Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05263/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 23 October 2013	**On 6 November 2013**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

KD
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Unrepresented
For the Respondent: Ms A Holmes, Senior Home Office Presenting Officer

Determination and Reasons

1. I am allowing this appeal under paragraph 391 of HC395 against the refusal to revoke a deportation order because of several substantial failings by the Secretary of State whereby her decisions were made on incomplete and erroneous facts after prolonged delays and then not properly served on the appellant. These delays and errors suggest that the Secretary of State and her predecessors cannot have thought deportation was necessary to protect the public from the appellant because there was no attempt to deport him when he was convicted of his most serious crime in 2003. The ensuing delays have served to give the appellant the opportunity to prove he is not a danger to the public by remaining drug free for some six or seven years and have allowed him to strengthen the particularly close family life he has had since 2001 with his British born partner and with their three children.

Background

2. On 26 September 2012 the Upper Tribunal set aside the determination of First-tier Tribunal Judge Ruth allowing the appeal against the Secretary of State's refusal to revoke a deportation order. There have been several attempts thereafter to determine the appeal but they have been adjourned due to the appellant's lack of representation and his failure to serve all the relevant documents he wished to rely on. On 23 October 2013, the appeal finally proceeded.

3. The appellant is a citizen of Jamaica born in 1968. He was somewhat confused about his immigration status and various applications in his evidence. I am not surprised because the summary in the Secretary of State's letter of 9 January 2012 is not entirely supported by the documentary evidence in her bundle. It is said that the appellant initially entered the UK as a visitor on 21 November 1999, was granted leave to enter until 20 December 1999, left on an unspecified date, re-entered on 7 January 2000 and was granted leave to enter until 20 May 2000. He then overstayed. However in the bundle is an application for leave to remain made by the appellant on 5 December 1999 and received by the Secretary of State on 5 January 2000 (Annex A1). Plainly he could not therefore have left and re-entered as stated above. The copy of his passport (at Annex E1-5) does not show any departure or re-entry endorsements. The Secretary of State's letter of 4 September 2007 (H1-3) suggests that an application for extension was granted after his initial arrival, taking him to 20 May 2000.

4. The appellant has a son, R, born in Jamaica who has been living in the UK with his mother for a number of years. Their status is not known. R is the appellant's oldest child.

5. On 22 December 2000 (according to the application form and not 12 January 2001 as stated in the Secretary of State's letter), the appellant applied for leave to remain as the spouse of HC, a British citizen. This was marked as received by the Secretary of State on 31 January 2001 and refused on 26 November 2001. It appears that by then the marriage had broken down (although they are still legally married). There are no children of that marriage. Further representations made in December 2001 (the basis of these is unknown as a copy has not been included in the respondent's bundle) were rejected on 17 April 2003 and the earlier refusal was maintained.

6. The appellant commenced a relationship with AT, a British citizen, in 2001.

7. In 2002 their son, B, was born.

8. On 1 January 2003 the appellant was convicted at Snaresbrook Crown Court on seven counts of supplying Class A drugs and two counts of possession with intent and on 25 July 2003 he was sentenced to five years in prison. There is no record of any appeal made at that time against the conviction or the sentence. The appellant did commence appeal proceedings last year and I shall come to that later. On 14 April 2005 the appellant was released from HMP Wayland.

9. In 2006 (10 days before stated in the Solicitor's letter) the appellant's daughter, D, was born.

10. On 2 January 2007 the appellant was convicted at Redbridge Magistrates Court of possession of class A drugs on 18 October 2006. He received a 150 hours unpaid community order and 12 months supervision requirement. I should point out that the reference to an intention to supply contained in the Upper Tribunal's Error of Law decision is a mistake.

11. On 4 September 2007 the Secretary of State maintains that the appellant was notified of a decision to make a deportation order. The letter was sent to the appellant at Stanfield Road in Dagenham with the postcode of E3 5QH. The appellant and AT maintain they never lived there and that E3 is the Bow postal area, not Dagenham at all. It is unclear where this address emanated from. It does not appear on any of the other evidence I have on file.

12. On 5 December 2007 a deportation order was signed. The refusal to revoke the order asserts it was made under section 5(1) of the 1971 Act. The decision to make a deportation order refers to section 3(5)(a). The summary to the respondent's appeal bundle maintains it was under section 5(2). Regrettably, a copy of that document is not contained in the respondent's bundle and has not been placed before the Tribunal. It. There is no evidence of service of that order and it is not known which address it was sent to. The appellant maintains he did not receive it.

13. On 1 February 2008 the appellant was convicted at Haverings Magistrates Court of using a vehicle whilst uninsured on 23 January 2008. He received a £200 fine. His licence was endorsed with six penalty points.

14. In 2008 the appellant's daughter, L, was born. AT is the mother of B, D and L.

15. On 29 September 2008 the appellant applied for leave to remain as an unmarried partner. That application was accompanied by a letter from the appellant's representatives dated 1 October 2008 and a withdrawal by the appellant of his earlier marriage application and was received by the Secretary of State on 3 October. In that letter, the representatives point out that the appellant was seeking to have the criminal conviction of 2003 quashed.

