week", when he was asked again how often every week he saw him, he said again that it was "every day".
54. In re-examination, the appellant was referred to his statement at paragraph 6, where he had said that his son had been living with his sister for a few months before the order had been made, and he confirmed that this was correct.
55. Clearly, it must be troubling that the appellant does not seem to be able to give a consistent account of how long his son, with whom he claims to have such a close relationship, has been living with his sister, but it is even more significant that his sister, again, gave an account which was not consistent with his account. There was a minor discrepancy between what she told the Tribunal about when the appellant's son had first come to live with her, which she said had been 1 July this year, and what she had said in her statement which was that it was since about June this year,

but when asked when her brother had last seen his son, her first reply was “almost every weekend”. When asked when was the last time he had seen him, she said that she “can’t quite remember”. At this point in her evidence, the appellant was seen (both by Mr Jarvis and independently, by myself) trying to say something to his sister and he had to be stopped by the Tribunal. This is a matter to which I will refer below, as it was not the only occasion on which this happened.

56. When pressed, Nerva said that sometimes Jerome Junior was at her sister so she could not say, she thought it was yesterday (which, as I noted, was not what the appellant had said).
57. It was pointed out to this witness that it was her duty as guardian to decide when the appellant saw his son, which the witness agreed was correct, but when asked when she had decided how often Jerome Junior should see his father, she said that the court had agreed four times a month “and when I say” (in fact, from the letter sent to the Tribunal from Mackesys, it appeared that the order was four times a year). However, again when pressed, the witness said that she had not given him a definite time. She was mostly with her mother at weekends.
58. When Nerva was asked how many times her brother had seen Jerome Junior the previous week, having taken time to think about what answer she should give, she replied “mostly over the weekend”. She also agreed when asked that the son was with her during the week and she cared for him during the week.
59. Nerva was pressed as to how many times on average the appellant had seen his son since July, when he had been living with her, to which she replied “at weekends”.
60. Clearly, again the evidence of the appellant and his sister was inconsistent, and the situation was not made clearer on this issue by the appellant’s mother’s evidence. She confirmed that her daughter brought her grandson with her to see her every Sunday and that she would remain with them during the day. When asked when was the last time that the appellant had seen his son that she knew of, she said “not last weekend, every day he sees him”. Again, both Mr Jarvis and I at this stage noted that the appellant was trying to say something, and I again explained why he must not try to speak, especially to indicate to witnesses what they should say, whilst evidence was being given. In answer to this, both the appellant and his sister Nerva claimed that he had not been speaking, which was simply not true. I had seen him doing so.
61. I should note with regard to how often the appellant saw his son, that his other sister, Claudia Williams, said in cross-examination that she did not know how often her brother saw his son during the week.
62. After the appellant’s sister Claudia had given her evidence, the appellant’s mother was recalled by the Tribunal and asked whether she could remember whether her son had seen his son on the previous weekend (her evidence earlier had been that the last time had not been the last weekend, but that he had seen his son every day, which was inconsistent with the evidence given both by her son and by her daughter

Nerva). On this occasion, she replied that he had seen his son on Sunday. When asked whether she remembered what they did, she said that they had played and that her grandson had said “dad dad” and they played together and he jumped up with his father. After that they had had dinner. This had all apparently taken place in her home, and there was no mention of a park at all.

63. When I consider the inconsistencies in the evidence of the witnesses on major parts of his case, and take into consideration also that the appellant appeared to be trying to indicate to the witnesses what they ought to say, and further that both he and his sister Nerva told the Tribunal what they knew to be untrue, namely that he had not said anything at all (which as I have indicated above, I saw myself was not true) I have to conclude that these three witnesses can be relied upon as witnesses of truth. I should add that this appellant has on many previous occasions been found not to be a witness of truth, and my conclusions following the hearing merely confirms that he has not changed in this regard.
64. Asking myself the normal *Razgar* questions when considering proportionality, as I must do (even though when considering proportionality in my second stage assessment I would have to give proper weight to the fact that Parliament has decreed that the appellant’s removal would be conducive to the public good) I must first consider whether the appellant even has a family or private life in this country such that his Article 8 rights are engaged. Clearly his removal would be both lawful and necessary for legitimate purposes, being both the prevention of crime and disorder and the maintenance of a fair and effective system of immigration control (which advances the economic well-being of the country). Then, assuming that his Article 8 rights were engaged, I would have to consider whether his removal was proportionate. For this purpose, I would have to consider whether the reasons he has put forward are so compelling that they would outweigh the very strong factors which would indicate that he should be deported.
65. Turning to the first issue, then, clearly the appellant has some private life in this country, because he has been here (albeit unlawfully) since around 2003. I am more doubtful as to whether he can be said to have a family life, on the basis of the evidence I have heard. Obviously, if he did have a close relationship with his son, that would amount to family life, but given my findings on the evidence, namely that I cannot accept the witnesses as witnesses of truth, I find that he has not established that his relationship with his son is as claimed. However, for the purposes of this determination, and so that there can be no doubt as to the decision which must, on the facts of this case, be reached in any event, I shall proceed on the basis that the appellant’s Article 8 rights are engaged.
66. It being clear that removal would be both lawful and necessary, I must then consider proportionality, and in this regard I have to assess the weight to be attached to such private or family life as the appellant has. Clearly, the weight to be attached to the appellant’s private life is extremely low, given the circumstances in which he has remained in this country, but in any event I would not consider the weight to be attached to his relationship with his son should be very much higher. He has shown

