



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

Appeal Number: DA/02077/2013

THE IMMIGRATION ACTS

**Heard at The Royal Courts of Justice
On 19 January 2015**

**Decision & Reasons Promulgated
On 6 February 2015**

Before

UPPER TRIBUNAL JUDGE PINKERTON

Between

**I R
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Naik of Counsel
For the Respondent: Mr S Whitwell

DECISION AND REASONS

1. The appellant is a Jamaican citizen who will be 40 years old in 2015. In a letter dated 30 September 2013 the appellant was served with a decision that Section 32(5) of the UK Borders Act 2007 applies to him and a deportation order was made against him also dated 30 September 2013. He appealed the decision.
2. At a hearing before the First-tier Tribunal on 3 March 2014 the First-tier panel dismissed the appeal. The appellant sought permission to appeal to the Upper

Tribunal. Permission was granted and at a hearing before me on 9 June 2014 I determined that the Tribunal had made an error of law and I set aside the decision. A copy of my decision and reasons has already been served on the parties. I gave directions for a resumed hearing before me which was thereafter listed for 8 September 2014.

3. It is of importance that in between those dates and since 28 July 2014 Section 19 of the Immigration Act 2014 inserted into the Nationality, Immigration and Asylum Act 2002 Sections 117A-117D part 5A which part deals with "Article 8 of the ECHR; Public Interest Considerations". I will turn to those provisions later in this decision.
4. Following a written application for an adjournment of the 8 September 2014 hearing the appeal was relisted for hearing on 8 December 2014. On that day the appellant, who is a serving prisoner, was not produced. Everyone was ready to proceed. We waited all morning and were given information from time to time that the appellant was on his way. Ultimately the hearing was adjourned once again because by about 2.30pm the appellant had still not been produced. Information received at that time was that he would not arrive for an hour or more and it was not felt appropriate that the case should start so late in the day.
5. Although I am continuing with my enquiries the information that I have received thus far as to why the appellant was not produced is that although the Upper Tribunal administrative staff sent out the appropriate hearing notices stating that the case was due to start at 10am the production notice was sent in error to DEPMU/Tascor. This is not likely to have caused the problem because the production notice was then forwarded to HMP Highpoint on 10 October 2014. On the day of the hearing it is said that HMP Highpoint handed over the appellant to Serco at 8.50am. The explanation for the delay in producing the appellant appears to be that Serco had "multiple drop offs on their way to London". It is then said that Serco arrived with the appellant at the RCJ at 2.30pm and departed at 2.50pm when told that the appellant was no longer needed.
6. If that information is correct there is still a lot of explaining to do particularly as the appellant was required to be available at 10am to enable the hearing to commence. There is no satisfactory explanation either as to what appears to be false information provided to the Tribunal throughout the morning as to the appellant's movements and expected time of arrival. Furthermore, information was passed to me after the hearing that the appellant had in fact been moved to Pentonville Prison the night prior to the hearing presumably so that he would be close to the RCJ and more easily brought there for 10am as that prison is only about 3 miles from the RCJ. If the appellant had been moved to Pentonville the day before then HMP Highpoint could not have handed him over to Serco at 8:50 am on the morning of the hearing.
7. In the circumstances I had little choice but to adjourn the appeal and this was to 19 January 2015. The appeal proceeded on that date and following the hearing I reserved my decision.

Documentation

8. The documentation that I have before me comprises the respondent's bundle sent under cover of a letter dated 25 October 2013; an appellant's bundle numbered 1-9 comprising witness statements, documents and testimonials; a skeleton argument handed in on 19 January 2015 replacing that which was before the First-tier Tribunal; an updated PNC record in respect of the appellant dated 30 December 2014 sent under cover of a letter dated 6 January 2015; an independent social work report prepared by Marlyn Samuels; a further witness statement of the appellant's wife ("Mrs W") dated 12 January 2015, and other supporting documents including character references. I was also referred to a number of cases during the course of the hearing.

The Appellant's Evidence

9. I heard evidence from the appellant. He was asked about a caution that he received on 4 September 2010 after he had been found in possession of a bladed article. He explained that the article was in the nature of a nail file that he used for painting and decorating. He had just purchased it. He has been a painter and decorator for some six or seven years and it was to be used by him in the course of his work. He accepted that he had also received a fine for driving without insurance in 2007. The car that he was driving was insured in his wife's name and he was driving it using a Jamaican licence, but he had a UK provisional licence.
10. He went on to say that since he has been in prison his wife has come to see him approximately two or three times per month. It is difficult for her to get to the prison because she works full-time. He has a very close relationship with his daughter. As for his 14-year-old son he is in the USA where he lives with his mother.
11. The appellant regrets "every single day" that he committed the offence of robbery for which he received a four year sentence and he finds it really hard when he speaks to his wife. He is due to be released in March 2015 and his wife and daughter are looking forward very much to seeing him.
12. As to the offence itself he never left the house intending to rob anyone. On 15 April 2012 he was at home with his wife. She suddenly felt like fried chicken and chips and he agreed to quickly pop into Catford to get them for her. While he was there he said that a fight started and one man approached him with a traffic cone. He did not take anything from the victim himself and there is absolutely no chance of such a thing happening again. If he had to return to Jamaica he has no family there and nothing to go back to. He does not know how he would manage. His wife has been to Jamaica on two occasions, in February and October 2009, once for the wedding of a friend of hers and the other on the anniversary of the funeral of her father's death. It would be really hard if he was deported. It is not a situation that he wants to think about. It would be really difficult for them all to live in Jamaica as they have their home here.