16. On 11 December 2011 further information was sought by the respondent as to the appellant's family life. This was provided by the appellant. The application was treated as an application to revoke a deportation order and was refused on 9 January 2012. No appeal was lodged. It appears that the appellant's representatives' office closed down around this time.

17. On 8 March 2012 the appellant was detained under immigration powers with a view to deportation. On learning of the order, an out of time appeal was lodged on 9 March, on the basis that the appellant had not been informed of the decision given the closure of his solicitors' office. On 14 March 2012 the Tribunal extended time.

18. On 14 May 2012 the appeal was heard at Taylor House by First-tier Tribunal Judge Ruth and allowed. The determination was promulgated on 30 May 2012. The judge heard oral evidence from the appellant. AT and from AT's mother.

19. On 6 June 2012 the respondent sought permission to appeal. This was granted on 18 June 2012.

20. On 26 September 2012 the matter came before Upper Tribunal Judge Rintoul and myself and we found an error of law in the determination of the First-tier Judge. The reasons are given in the determination of 10 October 2012.

21. Several adjournments followed as the appellant was pursuing an appeal against his 2003 conviction. He was also given time to try to obtain legal representation.

22. The matter then came before me on 23 October 2013.

Appeal Hearing

23. The appellant attended the hearing with his wife and their two daughters. The bundle the appellant recently submitted (after the directions deadline) had not been served upon the respondent. Copies of the documents were therefore made available for Ms Holmes.

24. The appellant then gave oral evidence. He stated that he had arrived here as a visitor and had then married. They separated in 2000-2001 but were still legally married as he could not afford a divorce. His relationship with AT commenced in 2001 and they started to cohabit from December 2001. They had three children, B, D and L born in 2002, 2006 and 2008.

25. The appellant confirmed that he was aware of the reason for the attempt to deport him. He stated that his first conviction in 2002 was a miscarriage of justice. His barrister had entered a guilty plea and he had been sentenced to five years in prison. He had appealed against that sentence or, at least he thought he had in that he had completed a form whilst in prison but nothing came of it. Last year, he had begun to pursue the matter with the courts. He said that he had never supplied drugs; he had only smoked them. His second conviction occurred in October 2006; on that occasion he received a community order. In 2008 he was convicted of driving without insurance.

26. The appellant said that he had not received any response to the marriage application he had made. He explained that his Solicitors had closed down and he had to take the matter to the Law Society as he had paid money. He had not seen his passport since it was submitted for that application.

27. When asked why he should not be deported in light of his convictions, the appellant stated that he was a commonwealth citizen, he had lived here for 14 years, he had no life elsewhere, he had family ties here and he had been convicted unlawfully.

28. In response to Ms Holmes' questions, the appellant said that he had tried to appeal his 2002 sentence. He had signed the form but was not aware of the procedure and so just waited. He said he had sent evidence of that to the Court of Appeal but did not have it with him.

29. With regard to his life with his family, he explained that he took the children to and from school and looked after them as AT worked long hours. He made meals for them. He also cooked for their restaurant.

30. The appellant said that he had an older child. He lived with his mother in Birmingham but visited during school holidays. He had recently started college.

31. The appellant said he would not re-offend. He was now 45 years old and a Christian. He insisted he had rights as a Commonwealth citizen. He maintained his partner and children could not be expected to relocate to Jamaica. That completed his evidence.

32. AT then gave evidence. She confirmed her date of birth and said she was a British national since her birth here. She had family here; her mother, sister, uncles and cousins. She had been living with the appellant since 2001 and they had three children. She stated that the appellant was now a responsible man. They were settled here and had two businesses. The appellant had changed since the days when he was involved in drugs. He was no longer that man. His deportation would affect five of them. She would become a single parent and did not know how she would cope. Her mother was unwell and her sister was disabled. She had to help them. She knew no other home. The stress and worry from the deportation proceedings had taken its toll on them all.

33. AT admitted that when the appellant was convicted in 2002 he had been irresponsible. She said that since then he had changed. She did not know what would happen if the appellant were to be deported.

34. In response to Ms Holmes the witness explained that she had never envisaged being a single parent. She had never had to deal with three children on her own except for when the appellant was detained last year. She had almost had a breakdown and the children were ill and had played up. She would be unable to relocate to Jamaica. Her mother would be unable to cope without her. She suffered from rheumatism. AT's 28 year old sister had Down's Syndrome and she helped with her care. Other relatives would not help. They did not even help with babysitting.

35. AT stated that the appellant's first son, R, had recently started college so would be spending more time with them. He got on well with the other children and they loved him. She asked for the Tribunal to look at the case with an open mind and an open heart.

The appellant had matured and was now a helpful and responsible man. Five of them, or six including the oldest child, would be affected by the deportation. AT left home at 17 and had worked hard to make a life for her children. They had three properties and let two of them. They were settled.

36. When asked why the appellant had not appealed against the deportation order, AT said that they had never received it. It had been sent to an address which did not exist and where they had never lived.

37. AT said that the appellant no longer smoked drugs. He had stopped around the time of the birth of their second child. He had attended a drugs rehabilitation course following his second conviction and that had changed him. After that, he changed his ways and assumed his responsibilities. AT admitted that prior to that he was irresponsible and took drugs. She was in denial about it because she had fallen in love with him. After his first conviction, she and their son had gone to live with her mother as AT could not cope on her own. It was a hard time and B had grown up without having his father around.

