Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00114/2009

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 11 June 2013	**On 4 July 2013**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MR S B
(Anonymity direction made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: the appellant appeared in person and was not represented
For the Respondent: Mr P Nath a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Jamaica who was born on 29 November 1978. On 12 January 2009 the respondent made a deportation order against him by virtue of section 32 (5) of the UK Borders Act 2007. At various times their positions have been transposed, each has changed from being the appellant to the respondent and vice versa.

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In this determination and in the hope of achieving consistency and clarity I will refer to the claimant as the appellant and the Secretary of State as the respondent.

2. The appellant appealed against the deportation order and his appeal was heard in the Asylum and Immigration Tribunal by a panel consisting of an Immigration Judge and a non-legal member on 28 April 2009. Both parties were represented. The appellant's appeal was dismissed. He applied for and obtained an order for reconsideration. On 12 August 2009 a Senior Immigration Judge found that the panel had erred in law by misunderstanding important aspects of the evidence as to when the appellant and his partner (later his wife) had lived together. A rehearing was ordered.

3. The appeal was re-heard in the Asylum and Appeal Tribunal by an Immigration Judge on 5 October 2009. Once again both parties were represented. By this stage it was clear that the appeal was being pursued on Article 8 human rights grounds only. The judge allowed the appellant's appeal.

4. The respondent sought permission to appeal to the Court of Appeal which was granted by a Senior Immigration Judge. On 24 June 2010 the Court of Appeal heard the appeal. By this stage the appellant was not legally represented. Counsel appeared for the respondent. The Court of Appeal allowed the appeal, quashed the decision of the Immigration Judge dated 15 October 2009 (which followed the hearing on 5 October 2009) and directed that "the matter be remitted for reconsideration in its entirety to the Upper Tribunal".

5. The rehearing has been listed before the Upper Tribunal on a number of occasions, as far as I can see on 25 June 2012, 20 March 2013, 16 April 2013 and today. The appellant does not appear to have been legally represented since sometime before the Court of Appeal hearing. Various directions have been given in an attempt to ensure that all the necessary documents and witness statements were put before the Tribunal, preferably in advance of the hearing and giving everyone time to consider them. Except to a very limited extent the appellant has not complied with these directions.

6. The first occasion on which the appellant appeared before me was 16 April 2013. He told me that he had been trying to obtain legal representation, so far without success, but he has an appointment with a solicitor later that week which he hoped would lead to his obtaining legal help. He had not been able to afford the sums which some solicitors had asked for. He told me that he was not currently working. His funds were very limited and he hoped to be able to obtain legal aid. He accepted that he had received the notices of hearing and the various directions. He asked for an adjournment which the Presenting Officer opposed. I granted the adjournment to give the appellant another and probably last chance to obtain legal representation. I explained to him what he needed to do in order to

comply with the directions, the importance of supplying witness statements and documents and that he should bring all his witnesses to the adjourned hearing. I indicated that he would be unlikely to obtain another adjournment.

7. At today's hearing the appellant told me that he had not been able to afford the fee sought by the solicitor he had been to see and had not been able to obtain legal aid. He brought with him Mrs X who is his mother-in-law, Ms Y who is the mother of his son A, A aged 12, his daughter B aged 18 and his daughter C aged 11. He said that his wife could not attend because she was unwell; suffering from a stomach bug and his son D wished to attend but could not do so because he was taking a Maths exam. He indicated that he wished to call all those present to give evidence. He produced letters from A, B, C and Ms Y. There was no letter or statement from his wife.

8. Mr Nath indicated that he would not wish to cross examine any child witness. Ms Y, A's mother, expressed a strong preference that her son should not give evidence or remain in the hearing room. After discussion as to whether it was appropriate for younger children to give evidence or to remain in the hearing room the appellant agreed that the best course of action would be for A and C not to give evidence or to remain in the hearing room. B, aged 18 would give evidence.

9. I went through the documents on the Tribunal file with the appellant. It appears that he has everything in the respondent's bundle. I told him that there was on the Tribunal file a bundle prepared by his former solicitors running to 63 pages which was put before the panel for the first hearing. I showed it to him and he agreed that this was the case. Mr Nath did not have this bundle so copies were taken for him and I gave him time to read them. The appellant thought that there had been a further bundle produced by his solicitors for a subsequent hearing, probably the hearing on October 2009. These are not on the Tribunal file. The appellant could not remember what this bundle contained or whether there was anything important on which he wanted to rely. I told him that he and his witnesses could give evidence in relation to matters both before and after what was set out in the witness statements annexed to the bundle before me. Copies of the case law to which reference was made were given to the appellant.