13. Cross-examined by Mr Whitwell the appellant said that he kept the nail file with his tools. It was kept in a plastic bag with his painting equipment. Every Saturday he and his mates go to shop to buy new materials. They were stopped on their way home in a car. He did not know why the police did not accept that the file was part of his work tools. He gets to work by train and also gets a lift sometimes. When he drives he always has someone with him in the car who has a full driving licence. When asked why it would be difficult for him to re-establish in Jamaica he said that he left there a long time ago and does not know the system there now. He has not discussed what would happen if he had to return there alone. He did not think that his wife and daughter would manage to live in Jamaica. His wife is working and his daughter is at school. It would be quite harsh and unfair on them. They could not live without each other.
14. In answer to questions from me the appellant said that he last saw his son in 2009. He has not been in touch with his son recently because it is hard for him now that he is in prison. The appellant confirmed that his mother is in the UK as are his sister and cousins. He has no friends in Jamaica and contacts no one there. He then said that the impact on his wife and daughter of him having to leave the country would be very harsh.

Mrs W's evidence

15. I next heard evidence from the appellant's wife Mrs W who confirmed her two written statements to be true. She is in full-time work and rents her home. She has an elder daughter who lives nearby, is an adult and has two children of her own. Mrs W has two jobs. Her husband used to take their daughter ("S") to school but she is now old enough to take herself there and return. S is aware of the date that her husband is due to be released. They have discussed the matter together but they have not discussed the situation if her husband is deported. She would be devastated for herself and S if he is deported and she would also be devastated for him because there would be nowhere for him to go in Jamaica. She has not contemplated moving there because she would have to give up her work, home, family and friends. She was born here and has lived here all her life. She has been to Jamaica approximately six times. The first time was in 1995 with a girlfriend and she has been on other occasions to a wedding and her stepmother's birthday, although she is now in the UK. Mrs W then confirmed the position with regard to the caution and motoring offences. As to the robbery she was absolutely devastated. She felt as if her world had come to an end and she is absolutely certain that such a situation would never arise again.
16. Mrs W was then asked what impact this has had on S. Mrs W said she found it difficult to describe how it was. S tries to get away with "bits and pieces". S says she wishes her dad was here because he would understand. They seem to have their own bond. As to the Secretary of State's comment that being a single parent is nothing out of the ordinary Mrs W said that she wanted to marry and have a family. Her first relationship broke down. The appellant has become a part of his stepdaughter's life also. As for Mrs W her health has deteriorated in the last couple

of years. She has had high blood pressure for years. Since the appellant has been incarcerated she has had a lump in her breast and suffers from a frozen shoulder; she is borderline diabetic, has high cholesterol and thrush all of which she thinks has been brought on by stress. She confirms that the appellant has no family in Jamaica. She herself has relations there but her grandparents have died and she has no contact with her father's half-brother in Jamaica.

17. In answer to questions from Mr Whitwell, Mrs W said that during the holidays she tries to get S on a play scheme. Mrs W herself works flexi hours but has often to go in early and go home late. She arranges for a friend to look after S. Her other daughter helps also but works herself. Mrs W's father had S for a week but he is a pensioner and is unable to provide much excitement for her. She would not leave with her husband to form a family unit in Jamaica. It makes no sense for someone to be sent back to Jamaica with no one to go to. He would not reoffend here and will pose a low risk to the British public. She thought he had permission to stay when he made his application for permission to remain. He did not apply for a full driving licence because he had difficulty with the theory test. It would be very expensive for her to go to Jamaica to visit him. Where would he go there anyway as he would be homeless?

SM's Evidence

18. I then heard brief evidence from SM who is the appellant's stepdaughter. She works full-time as a recovery officer. She thought the offence was "a bit out of character" and she was "a bit upset about it". She had discussed it with the appellant and it seemed that he was at the wrong place at the wrong time. He realises what he has put his family through and he would not jeopardise the family again. She has visited him in prison.
19. Cross-examined she said that it was hard on Mrs W and S. She offers what help she can but she has two children of her own. Her role is really as a big sister. Because of health issues and the fact that they are pensioners her mother's parents are only able to give limited help. If the appeal is unsuccessful it will affect her mother and sister "very, very, hard".

Submissions

20. I heard submissions from both parties. Mr Whitwell relied upon the Reasons for Refusal Letter and made the point that this appeal was now subject to Sections 117A-117D of the 2002 Act. The appellant had his formative years in Jamaica and was employed there and bearing in mind that the appellant received a four year custodial sentence he is not able to show that there are very compelling circumstances over and above those described in exception 2 of 117C(5). It is acknowledged that the appellant has a genuine and subsisting relationship with a qualifying partner and a parental relationship with a qualifying child but he would need to show that the effect of his deportation on them would be unduly harsh and, because he received a four year sentence, there would have to be very compelling circumstances over and above unduly harsh for him to succeed and he would not be

able to show that. Mr Whitwell referred also to the written evidence of the independent social worker who could not be cross-examined. There were several matters in the report with which he did not agree and he would have wished to ask her questions about what she had written.

21. Ms Naik relied upon the updated skeleton argument. She accepted that if I had been in a position to determine the appeal prior to 28 July 2014 when the new statutory provisions came into force I would not have to apply them, but as it is I have to.
22. I have read, taken into account and weighed in the balance the statements, documents and testimonials set out in the appellant's bundle. These include the further statement of RL dated 19 January 2015. She is a close family friend who was not called to give oral evidence.