38. With regard to the last offence, AT said that the appellant had been working on a friend's car and it was time to collect D from nursery. Although he could have walked, he took the car and was stopped. He made a mistake and had been punished.

39. When asked why the court should accept that the appellant would not re-offend, AT stated that if this had been 2006, she would have agreed. She emphasised, however, that he was now grounded and a changed man. He would not re-offend. He was now a responsible man.

40. AT described an average week in their lives. She said she slept through the alarm so the appellant would wake her up. She made breakfast and then the appellant took the children to school. He also walked them home again. She worked in a hairdresser's and also in maternity at Queen's Hospital. She worked long hours in the salon and on Thursdays, Fridays and Saturdays did not get home until very late, sometimes midnight. She had Wednesdays and Sundays off. On Wednesday she did the laundry and checked up on her mother and sister. Sunday was spent with the appellant and children.

41. That completed the oral evidence.

42. I then heard submissions from Ms Holmes. She submitted that the only way the appellant could succeed under the current rules would be if he showed there were exceptional circumstances in his case. She submitted that there were none. She referred to OH (Serbia) [2008] EWCA Civ 694, DS (India) [2009] EWCA Civ 544, A D Lee [2011] EWCA Civ 348 and SS (Nigeria) [2013] EWCA Civ 550 and took me through the paragraphs relied upon. She submitted that deportation could only be averted by a very strong case and this was not such a case even though she did not dispute that there were close family ties. She submitted that even though the appellant had children, he continued to re-offend and had never had any right to be in the UK. He had committed serious

offences and it would be irresponsible of the Secretary of State if she did not make a deportation order. The appellant had not accepted responsibility for his crimes and was attempting to evade responsibility for a crime to which he pleaded guilty. If he had not taken responsibility, how could it be said he was a reformed character. There was little evidence from other relatives. The appeal should be dismissed.

43. The appellant and AT both responded. The appellant relied on the transcript of the proceedings in 2003. He stated that he lived with his family whom he loved. He looked after the children. He cooked for their restaurant. They paid their taxes. They also had a barber's shop. Deportation would destroy the family.

44. AT emphasised that the appellant had changed since his drugs awareness counselling in 2007. He had made mistakes in the past but he had changed. He was now the man he should have been years ago. Theirs was an exceptional case. They worked hard together and his removal would have devastating effects on all of them. The deportation order had been sent to a bogus address so they had not known about it and could not have appealed. They had been advised at the last hearing that there was no need for other witnesses as they had attended previously. It was unfair that the UKBA had taken no action for so long. In that time, the appellant had changed his ways. He was a non violent person and the drugs course had opened his eyes to the damage that they cause.

45. That completed the submissions and I reserved my determination which I now give.

Findings and conclusions

46. The appellant has not technically sought to make an application to revoke a deportation order. I find, for reasons I shall explain later, that he had not been served with the order and had no knowledge of it when he made the application on 29 September 2008 to remain on the basis of his relationship with AT. It was that application which the Secretary of State treated as an application for revocation and which she refused on 9 January 2012, 3 years and 3 months later.

47. Although Ms Holmes' submissions focused on the current Immigration Rules, they were not in force at the date of the refusal in January 2012 and so cannot apply to this appeal. The application was refused under paragraphs 390 and 391 of HC395 and on Article 8 grounds. At the error of law hearing, Mr Wilding, for the Secretary of State, confirmed that paragraph 390 was the applicable rule. I have, therefore, considered that and Article 8. I have also, had regard to the fact that the current rules are an expression of the Secretary of State's interpretation of Article 8.

48. At the date of the decision, paragraphs 390 and 391 stated the following:

390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

(i) the grounds on which the order was made;

(ii) any representations made in support of revocation;

(iii) the interests of the community, including the maintenance of an effective immigration control;

(iv) the interests of the applicant, including any compassionate circumstances.

391. In the case of an applicant who has been deported following conviction for a criminal offence, continued exclusion

(i) in the case of a conviction which is capable of being spent under the Rehabilitation of Offenders Act 1974, unless the conviction is spent within the meaning of that Act or, if the conviction is spent in less than 10 years, 10 years have elapsed since the making of the deportation order; or
(ii) in the case of a conviction not capable of being spent under that Act, at any time, unless refusal to revoke the deportation order would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees

will normally be the proper course. In other cases revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State . The passage of time since the appellant was deported may also in itself amount to a change of circumstances as to warrant revocation of the order.

49. Although the appellant has not yet been deported, paragraph 391 is a helpful indicator of the kind of factors that the Secretary of State would expect to see before agreeing to revocation of a deportation order. I note that the appellant's conviction in 2003 can never be spent under the Rehabilitation of Offenders Act.

50. I have had regard to the judgments to which I was referred by Ms Holmes and, additionally, I have considered the principles enunciated in N (Kenya) [2004] EWCA Civ 1094 which Mr Wilding relied on at the error of law hearing.