himself to be a feckless individual, who has had little or no relationship with any of his children except now, when in consequence of claiming such a relationship, it is hoped that he might avoid deportation. He has, by becoming involved in family proceedings in relation to his son, been able to extend the period in which he has been able to remain in this country beyond the time he would otherwise already have been removed, but as the decision of the family court is now clear, I am able to factor into my decision the best interests of his son.

67. I reach the conclusion that the weight to be attached to the relationship between the appellant and his son is not high. While for the purposes of this determination I am prepared to accept that it is, or might be, marginally in Jerome Junior's best interests that his father remains in this country, especially as his mother is not in contact with him at present, and that his "best interests" are a primary consideration (which means they must be considered first), it must still be acknowledged, when considering the weight to be given to the various competing factors, that his father's influence would not be a wholly positive one. I will turn to the appellant's immigration history in a moment, but I must take note of his appalling record as a father also, to which I have referred above. The risk of disruption to Jerome Junior's life should his father build up some sort of relationship with him and then desert him, as he appears to have done in respect of his other children, would be extremely harmful, and this is a risk of which this Tribunal must take note. I also have to have in mind that even though the best interests of Jerome Junior are a primary consideration, as has been made clear in all the relevant jurisprudence, in particular by the House of Lords' in *ZH (Tanzania)*, they are not the only consideration, and the Tribunal must give appropriate weight to the other factors also.
68. Accordingly, I now turn to consider those other factors. This appellant's immigration history is absolutely appalling. As already recounted, having been removed from this country, he then returned in another name, using a false identity, as I so find. It is, in my judgment, more likely than not that the second identity was false rather than the first. It follows that this appellant has relied on a false passport, which itself is a serious criminal offence.
69. The appellant's presence in this country has further aggravating features. He has committed a number of criminal offences, in addition to the passport offence with which he has still not been charged, and these include serious drug offences. He has absconded, and has also been in breach of bail. It is not at all clear why he had not been charged with the criminal offence of breaking his bail conditions initially, nor is it clear why the original proceedings which had been brought against him were not re-opened. It is also the case, as I have found, that he has lied consistently to the court, and that he has not given honest evidence even to this Tribunal.
70. Accordingly, I am considering the case of a person who has not only committed serious criminal offences (while not necessarily the worst offences which can be committed, dealing in class A drugs in any circumstances is serious, and a sentence of twelve months' imprisonment is sufficient that his removal is deemed to be conducive to the public good in any event), but he has also been in breach of bail

conditions and has absconded. Clearly, unless people such as this appellant are removed, public confidence in the respondent's ability either to maintain a fair and effective system of immigration control or to deter other foreign criminals from committing serious criminal offences must be seriously diminished. Public confidence would be greatly reduced.

71. Against this, I have to consider whether what I have found to be a very weak Article 8 claim is so compelling as to outweigh the public interest in deportation.
72. In my judgment, in this case, it is overwhelmingly clear that the factors in favour of deportation outweigh by a huge margin the reasons why he should not be deported. Even if the First-tier Tribunal made an error of law by not considering the appellant's appeal under Article 398 and 399 of the Rules (which for the reasons I have set out above I do not consider could in fact have been a material error in the event) having considered very carefully the appellant's Article 8 claim in light of existing jurisprudence, I am in no doubt whatsoever but that his removal would not be in breach of such Article 8 rights as he might otherwise have. It follows that his appeal must be dismissed, and I so find.

Decision

The determination of the First-tier Tribunal having been set aside as containing a material error of law, such that its decision must be re-made by the Upper Tribunal, and I substitute the following decision:

The appellant's appeal is dismissed.

Signed:

Dated: 29 October 2013

Upper Tribunal Judge Craig