The Independent Social Work Report

23. This report is dated 1 September 2014. It is through no fault of its author or the appellant and his family that she was unable to attend the hearing on 19 January. I accept Ms Naik's statement that Ms Samuels is unwell and unlikely to be well enough to be able to give evidence for some time. No adjournment was sought. Ms Samuels was at court and ready to give evidence on 8 December 2014. It appears to be the case that the statement has not been signed but I have little doubt that she intended to speak to that statement when she was due to give evidence.
24. In the introduction to her report Ms Samuels states that she is an independent social worker; a practising children's guardian; a social work consultant; child protection case conference coordinator independent reviewing officer; family group conference facilitator and trainer. She has received "the appellant's bundle" and refers to S as black British of Jamaican heritage, she being the only child of her parents. S attends a private school that she has been attending since reception class. The home in which S and her mother live is a well-maintained three bedroom house rented from a Housing Association. In a conversation with S she was asked about her wishes and feelings and with regard to her father she said :-

"Well!, well I wish for my dad to come back to my family unit, it feels weird because dad usually cooks my dinner, takes me to school, takes me out and makes me laugh. When I do go and see him my dad he is so happy and he gives me a big hug and kiss. He calls me almost every evening."

When asked what if he was to be sent back to Jamaica; she said "I would be upset and I would try and call him every day but I would not be happy at all."

Ms Samuels then states that she does not believe S has truly conceptualised the prospect of her father being deported and answered the question in an impromptu way. When asked if there was anything else that she chose to tell Ms Samuels S said "To be honest with you, my dad isn't a bad guy. He grew up with a good Christian background and he cares for all people and loves everyone. Even if he saw someone out on the street who was hurt, he would try to help them." S then went on to tell

Ms Samuels about her summer holidays, that she attends a play scheme, but she does not tell anybody where he (the appellant) is; she says that he has gone on holiday and that she misses him a lot.

25. At this point I refer to a letter from the appellant's school dated 27 February 2014. That letter refers to an earlier one which is in the respondent's bundle and states that to the school's knowledge the appellant has always been involved in the general development of S. He has always dropped and picked her up regularly from school and been in attendance as occasion demands at parents' evenings, sports days, Christmas presentations and other school events. The 27 February 2014 letter states

“... Although we are not trained psychologists, it has been observed however that S shows a slight dip in her academic performance. We cannot categorically link this to the absence of the dad but we are of the opinion that his presence in her daughter's development especially at this stage can only be better for S.”

Ms Samuels comments that she is in total agreement with the “essence” of the letter but is of the opinion that the school is not in the best position to make such comments and the court should be mindful of this. In her opinion as an independent social worker she would make the link of her father's absence to the decline in S's academic performance.

26. In the conclusion of her report Ms Samuels says that the impression gained from the interviews that she has undertaken with both the child and her mother is that “if ever there was a genuine case to be had it was this one. (The parents) constitute a family along with their daughter (S). For the reason of (his) immigration status and initially being unable to seek employment (the appellant) became and has remained the primary carer for his daughter S. His working conditions were more flexible than those of his wife so when he gained employment he continued to remain as (S's) primary care giver. He undertakes equal share of the household duties and undertakes the majority of the cooking for the family.”
27. The conclusion continues that Mrs W's health has deteriorated considerably since the appellant's imprisonment and if this continues she will not be able to remain in full-time employment and would therefore be unable to pay the necessary school fees for S's final year in primary school. There has already been a decline in S's emotional wellbeing which has been noted by the school since the incarceration of her father. The appellant and S are extremely close and therefore the person that will be most affected by the proposed deportation with, “the right to family life” will be S.
28. In Ms Samuels' opinion any deportation of the appellant would be contrary to the provision of Section 55 of the Borders, Citizenship and Immigration Act 2009 which imposes a statutory duty upon the Secretary of State to safeguard and promote the welfare of children. “It has been stated throughout the papers that the incident in which I understand he did not take part in but was a bystander, was totally out of character. It would not be in S's best interests if her father was deported as it would clearly deprive her of the right to family life.”

The Burden and Standard of Proof

29. In immigration and deportation appeals the burden of proof is on the appellant. The standard of proof is that of the balance of probabilities that the appellant falls within the relevant Immigration Rules applicable to remain in the United Kingdom. The appellant claims that his removal would breach the United Kingdom's obligations under the 1950 Convention with particular regard to Article 8 thereof and as such removal would breach his rights to family and private life. On that matter it is for the appellant to show that there would be an interference with his human rights. If that is established and the relevant Article permits, it is then for the respondent to establish that the interference would be justified. The appropriate standard of proof in relation to Article 8 claims is the civil standard of the balance of probabilities. Under exception 1 of Section 33(2) of the UK Borders Act 2007 exception 1 is applicable in cases where removal in pursuance of the deportation order would breach the appellant's rights under the European Convention on Human Rights or the United Kingdom's obligations under the Refugee Convention. The appellant has not claimed that the United Kingdom would be in breach of its obligations under the Refugee Convention but does claim that his removal would breach his and his family's rights under Article 8 ECHR.