51. The gist of the court's decision in N (Kenya) was that the Adjudicator's analysis of the public interest had been inadequate. Discussing the Adjudicator's discretion under paragraph 21(1) of Schedule 4 of the 1999 Act, May LJ said:

> *64. …The discretion is to balance the public interest against the compassionate circumstances of the case taking account of all relevant factors including those specifically referred to in paragraph 364 of HC 395. Essentially the same balance is expressed as that between the appellant's right to respect for his private and family life on the one hand and the prevention of disorder or crime on the other. Where a person who is not a British citizen commits a number of very serious crimes, the public interest side of the balance will include importantly, although not exclusively, the public policy need to deter and to express society's revulsion at the seriousness of the criminality. It is for the adjudicator in the exercise of his discretion to weigh all relevant factors, but an individual adjudicator is no better able to judge the critical public interest factor than is the court. In the first instance,*

that is a matter for the Secretary of State. The adjudicator should then take proper account of the Secretary of State's public interest view.

65. The risk of re-offending is a factor in the balance, but, for very serious crimes, a low risk of re-offending is not the most important public interest factor.

52. Later in the judgment, Judge L J said:

83. The "public good" and the "public interest" are wide-ranging but undefined concepts. In my judgment (whether expressly referred to in any decision letter or not) broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged. They include an element of deterrence, to non-British citizens who are already here, even if they are genuine refugees and to those minded to come, so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of serious crime may well be deportation. The Secretary of State has a primary responsibility for this system. His decisions have a public importance beyond the personal impact on the individual or individuals who would be directly affected by them. The adjudicator must form his own independent judgment. Provided he is satisfied that he would exercise the discretion "differently" to the Secretary of State, he must say so. Nevertheless, in every case, he should at least address the Secretary of State's prime responsibility for the public interest and the public good, and the impact that these matters will properly have had on the exercise of his discretion. The adjudicator cannot decide that the discretion of the Secretary of State "should have been exercised differently" without understanding and giving weight to matters which the Secretary of State was entitled or required to take into account when considering the public good.

And:

87. …the risk of further offending or potential danger was relevant to the deportation decision. In simple terms, the greater the risk represented by the offender, the greater the public interest in his deportation.

53. The importance of the public interest is reiterated in OH (Serbia). OH was a 25 year old man from Kosovo who had been in the UK about nine years at the date of the hearing of his appeal. He had been convicted of wounding with intent to do grievous bodily harm, having come close to killing his victim, and was sentenced to four years. The court drew the following propositions from N (Kenya) summarised at paragraph 15:

(a) The risk of reoffending is one facet of the public interest but, in the case of very serious crimes, not the most important facet.

(b) Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.

> *(c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.*
>
> *(d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the respondent and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of the case.*

54. Despite sympathy for the appellant who had his parents and siblings here and who had sought to rehabilitate himself, the court found itself unable to allow the appeal.

55. In DS (India) the court considered the appeal of DS who had come to the UK as a spouse and attempted to rob a betting shop whilst armed with a knife seven years later. He was sentenced to a term of imprisonment of 4 years 3 months. He also had seven further convictions for dishonesty prior to the robbery. His wife (who had come to the UK from India some 10 years before him) had divorced him, but they were reconciled at the time of his hearing. They were seeking to formally adopt the five year old son of the wife's brother. The court considered the issue of relocation for the wife and child. It found that:

> *If it would be reasonable for a wife to accompany her husband, then the interference in family life is that much the less. If it would be unreasonable, then the interference would be that much the more. However, where the scales ultimately fall will depend on the overall evaluation of every factor in the balance. In the present case, a critical factor is the serious offence of which DS was convicted* (at paragraph 30).

It also found that:

> *The public interest in deportation of those who commit serious crimes goes well beyond depriving the offender in question from the chance to re-offend in this country: it extends to deterring and preventing serious crime generally and to upholding public abhorrence of such offending* (at paragraph 37).

56. A D Lee was a 32 year old Jamaican national who had been deported and who had appealed from Jamaica against the refusal of the Home Secretary to revoke the deportation order. He initially entered the United Kingdom as a visitor in 1996 but was granted a variation to enable him to remain as a student. When this leave expired at the end of October 1999 he overstayed, but at some point thereafter left the country, returning in April 2002 and absconding after securing temporary admission. He was however arrested within three months for having a forged insurance certificate. In January 2003, having been removed to Jamaica, he re-entered the United Kingdom on a false passport and within a few months had again been arrested, this time for possession of class A drugs with intent to supply. On pleas of guilty to ten counts he was sentenced on 3 October 2003 to 7 years' imprisonment. In April 2006, while still in prison, the appellant was served with notice of intention to deport him. He completed his sentence and following the final dismissal of his appeal he was deported in November 2008. Whilst in prison he married

Rachel Lee with whom he had two daughters. It appears from the evidence that his relationship with his first daughter only took root after his release from prison. The younger child was unaffected by his departure. The wife established a small cleaning business when the appellant was in prison and his presence as a child-minder upon release enabled her to keep it going. The issue before the Tribunal was whether it was proportionate to break the family up. The judge considered that despite the distress deportation would cause the family, it was appropriate because of the appellant's bad immigration history and his criminality and because his wife was aware of both when she married him. In upholding his determination, the court found:

> *27. The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does. Sometimes the balance between its justification and its consequences falls the other way, but whether it does so is a question for an immigration judge.*

57. In SS (Nigeria) the court had to consider the appeal against deportation of an appellant who had a relationship with a British national and a young son. SS was convicted on three counts of supplying crack cocaine sentenced to three concurrent terms of three years imprisonment. He had been a street dealer. An antisocial behaviour order was imposed prohibiting him from entering Walsall Town centre. In dismissing his case, the court took note of Parliamentary endorsement of the new rules on deportation with the result that this gave the proportionality scales a markedly greater weight than in other cases and meant that only a very strong claim indeed could override the pressing nature of the public interest in the criminal's deportation.