My Findings of Fact

30. In the main I accept the appellant's evidence. However, I do not accept as true everything that he has said. I find that he has played down the circumstances surrounding the caution that he received in relation to the bladed instrument. If the circumstances were such as he describes it is difficult to see how what occurred led to him receiving even a caution. Nevertheless this is a relatively minor matter.
31. I accept that the appellant's immediate family is in the United Kingdom and has migrated here over a number of years. The appellant's son by another relationship lives in New York and the appellant has not seen him since 2009. The appellant says that he knows no one in Jamaica now. I find that likely to be a distortion of the truth. He was born and brought up in Jamaica from birth in 1975 until he came to the United Kingdom in April 2001, some 26 years later. He attended school and worked in Jamaica. He will have made friends. He has returned to Jamaica on at least two occasions. I do not accept that he would not know anyone there. Although he will have friends and acquaintances there I accept that he may not be in touch with them and whether any of them would be able and willing to assist in any way such as emotionally, financially or practically is not something about which I speculate.
32. From his reaction at the hearing (at one point he broke down as he was giving evidence) it is clear to me that he realises the problems that he has caused Mrs W and S by his behaviour.
33. I found Mrs W to be straightforward and honest and she did her best to answer truthfully the questions that were put to her. Understandably she is likely to have relatively little knowledge of what friends and, perhaps, more distant relatives her husband has in Jamaica.

34. I give less weight to the evidence of other witnesses who have done their best to support the appellant and his family in this whole unfortunate matter. Having said that it is clear from all the evidence that has been put before me that S has a very good relationship with her father and he with her.
35. The appellant will be 40 years old in 2015. He was born in Jamaica and spent approximately the first 25 years of his life there. He worked as a painter and decorator and "in catering". From a relationship that he had in Jamaica he has a 14 year old son who lives in the USA with his mother. I assess from the son's date of birth that the appellant came to the United Kingdom approximately 7 months after his son was born. There has been some contact between the appellant and his son but none recently. The appellant last saw him in 2009. I accept that the appellant's close family members have migrated to the United Kingdom.
36. The appellant arrived in the United Kingdom as a visitor on 27 April 2001 and was later granted further leave which expired on 27 October 2001. He did not return to Jamaica. In May 2003 he made an out of time application for leave to remain as a student. I do not know the particular details and, for instance, whether the appellant chased up that application but it seems that no decision was made in relation to it until 2008. During the intervening period he met Mrs W. Their daughter S was born in January 2004 and is at the time of hearing now 11 years of age. The appellant and Mrs W married in September 2004 and in December of the same year he made an application for leave to remain on the basis of his marriage. Again there was no decision on that application until September 2008 when he was granted discretionary leave for a period of three years. He submitted a further application in September 2011 for further leave to remain outside the Rules which was considered in conjunction with the deportation order.
37. The appellant first came to trial on 9 October 2012 for robbery. The jury were unable to reach a verdict in relation to the charge against the appellant but his co-defendants were convicted. After a retrial the appellant was convicted on 7 May 2013 of robbery on the basis of joint enterprise for which he received a four year prison sentence.
38. Although the matter does not appear to have been raised elsewhere I note that the appellant wrote a letter to UKBA on 9 March 2012 referring to him having been released on bail in October 2011 pending his trial on 16 January 2012. He writes to advise UKBA that "as of 16 January 2012 I was acquitted of all charges against me at Woolwich Crown Court ...". I know nothing further about that matter and do not take it into account as the appellant says that he was acquitted, although he must have been charged with an offence. The only other relevant matters are that, according to the appellant, in June 2006 he was fined for driving other than in accordance with his licence and on another occasion for driving without insurance. He was fined for both offences.
39. The sentencing remarks of the judge following his conviction at Woolwich Crown Court include the following:-

“I have watched the video of that robbery on many occasions in the course of the trial that I conducted and I have no doubt at all that the jury were right to convict you; the evidence you (sic) was overwhelming.

You and the two other men hid down a side passageway late at night and attacked Mr M when he was completely unsuspecting and on his own. It was a cowardly attack, three men on one, which must have been extremely frightening for Mr M.

... I take the view that your involvement in this robbery was not as great as the man who actually conducted the robbery, Mr B, who removed the wallet, but equivalent to that of Mr P.

I take into account that Mr B has a serious previous criminal record and that both you and Mr P have effectively not been involved in any serious way with the law.

Nevertheless, this is a very serious matter indeed. A robbery of this kind, late at night, weapon was used and it was, as I have said, an ambush, means that I have to take this very seriously and only a sentence of imprisonment is appropriate.

... I have listened to the matters that were put forward in mitigation and I have to say – and I say it in open court because your wife is present, I understand, so she can hear it – that unfortunately the consequences for your family are consequences which you have brought upon them. They are not mitigating factors, they are simply the consequences of this behaviour. You should have stood back, you should not have been party to that ambush, you should not have got involved at all and you should have walked away. Why you were weak on that night and got involved, I do not know.

But I am able to balance the aggravating factors that I have mentioned against the fact that you have effectively a previous good record and have tried hard to look after your family while you were here and that is why the sentence is exactly the same as I have said and will be four years.

You will be released on licence after two years but you are liable to be recalled if you get into trouble again afterwards.”

40. It appears to be common ground that the appellant did not seek leave to appeal against conviction or sentence.
41. The appellant has provided documentation to show that for some of the period anyway that he has been in the United Kingdom he has worked as a subcontracted painter and decorator and has paid income tax appropriately. He has provided statements of payment and deduction for months ending 5 May 2009 to 5 February 2010 and then 5 July 2010 to 5 November 2010.

42. I have read and give some weight to the character references that have been forthcoming from prison officers at HMP Highpoint who have clearly been very impressed by the appellant who always does as he is asked and goes beyond what is expected of him to help staff and other prisoners. There is reference to him being a devoted father and husband who has been committed to maintaining his strong family ties during his time in custody by means of social visits, letters and through using the prison telephone. Also through hard work, patience and his faith in the Lord it is said that he has managed to show remorse for any wrong doing in the past and has made real steps to improve and progress during his time in custody and upon his release.
43. I give some weight to the pre-sentence report prepared for the Crown Court in May 2013. I do not set out here everything that is contained within that report but there are some matters which would not allow me to conclude with certainty that once the appellant is released from custody he would return to the bosom of his family, be an ideal working father to S and husband to W, and keep out of trouble. I note in particular at page 7 of 9 in the report under "Thinking and behaviour" that in respect of "thinking skills" the circumstances of the offence indicate a distinct lack of consequential thinking and impulsive behaviour which is indicative of deficits in problem solving. The appellant's behaviour appears to have been fuelled by what he interpreted as the victim's initial "flashing of lights", "looking for a fight", and alleged "insult" when he approached the group. In assessing this it is clear that the appellant sought no other alternative to address what had been perceived as offensive, and resorted to violently robbing the victim to retaliate. There appears to be no remorse for his actions which further indicates a lack of victim empathy and a failure to accept responsibility for his actions. The appellant was assessed as demonstrating some level of interpersonal skills and appropriate thinking but his ability to disregard and respect social and legal boundaries constitutes risk issues linked to offending and likelihood of causing serious harm.
44. Under "Attitudes" the appellant is said not to appear to overtly condone pro-criminal activities. However in discussing the offence he did remark that the victim/s "looked like they wanted a fight" and it is possible that this may have contributed to his behaviour. Therefore the assessment was that the appellant's attitudes contribute to risks of offending and likelihood of causing serious harm in the future. It is noted that of offenders with similar age, gender, criminal history and social/personal risk factors, about two in ten are known to reoffend violently and about one in ten non-violently within two years. He was thereafter assessed as posing a medium likelihood of causing serious harm to members of the public; those specially vulnerable are individuals perceived to be carrying valuable items or who may be on their own. That risk would be increased if he were in the company of other pro-criminal associates, therefore boosting his level of confidence in commission of an offence. In determining dangerousness the court had to be confident that there was a significant risk of the appellant committing further specified offences. Although the nature of the index offence is serious he did not have a history of committing specified offences and therefore he was assessed as not currently satisfying the criteria to be assessed as "dangerous". There was a comment

in the conclusion on page 9 of the report that the appellant's denial of the offence serves as an aggravating feature of the offence indicating his lack of insight into his behaviour and how it affected the victim. There is a further conclusion that to his credit he has no previous convictions or evidence of similar behaviour either in a group or on his own and the offence appeared to have been an opportunistic venture. His behaviour appeared to be out of character and it was therefore possible that on this occasion the influence of the group may have affected his behaviour.

45. I have also considered the result of the request for offender management information provided to the Home Office Criminal Casework and others that assesses that the risk of the appellant reoffending within two years is low but that if he did reoffend the risk of serious harm level would be "medium". The risk would be greatest on release and when in the company of other pro-criminal associates. He is likely to involve in behaviour indicative of a likelihood of causing serious harm and has been assessed as medium likelihood of causing serious harm in those circumstances.

Findings in Relation to Mrs W

46. Mrs W is now 51 years old. She was born in the United Kingdom and is a British citizen. She has a daughter by a previous relationship who herself has two children. They all live in the same neighbourhood in London. Mrs W describes the marriage to the appellant as a very happy one, albeit not without its ups and downs. She has met and gets on with all of his family as he does hers. The relationship between the appellant and their daughter S she describes as "truly fantastic". Mrs W works full-time and in addition has a part-time job which she has held for many years. She took that job to earn a little extra cash to help with meeting the costs of raising her own daughter which she had to do as a single parent. The nature of the appellant's work means that he has far more flexibility than she and as a result he is very much involved in S's care. She describes the appellant as a self-employed decorator who is also an excellent cook and has a sideline catering for functions. The relationship between S and the appellant is "fantastically close". She is a typical daddy's girl and he takes her to and collects her from school, prepares her meals and helps with her homework. She considers that in all respects he could quite properly be regarded as her primary carer.
47. Mrs W's shock at the appellant being found guilty of robbery and sent to prison was only surpassed by the feeling of "utter devastation and disbelief when I learned he was to be deported". The marriage is both genuine and subsisting and the notice of decision which seeks to justify the decision to deport disappointed her. There appears to be a complete disregard of the traumatic effect that forced separation will have upon her and S's rights to family and private life. Mrs W was born in the UK and has lived her whole life in south London where she went to school and where her family and most of her close friends live. She has a very close relationship with her elder daughter and the two grandchildren.
48. Although it has been said that Mrs W has been able to care for their daughter without any outside assistance and has been able to depend on extended family

members to assist her should this be required, this demonstrates a serious failure to understand the important role of a father generally but more importantly it fails to recognise the special bond that exists between the appellant's daughter and her father.