58. In making my findings I have had full regard to the evidence before me, the submissions made, the applicable rules and the law and the relevant jurisprudence.

59. I start with the appellant's criminal history and the importance to be given to the public interest in effecting his deportation. The appellant has three convictions; the most serious occurred in January 2003 for which, in July 2003, he received a five year prison sentence for possession and intent to supply Class A drugs. This is without doubt a very serious offence. As stated by the sentencing judge, drugs lead to addiction, destitution, physical and mental ill health and evil consequences for society. It is right that society should be protected against individuals who pose such a risk.

60. The appellant continues to maintain that he was framed by the police and that he never intended to supply drugs only to smoke them himself and that he has been seeking to clear his name. I accept that he was under the impression that a form he had signed whilst in prison was for the purpose of challenging the conviction. However nothing appears to have come of that. I also accept that in 2008 his representatives informed the Secretary of State that the appellant was seeking to have his conviction quashed. Again, nothing seems to have come of that. In June 2012 the appellant did commence proceedings against his conviction but so far he has not been successful. I have had regard to the trial transcript which he had adduced, and I see that there were lengthy submissions by Counsel seeking a change of his guilty plea made, it is said, when he was under pressure.

However, in spite of that the plea stood and the appellant was convicted. I am unable to go behind that conviction.

61. The sentencing judge observed that the appellant was storing and bagging heroin for others to sell. He took account of the mitigating circumstances and noted that the appellant had young children whom he clearly cared for. He also noted the domination and violence he had suffered at the hands of his co-defendant. Despite this he received a heavy prison sentence.

62. The appellant was released from prison in 2005. Surprisingly, the Secretary of State took no action against him at this stage. It was only in September 2007, four and a half years after that conviction, that she took steps against the appellant and made a decision to deport him. This came nine months after his second conviction for possession for which he received a non custodial sentence at a Magistrates Court. I have considered the pre sentencing report in respect of that conviction and note that a community order was recommended, it being noted that the appellant was willing to undergo a rehabilitation programme.

63. The first point I would therefore make, in the light of these events, is that the Secretary of State's failure to act during the four and a half years after the appellant's serious drugs conviction and, indeed, the fact that it took nine months after the second conviction (for a lesser offence and when there was no custodial sentence) for her to actually take action, does not suggest that she considered the public to be at great risk from the appellant's presence or that there was any pressing need to remove him expeditiously. In spite of the importance to be attached to the three main 'public interest' factors, namely (a) the risk of re-offending, (b) the need for possible deportation to be seen as a means of deterrence, and (c) the role of using deportation orders as an expression of the public's revulsion at serious crimes and the need to build public confidence in the treatment of foreign citizens who have committed serious crimes, the appellant was left to continue to strengthen his life and ties here. Had he been removed then, when his rehabilitation had not commenced and when his ties here were weaker, he would not have had much of a case to argue about. Instead he remained and fathered two more children with AT.

64. The second difficulty with the Secretary of State's action is that when she did made a decision to deport the appellant, she sent her letter of notification to an address where he has never lived. Not only that, she sent it a street in the town of Dagenham but with a Bow post code (as confirmed by the Royal Mail website). Not surprisingly, he never received it. The notification of a decision to deport was therefore not served on the appellant. That had the effect of allowing him to continue with his life with his partner and their three children.

65. The third problem is that the facts on which the Secretary of State based her decision under paragraph 364 were incorrect. It appears that she considered the facts as at the time of the appellant's earlier application for leave to remain (in 2001) and without seeking any update from him as to any changes which may have occurred since then. So, the Secretary

of State only considered the appellant's first child, R. There was no consideration at all of the two children born thereafter (at that date) who lived with the appellant and no consideration of his long term partner, AT. The Secretary of State did not consider other matters such as the appellant's contribution to the household and his role as the primary carer of the children which allowed AT to work, establish two businesses and contribute in taxes to the economy of the UK. And, importantly, there was no consideration of the drugs awareness courses and counselling the appellant attended following his second conviction which helped him to turn his life around. The erroneous factual basis on which the decision making was carried out could not be put right by the appellant because the letter of 4 September 2007 from the respondent was sent to the wrong address.

66. The disastrous effect of this error by the Secretary of State was compounded by the signing of the deportation order in December 2007 on the premise that the appellant had not sought to appeal the decision. Plainly he could not do so as it had not been served on him. The deportation order itself has never been produced to the Tribunal. Its date and place of service is not known. The appellant maintains he was not aware of it and that is borne out by the representations/application made by his solicitors in October 2008. No reference to deportation was made in that letter in which the appellant seeks to amend his initial application made following his marriage so as to remain with AT and their children.