49. Her other daughter's father played no part in her life despite being relatively close by and she would not want the same to happen to S. The impact of the separation upon S has already seen an adverse reaction both at home and in relation to her progress at school. She is a very forward child, which can make her appear cheeky and argumentative. Her father has always been responsible for her discipline but since he has been in prison Mrs W has often found it difficult to get her to do as she is told, including her homework. She has no idea whatsoever how she would deal with S if in reality he is to be deported and prohibited from ever returning. S had understood that her father would be coming home in May 2015 and has been able to use that light at the end of a very long tunnel as a comfort for her. She is currently considering whether some form of counselling would help S to get back on track as regards her attitude and behaviour at school. This is particularly important as Mrs W will soon be starting the process of identifying and applying for S's secondary school. Currently she attends a small independent school but Mrs W would not be in any position to continue to pay fees when she starts secondary school.
50. Mrs W states that the threat of deportation has taken its toll on her health and has affected her own wellbeing. This is clearly attributable to the trauma and uncertainty of her husband's deportation. There is a letter from Mrs W's GP who states that she has been seen on several occasions with stress related problems. He then describes these and states that Mrs W is very stressed and upset about the "pending review for deportation back to Jamaica" and it is having a significant impact on her health.
51. Much of what is set out in the previous paragraphs in relation to Mrs W was taken from her statement which is dated 26 February 2014 i.e. almost a year ago. In her latest statement of 12 January 2015 she states that S's schoolwork continues to suffer because her father has not been there to support her homework which he always did. Mrs W still carries out two jobs which means that she has not been able to compensate for the time that S had spent with her father and her studies at home. Mrs W is now borderline diabetic and has been suffering from a frozen shoulder for which she has received cortisone injections, but her condition is worsening because the pain is radiating down her arm and neck. She considers that having the appellant to support her would be a considerable help.
52. Financially things have been very tough. She is behind with her daughter's school fees which would not have been the case if the appellant had been there to contribute to the finances of the household. S has had to learn to go to school on her own and return in the same way.
53. Mrs W continues to use various family members to support S and look after her when Mrs W has to be at work. Mrs W and S continue to speak regularly to the appellant on the telephone and to continue to visit him when they are able. If he

were to be removed from the UK it would be incredibly difficult for S and the appellant to continue that bond. S is due to move schools at the end of the summer and this is a difficult time of change for any young person. As she enters her teenage years it will be more important than ever having regard to the fact that her father is her main carer that she has him there to support her through this time.

54. Mrs W maintains that it would not be possible or practical for S and her to join the appellant if he were to be deported and this could only result in the continued deterioration of S's wellbeing and education. The financial strains that would inevitably result could not be sustained by them as a family unit and the only way that they could deal with the issues would be by the appellant being allowed to remain with his family in the UK. She asks that the Tribunal finds that the circumstances of the special bond between S and her father are truly exceptional and that his deportation in consequence of his conviction that was entirely out of character is disproportionate so as to amount to a breach of their rights.
55. My findings in relation to Mrs W are that she is a hardworking woman who is in a genuine and subsisting relationship with the appellant. In the past she struggled to bring up SM on her own whilst working full-time and additionally taking a part-time job to help make ends meet. Nevertheless she clearly made a good job of bringing her up as SM has a good job and is raising two children also. Since the appellant has been in prison Mrs W has had to face the same situation of bringing up S on her own and dearly wishes to avoid that continuing for any longer than it already has. I accept that the appellant's hours of work would to some extent be more flexible than Mrs W's and that for some of the time he was not working. However, there would have been times also when they were both working and sharing the responsibility for bringing up S. Mrs W has health problems. She is receiving appropriate medical care for them but it appears likely to me that stress is affecting her health adversely. She has had to endure a lot of stress because of her husband's participation in the robbery in April 2012.

The Child S

56. S has recently reached her 11th birthday. S wrote a letter in September 2013 which is a plea to the Home Office not to send her father to Jamaica because he cooks her dinner and takes her to school but now her mother has to. That is very hard because Mrs W has to get to work for a certain time. He is her father and she will not be able to see him again and her education is very low because he is not there to pick her up. He is part of her life and she loves him so much. There is a further letter from S written, it seems likely, just before the hearing before me in which she states that her dad is her life and they speak every day. He calls her every morning before she leaves for school and when she returns from school. She misses him as he has always cooked for her. She hopes and prays that he can come back into the family unit. She would be upset and unable to cope if he was not able to return.
57. S attends a small private school close to where she lives. According to the social worker report Mrs W pays "£490 per month, totalling £1,400 per term for school

fees". There are two letters from the principal of this school dated 5 September 2013 and 15 January 2015. I have already referred to these two letters but there is a further one which is wrongly dated 16 January 2014 and which must be 16 January 2015. The principal is the same person that wrote the previous two letters who expresses her amazement that the issue of S being away from her father not having been resolved is quite amazing. S has often spoken about missing her father with peers "to the hearing of teachers" and the principal feels this could be the cause of her being absentminded sometimes. "We believe that his continued presence in her (sic) daughter's development especially at this stage can only be better for S."

58. There is a school progress check for autumn term 2014 which sets out her achievement and efforts in a range of subjects which are mainly shown to be Cs with some Bs and one A, where A is excellent, B is good and C is satisfactory. The teacher's comments are:-

"S is a capable member of the class. She has the ability to produce good work in most of the subjects. S responded well to one to one teaching but sometimes needs to be reminded to stay focused on the task at hand. She has the ability to do better if she maintains a more positive attitude to work."

59. From all that I have heard and read I find that S and her father have a close relationship. He has played a major part in her life up until his remand in custody and/or imprisonment. S has no physical health problems. She is very sad that her father is currently incarcerated. She is clearly aware that he faces deportation and has some idea of what that will mean for her, her mother and father if deportation becomes a reality. Her school work has been affected to an extent by this even though I appreciate that there could be many reasons why a child of her age would not "stay focused on the task at hand" or be "absentminded sometimes". As to whether she would be "unable to cope" if her father is deported it seems to me somewhat speculative and a difficult concept for someone of her age to envisage with any degree of understanding as to what this would mean. Nevertheless given the relationship as described there is little reason to doubt that she will be badly affected by his removal. I tend to agree with Mrs W that knowing he is to be released in the near future would help her to function more normally than would be the case if he is to be removed.
60. I have only one particular concern in relation to the report from Ms Samuels and that is at 4.2 where she states that it is her opinion as an independent social worker that she would make the link of the appellant's absence to the decline in S's performance. Whereas I can accept that the fact is that there has indeed been a decline in S's academic performance it is not deemed to be unsatisfactory as is shown by the school progress check referred to above. I do not find that the report is particularly helpful. Much of what is written in the conclusion seems to deal with matters that are for me to decide and I do not understand the statement made at 5.2 that the impression gained from the interviews that Ms Samuels has undertaken with both the child and her mother is "if ever there was a genuine case to be had it was this one". Any

family caught up in deportation proceedings is bound to suffer and it is not demonstrated why this particular case is any more “genuine” than any other.