67. The Secretary of State then took until 13 December 2011 to respond to that application. Even in that letter, sent to the correct address this time, there was no reference at all to the deportation order and so there was nothing to alert the appellant at that stage that one had been made against him. Three years and three months after his application, the Secretary of State finally refused it, having decided to treat it as an application for revocation of the deportation order. Once again, her inaction for many years does not show any pressing need to remove the appellant as a threat to the public. Once again, the long delay led to a further strengthening of the appellant's position and ties here. It also provided time during which the appellant has been able to show that he has stayed clear of drugs and that his rehabilitation, following the drugs awareness courses he attended following his community order, was a success. The investment of public resources in the rehabilitation of foreign prisoners is certainly pointless if the intention is always to remove them. Where the system has worked, as it has in this case, the public interest in removal must have lessened.

68. It can be seen, therefore, that by her own actions, the Secretary of State has not demonstrated that there is an urgent need to protect the public from the appellant or indeed to use his deportation as a deterrent to others and as an expression of society's disapproval of his conduct. Moreover, the lack of service of both the decision to deport and the deportation order itself, and the factual inaccuracies on which the decision was based, have placed the appellant at an unfair disadvantage. The failure to serve the decision to deport on the appellant is not just a technical point. It means that the weight the Secretary of State gave to the public interest as expressed in the decision is undermined by the faulty premise on which the decision was made. In other words, as the Secretary of State deprived herself of making a properly informed decision, the weight that would normally be given to the public interest view as expressed therein. It should

also be pointed out that when considering whether to revoke the deportation order, the Secretary of State wrongly considered the appellant's length of stay here to be 8 years (at paragraph 24); in fact at the date of the letter in January 2012, the appellant had been here for over 12 years.

69. For these reasons, I find that the appellant has come to these proceedings from a disadvantaged standpoint. Not only was he never informed of the decision to make a deportation order, but the basis on which it was made was factually incorrect. Further, he was deprived of his right of appeal against it as it was not sent to him at the right address and there is no evidence from the Secretary of State to show that the signed deportation order was sent to him at the correct address in December 2007. Additionally, when the Secretary of State decided to treat the appellant's application for leave to remain as an application to revoke the deportation order, she did not notify him that that was what she was doing, nor did she make any reference to the order in her request for further information sent to the appellant in 2011. What all this means is that the appellant had no opportunity to make representations in connection with the decision to deport, or the deportation order itself or even the refusal to revoke it. The first he knew of the deportation process was when he was detained under immigration powers in March 2012. Whilst I do not seek to condone the appellant's convictions in any way at all, I do find that his rights under the law and the rules have been disregarded to a significant degree by the Secretary of State.

70. Paragraph 390 sets out the factors the Secretary of State *must* consider when deciding whether to revoke a deportation order. The first is the grounds on which the order was made. It can be seen from what I have set out above, that the grounds on which the order were made were incomplete and significantly lacking in substance. The second factor to be considered is "any representations made in support of revocation". None were made as the appellant did not even know he was the subject of a deportation order. His application was for leave to remain as a partner and not for revocation. The third factor requiring consideration is the interests of the community. Whilst the Secretary of State did take these into account, she did so without a full factual appraisal and without any knowledge of the appellant's programme of rehabilitation, the success of that programme and the appellant's six drug free years. The maintenance of effective immigration control must also be considered. Had the appellant been removed after his first application for leave to remain was refused or as soon as his first prison sentence had been completed, immigration control would have bee effectively maintained. However, the fact that he was allowed to remain for several years, despite his address being known to the authorities and even after the deportation order was signed, does not suggest that his removal was imperative for immigration control. The last factor to be considered is the interests of the appellant including any compassionate circumstances. Although the Secretary of State did by this time know of the appellant's family life with AT and their children, she did not take any account of the fact that the deportation order was signed on an erroneous factual basis and the appellant's length of residence was wrongly stated. Moreover as the appellant was not aware that he was facing deportation, he never had the opportunity to make the points he could be expected to have made had the procedure been properly followed. It is for all these reasons that I find that the Secretary of State has not correctly

followed the law and the rules. such a failing is all the more significant when deportation means the break up of a close family and long lasting and severe adverse consequences on a British born woman and three British born children, all of whom have rights themselves.

71. I now deal further with the appellant's criminality. The appellant accepts that he was involved in drugs (although he disputes he was supplying them). He accepts he acted irresponsibly in the past. Both he and AT gave compelling evidence that he had turned his life around following the drugs courses and counselling he received in January 2007. Letters showing his various appointments for counselling have been adduced. AT was candid in her evidence and admitted that the appellant had been immature and irresponsible during their early years together. However she described the courses as a turning point; a time when the appellant realised the error of his ways, took steps to change them and became a mature and responsible father and partner. The appellant has remained drug free since then and it accepted that he is a very good and hands on father.

72. In 2008 the appellant was caught and fined for driving without insurance. The circumstances of that incident were that he had been fixing his friend's car and the time came for him to collect his daughter from nursery. Instead of just walking there, he foolishly opted to drive and got caught. Whilst it may be said that this behaviour shows a disregard for the law, I am prepared to accept it was a one off lapse, that he acted foolishly without thought rather than maliciously seeking to flout the law and that he has learnt his lesson. There have been no further incidents in the ensuing five years.