The Best Interests of S

61. I turn now to assess the best interests of S. Under Section 55 of the Borders, Citizenship and Immigration Act 2009 the respondent has to make arrangements for ensuring that in relation to any immigration, asylum or nationality functions regard must be taken to the need to safeguard and promote the welfare of children who are in the United Kingdom. This is a duty that the respondent states that she recognises.
62. The Secretary of State in the notice of decision is of the opinion that it is in the best interests of S who is a British citizen to remain in the United Kingdom in the care of her mother as she has done since birth and where she may continue to receive support from family members and friends. The respondent states that it has considered that Mrs W has been S’s primary carer since the appellant’s incarceration. There is no evidence to suggest that this cannot continue or that S has been emotionally or socially disadvantaged by this. In addition it is noted that she is of school age and it is considered that she is in a settled environment and has formed relationships with friends and class teachers. The appellant would be able to maintain contact with her by modern forms of communication as he has done since his incarceration. Alternatively she could visit him in Jamaica. It is also said that there is no evidence that S has suffered any ill-health or that her development has been impaired.
63. My own findings as set out above lead me to conclude that there has been some tangible adverse effect on S’s schoolwork and emotional stability and development. The appellant and Mrs W have shared care responsibilities in the past as is shown from the evidence provided. The appellant has at times been the primary carer, particularly when he has not been working. At other times that responsibility has been shared. Since the appellant’s imprisonment there is no doubt at all that Mrs W has been the primary carer and would continue to be S’s primary carer in the future once the appellant has been deported.
64. I assess that there is a low chance of the appellant reoffending. Despite him being a poor role model in the sense that he committed a serious offence he has been a good father and husband. The ideal position for S would be for the appellant to return to the family home as this would benefit the appellant, Mrs W and S in terms of stability, and both financially - assuming that the appellant obtained work which is likely to be the case - and emotionally. It would be best for S to be brought up by both her parents.
65. I have borne in mind that although S has already been affected adversely by what has occurred it is difficult to assess what the consequences would be in the short, medium and long term of her father being deported. It would certainly not be beneficial to her. In my view undoubtedly some harm would be caused and I give considerable weight to that. It is true that S is in a settled environment and will have formed relationships with classmates and teachers. She is currently at a private

school and she will be changing schools later in 2015 when she goes to secondary school. This is likely to be a difficult time for her with the change of schooling, making new friends, and getting to know new teachers.

Other Considerations

66. It has not escaped my notice that Mrs W has been paying for legal representation and is actually said now to be behind with paying school fees. One hopes that once such fees are no longer payable there would be a benefit to the family purse which could be utilised in making visits possible to Jamaica if the deportation of the appellant takes place. I acknowledge that "modern forms of communication" are no substitute for a relationship where the parties live together as a proper family.
67. I have already stated that as far as Mrs W is concerned this is a genuine and subsisting marriage. The effect of the appellant's deportation to Jamaica would have adverse consequences for her without a doubt although she has in the past brought up another daughter with help from family members and others and would be doing so again. Others would be less affected by the appellant's deportation, but affected nevertheless. Amongst these in particular are SM and the grandchildren although they lead largely independent lives. The appellant has his mother and other family members here. They will be affected by his departure and the appellant in turn will miss his relatives and friends that he would be leaving behind. I am quite sure that he would be adversely affected by his deportation and in particular the loss of his family.
68. The appellant would be returning to Jamaica with no immediate members of his family there. I do not accept that he will know nobody in Jamaica for reasons that I gave earlier. He is of an age that he can work and he may well be able to return to similar work in Jamaica that he was doing in the United Kingdom, and prior to that in Jamaica, up until the age of 25 when he came to the United Kingdom.
69. I note from pages 7 and 8 of the notice of decision that there are said to be currently two NGOs offering emergency accommodation for men and there are a number of organisations that "have helped deported persons to resettle in Jamaica over the years". They are said to offer support in finding accommodation, reuniting deported persons with relatives and friends, support and advice, referrals to other services and redocumentation. There has been no challenge, as far as I am aware, to what the respondent says about what support might be available in Jamaica for the appellant, should he require it. There is the further point that the appellant is said to be a church member and god-fearing. If that is indeed so it is quite possible that he could be helped by the church in Jamaica - I use the word "church" in its broadest sense.

The Law

70. As already stated Section 19 of the Immigration Act 2014 inserted part 5A into the Nationality, Immigration and Asylum Act 2002. The new Sections 117A - 117D set out statutory guidelines that must be applied when the Tribunal has to decide whether an immigration decision to remove someone from the UK would be in

breach of Article 8 rights. The Immigration Rules were amended on 10 July 2014 (by HC 532) and apply to all ECHR Article 8 claims made by foreign criminals which are decided on or after 28 July 2014, as in this appeal.

71. Under 117C the deportation of foreign criminals is in the public interest. The appellant is categorised as a foreign criminal who has been sentenced to a period of imprisonment of four years. Therefore under 117C(3) the public interest requires his deportation unless exception 2 applies. That exception applies where the appellant has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of his deportation on the partner or child would be unduly harsh. In this appeal the appellant has a genuine and subsisting relationship with both a partner and a child. Therefore the question to be asked is whether the effect on them of his deportation would be unduly harsh. However, that is not the only question to be considered. Under 117C(6) where (as in this case) the appellant has been sentenced to a period of imprisonment of at least four years the public interest requires deportation unless there are very compelling circumstances, over and above those described in exception 2. That is a very high hurdle for the appellant to overcome.
72. Ms Naik on behalf of the appellant submits in the skeleton argument that there are very compelling circumstances that exist over and above the provisions in the applicable exception because there is not only a qualifying wife but a qualifying child also. They are both British citizens. It is submitted that greater weight should be given to cases where the appellant can meet both limbs of the exception. The further point is made that the statutory provisions make no distinction between a British child who has lived in the UK for over seven years and a non-British child who has done so. They are treated equally. This fails to consider the impact of the loss of the importance of British citizenship itself along with the length of residence here of the child in determining the question of proportionality.
73. In considering any appeal under Article 8 of the 1950 Convention the following separate questions have to be determined in accordance with the House of Lords decision in **Razgar [2004] UKHL 27:-**
 - (i) Will the proposed removal be an interference by a public authority with the exercise of the appellant's right to respect for his private life or (as the case may be) family life?
 - (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
 - (iii) If so, is such interference in accordance with the law?
 - (iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(v) If so, is such interference proportionate to the legitimate public end sought to be achieved?

74. I accept that it is necessary to evaluate whether the public interest in deportation outweighs the Article 8 rights of the appellant, his wife and child. I take into account that the length of the appellant's sentence being 4 years but no more is a factor to be taken into account in the proper assessment of proportionality outside the Rules. Although I cannot assess this as a near miss argument I can give some weight to that fact given the arbitrary nature of the statutory threshold.
75. I have found that the interests of Mrs W and S are best served by not disrupting their present circumstances by leaving the UK to live with the appellant in Jamaica. Nevertheless, that is an option open to them if the appellant is deported. The possibility of moving to Jamaica, I gather from the evidence, has not been discussed as a rational alternative because the family is hoping that the appellant will remain in the United Kingdom.
76. Jamaica is not entirely unfamiliar to Mrs W, she having visited there on six occasions. Nevertheless the link to Jamaica is now somewhat tenuous and would entail massive upheaval for all the family if they were to settle there. Although the possibility of moving to Jamaica is a decision that might be taken by the family I do not find that it would be reasonable to expect Mrs W and S to relocate with the appellant to Jamaica.
77. Factors that are in favour of the appellant, his wife and child in considering the Article 8 position are the quality of their relationship and the difficulties of relocating to Jamaica; the strong ties that Mrs W and S have with the UK; the effect as I have already stated upon each of them, and in particular S; the effect upon other family members by the severing of the appellant's private and family life here; the fact that the appellant has resided in the UK for some thirteen years mostly lawfully and thereafter with discretionary leave as the spouse of a British citizen; the four year sentence which triggers the exceptionality provision in the Rules is at the lower end of the scale, and the likelihood or perhaps rather the lack of likelihood of reoffending.
78. Against those matters are the statutory guidelines as already set out and the weight to be given to the fact that the appellant is a foreign criminal who has received a four year prison term.
79. On the facts as I have found the effect of his deportation on Mrs W and S would be harsh and possibly even unduly harsh given that the expression "unduly harsh" is almost incapable of precise definition but in any event I am not able to find that there are very compelling circumstances over and above the exception as set out in 117C(5) of the 2002 Act. The public interest in deporting foreign criminals is so great that only in exceptional circumstances will it be outweighed by other factors, including the effect of deportation on any children.
80. As was said in AJ (Angola) [2014] EWCA Civ 1636 at [39] – [41] the fact that the new rules are intended to operate as a comprehensive code is significant, because it means that an official or a tribunal should seek to take account of any Convention rights of

an appellant through the lens of the new rules themselves, rather than looking to apply Convention rights for themselves in a freestanding way outside the new rules. This feature of the new rules makes the decision-making framework in relation to foreign criminals different from that in relation to other parts of the Immigration Rules, where the Secretary of State retains a general discretion outside the rules in exercise of which, in some circumstances, decisions may need to be made in order to accommodate certain claims for leave to remain on the basis of Convention rights, as explained in **Huang and R (Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin)**.

81. **SS (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 550** and **MF (Nigeria) [2013] EWCA Civ 1192** as well as **AJ (Angola)** all emphasise that 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.
82. The consequence for this family is serious. The heavy weight that I have to place in the scales in favour of deportation as required under the statutory guidelines and in the rules I find is not outweighed by other factors. There are no very compelling reasons over and above factors set out in rules 398, 399 and 399 A or elsewhere which outweigh the public interest in deportation. In coming to my decision I have taken all matters into account including the evidence before me; the submissions made and also the general Article 8 factors considered in cases such as **Uner v The Netherlands [2006] ECHR 873** ; the applicable Immigration Directorate Instructions of 28 July 2014 and January 2015 and case law.
83. The First-tier Tribunal decision has already been set aside. My conclusion is that the appellant does not succeed in his appeal and this is for the above reasons.

Notice of Decision

This appeal is dismissed.

I make an anonymity direction to protect the identity of S who is a child.

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

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

Signed

Date

Upper Tribunal Judge Pinkerton