73. I have considered the case law very carefully. There are significant differences in the facts between the cases Ms Holmes relied on and the appellant's case. N had never lived with his partner and children as a family due to his lengthy prison sentence. She was from Dominica and had come here as an adolescent and he married her in a bigamous ceremony whilst serving his prison sentence. N's crime involved appalling cruelty and violence. He abducted and imprisoned a woman who was a stranger to him and subjected her to a horrific ordeal during which she was threatened with violence from a knife and scissors and raped three times. He was convicted by the jury and sentenced to 11 years' imprisonment. His victim, who had given evidence, had sustained serious mental injury. She had undergone a change of personality and was on medication and obtaining regular treatment from a psychologist. The judge concluded that the appellant was a danger to the public. After his release from prison he was on immigration bail but breached his conditions. His case can be distinguished from the appellant's on the basis that the latter was not involved in violence, has a long term relationship with a British citizen who has lived here since birth and has three British born children.

74. OH was also involved in a violent crime where his victim only just escaped death. He had no partner and no children, was a young man in his 20s and had been here less than ten years. The appellant has been here 14 years, is now 45 years old and has a long term partner and children.

75. DS had been here for about ten years at the date of his hearing. His wife had come here from India and they were divorced although said to be reconciled at the hearing. They

were seeking to adopt a relative's son. DS's offence also involved violence and a weapon. He also had seven other convictions for dishonesty.

76. A D Lee had been both an overstayer and subsequently an illegal entrant. He absconded and evaded immigration control. He used false documents. After his deportation he re-entered illegally on a false passport and was arrested shortly thereafter on drugs offences. He received a seven year sentence. He married his partner whilst in prison and when she knew he had re-entered illegally and in breach of a deportation order. Although he had two children, the younger one was not affected by his removal and the older one, with whom he had bonded for a relatively short period after his release from prison, had adjusted to his departure after initial difficulties. The appellant in our case had not entered illegally and although he had overstayed for a short period after his leave expired in 2000, he subsequently made attempts for regularise his stay and did not seek to evade immigration control. His relationship with AT has lasted 12 years and he has close relationships with all their three children. He has not used false documents.

77. Although the factual bases of these cases differ substantially from the circumstances of this appellant, the principles set out therein are relevant to my assessment and I fully apply them.

78. It could be said that despite the Secretary of State's errors and failings, listed above, the appellant should be removed given his previous involvement in drugs. However that would mean that no consideration was given to the appellant's successful rehabilitation, unchallenged by the respondent in her submissions, to his very close family ties, fully accepted by the respondent, and to the unfairness that deportation would lead to, where it was ordered without an assessment of the full circumstances. It is also the case that when the Secretary of State considered whether to revoke the deportation order she considered representations that were not made for that purpose and which were made without any knowledge of the deportation order. Plainly there were matters which the appellant would have sought to address had he been aware of the fact that his application for leave to remain as a partner was in fact being treated as an application to revoke the deportation order he did not know existed. He could have addressed matters such as his convictions, his re-offending and his rehabilitation. However he was not given any chance to do so before the decision was made. As I have made clear at paragraph 70, the factors to be considered by the Secretary of State, as set out in paragraph 390 of the rules, were not taken into account.

79. I am required to consider the rights of those who will be adversely affected by the appellant's deportation, that is to say, AT and the three children. This principle was set out by the House of Lords in the judgment of Beoku-Betts [2008] UKHL 39. I am also required to consider the best interests of the children under section 55. When considering the family ties described by the appellant, AT and AT's mother (whose unchallenged oral evidence and written evidence before the First-tier Tribunal supports that given by the appellant and AT before me), I find them to be strong and secure. The appellant is plainly the primary carer for the three children aged 11, 7 and 5. As such he has a particularly close relationship with them. This is not the run of the mill type of case where the

appellant helps out with some household chores and childcare; he is the primary carer of the three young children given AT's lengthy working hours. I accept that she is motivated by wanting to establish a secure future for the children and by the need to do it herself given the restrictions against the appellant taking employment.

80. I have taken account of the oral evidence and the written statements and in particular the statements written by the children themselves (in the respondent's bundle). I am mindful of the principles established in ZH (Tanzania) [2011] UKSC 4 with regard to the welfare of children who are innocent victims of their parent's/parents' choices and to the primary consideration that must be given to a child's best interests. An important part of assessing where these interests lie, is discovering the child's own views, hence the importance of the letters written by the children.

81. I also take note of the severe adverse effect the appellant's detention last year had on two of the children. Letters from the school have been adduced and show that B became uncommunicative, developed boils as a result of stress and refused to attend school and L became emotional and withdrawn with a lack of interest in her environment, more noticeably so when other parents came to collect children from school/nursery. Both conditions were considered sufficiently serious to warrant intervention by the local NHS Mental Health Team.

82. Whilst it may be said that the appellant's own bad behaviour caused the distress to his children, it must be remembered that they are innocent victims and that his realisation of the suffering he caused led to the turnaround in his conduct, along with the support and assistance he received from attending drugs counselling. When he was detained in 2012, he had been free of drugs and had remained out of trouble for several years.

83. It is because of the particularly close relationship between the appellant and the children, the vital role he plays in their upkeep and their own heavy reliance on and love for him, that I find their best interests are for him to remain with them and for their family life to continue as it is. This is not a paramount interest but it is a primary one. The children are of an age when they need their parents around them. The exchange of letters, emails and telephone calls at their age would be a wholly inadequate alternative to having their father there for them every day.

84. The appellant's partner and children are all British nationals and have lived here all their lives. AT is not someone who came here from another country and who could be expected to leave with the appellant. It was conceded by Mr Wilding at the error of law hearing before the Upper Tribunal that relocation by the appellant's partner and children was not a suggested option. Despite Ms Holmes' questions on why the family could not live in Jamaica, she did not submit that as a realistic choice and quite rightly so. The appellant's deportation would therefore effectively destroy family life as it now exists. The question is would that be right in all the circumstances?

85. In many deportation cases, that is what happens. Where a foreign national has offended, he has to accept that the result of his offending may be to end family life as he

knows it. However, for the reasons set out in this determination, this is not such a case. The deportation procedure was not properly carried out, resulting in great disadvantage to the appellant and there have been prolonged delays by the Secretary of State in taking steps to remove the appellant. These delays have the effect of reducing the weight that can be given to the imperative need to remove this particular appellant and of course of using him as an example to others for the purpose of deterrence. The lengthy period he has remained out of trouble and clean of drugs since his offences demonstrate the success of the rehabilitation programme he undertook and the absence of any risk to the public.

86. Under paragraph 391, a deportation order in respect of an individual whose sentence can never be spent, as in the appellant's case, can only be revoked if refusal to revoke it would be contrary to the human rights convention of the Refugee Convention. The latter does not apply. However the former does. I have taken account of the steps in Razgar [2004] UKHL 27 and apply the findings I have made to the principles set out therein.

87. Turning to the first of Lord Bingham's questions, it is accepted that the appellant has established family life in the UK. As found by the First-tier Tribunal Judge, that life is particularly deep and rich. The relationship between the appellant and AT had lasted 12 years to date and the appellant is the primary carer of their three children. He is the one who is responsible for the day to day parenting and activities. Details are set out earlier in this determination.

88. With respect to the second question, I find that deportation would either sever the appellant's life with his family or result in the severe disruption of it if the family uprooted ad moved to Jamaica. As it is not suggested by the respondent that the latter is an option, removal would end life as it is for this family. It would therefore have consequences of such gravity as to engage Article 8.

89. The appellant's deportation would be in accordance with the law although there are concerns about the manner in which the deportation proceedings have been conducted so far (as I have explained above). There is the strong view taken by the respondent that deportation of such a person is conducive to the public good and the Secretary of State has a clear right and interest in deporting a convicted criminal. It is also important to recognise the need to deter other foreign nationals who may otherwise enter the UK and commit crimes. I have given considerable weight to these matters.

90. That brings me to the balancing exercise. I have endeavoured in this determination to set out all the factors for the Secretary of State and for the appellant and to reach a balanced and fair judgment. This is not the usual ordinary case of a convicted non national who flouts the laws of this country, has contributed little to it and who has had several opportunities to put his case to the authorities. This is a man whose case has not been properly dealt with by the Secretary of State, whose deportation was made without his knowledge and who never had the chance to put all the representations one would have expected him to have made to the Secretary of State before she took steps against him. It is also a case where the appellant has made good use of the rehabilitation programme offered to him, has mended his ways and stayed drug free for several years. Importantly it

is a case where the appellant's deportation would severely affect the lives of four British born nationals. It is for all these reasons that I conclude that the deportation order should be revoked under paragraph 391.

91. The facts of this particular case, notwithstanding the appellant's convictions, do not support the conclusion that it would indeed be conducive to the public interest for this appellant to be deported. Plainly it was envisaged that some offenders would succeed under the immigration rules (as they were) otherwise there would have been be no point in having an appeal to a Tribunal.

92. The appellant's situation is now very different from what it was in 2003. The rules themselves acknowledge that circumstances can change and that the passage of time itself is a significant factor. When the order was signed, his life had already transformed but, as explained above, no consideration was given to that. Whilst I fully accept that there will continue to be cases where families will have to accept continued separation, I am satisfied that the appellant does not pose any risk to the society of this country and that the continuation of the deportation order would be unjustified in this case. The appellant has realised the detrimental effect of misconduct on his family and has, over the last six or seven years, tried his best to make amends. Undoubtedly AT and the children have had a tremendous effect on him and I hope that that good influence will continue in the future. The time that has elapsed since the offence and an appellant's conduct during that period, the nationalities of the various persons concerned, the appellant's family situation and the well being of any children are also recognised as important criteria for assessing expulsion and continued exclusion by the European Court (Boultif criteria cited in Onur at paragraph 57).

93. The appellant also has another son here by the name of R who is the child of a previous relationship. However there is little evidence before me in relation to this child and he does not factor in my assessment.

94. This decision gives the appellant another opportunity to make a life with his family but he should be under no illusions that he would be treated in the same way if he misbehaves in the future.

95. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. However as this determination refers to young children and the appellant's partner, I make an order for anonymity, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

DECISION

96. The original Tribunal was found to have made an error of law. I now remake the decision. The appeal is allowed under the rules and on article 8 grounds.

Signed:

Dr R Kekić
Upper Tribunal Judge
3 November 2013