10. I explained the hearing procedure to the appellant and to each witness what was required of him or her. I told the appellant that I would do my best to assist him within the limits of fairness to both sides. It was clear that the appellant did not know how to order his evidence or ask questions of his witnesses. If I had left him to attempt this I considered that only limited coherent evidence would have emerged and important issues would not have been addressed. In the circumstances and without objection from Mr Nath I took the appellant and each witness through his or her evidence

taking as my starting point such witness statements, letters and other information as I have. I asked the appellant and the other witnesses whether they wish to add anything. Mr Nath cross-examined the witnesses apart from B.

11. I heard oral evidence from the appellant, Ms Y, Mrs X and B. Their evidence is set out in my record of proceedings.

12. Mr Nath relied on the reasons for refusal letter of 19 January 2009 and the judge's sentencing remarks. He argued that there were uncertainties and inconsistencies as to the periods of separation between the appellant and his wife. For one period he said 2005 and she said 2006, although later he said that she was right. There was no documentary evidence to show the addresses at which the appellant had lived or for what periods. There was no documentary evidence confirming his claimed periods of employment.

13. Mr Nath submitted that the appellant's conviction in 2007 was for a very serious class A drugs offence. Since then he had been convicted of drink-driving. Before the 2007 offence there were three convictions for possession of cannabis, one caution and another conviction for driving without insurance. The OASYS report appeared to have been produced in 2007 and put him at medium to low risk of reoffending. There was no subsequent report.

14. In relation to the Article 8 grounds and his family situation there was little evidence about his children's progress in life or at school. At this point the appellant said that he had a letter from C's head teacher dated 6 June 2013 which he produced. Mr Nath did not object and I accepted this in evidence. Mr Nath argued that it would have been helpful to have evidence from the appellant's wife. There was no medical evidence to show that she was not fit to attend the hearing.

15. Mr Nath accepted that this was a case decided before 9 July 2012. He relied on Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC), MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC) and Green (Article 8 – new rules) [2013] UKUT 00254 (IAC). He submitted that I should consider the appeal under the new rules but might then find it necessary to go on and consider the appeal under the Article 8 jurisprudence outside the new rules. He argued that the appellant failed under the new rules because he had not been in this country for 20 years. I should look at the competing interests of the public on the one hand and the appellant his wife and children on the other. He had shown a total disregard the laws of the UK. Mr Nath accepted that the appellant had established private life here

but he had committed very serious offences. I was asked to dismiss the appeal.

16. The appellant said that on release from prison he was on probation and had no difficulties with his probation officer. If he had been in any trouble he would have been sent back to prison. In relation to the drink-driving offence he argued said that he was not far over the limit and had not realised that this was the case. He was finding it difficult to get work because he needed to show his passport which was held by the Home Office. He said that at some earlier stage the Home Office had told him that they would not be pursuing the deportation order. He was not able to tell me who had said this or when. He agreed that it had not been put in writing. He said that he had been refused naturalisation only because he had not provided his driving licence. He had a provisional driving licence but accepted that he had not sent it to the respondent because it was with the DVLA for endorsement. He asked me to allow his appeal. I reserved my determination.

17. The decision of the original panel was found to be flawed and a "de novo" hearing was ordered. The subsequent decision of the Immigration Judge was quashed by the Court of Appeal. In the circumstances no findings of credibility or fact are preserved from either decision and I cannot treat them as my starting point applying Devaseelan principles. However I can, with caution, look at the records of evidence given on those occasions as they are set out in the determinations. This is necessary and helpful because of the limitations in the evidence submitted to me by an unrepresented appellant. In 2009 the appellant was represented and the evidence given then helps establish the position at that time.

18. Looking at the evidence in the round I make the following findings. The appellant is a citizen of Jamaica who arrived in the UK on 17 October 1999 as a visitor. He was 20 years of age. He was granted one month’s leave but overstayed. On 5 January 2000 he applied for leave to stay as a student on a computer course. He attended the college for less than half of the possible sessions. His application was refused on 20 November 2000. In March 2000 he started living with Z. I will refer to her as his wife although they did not marry until later.

19. On 20 April 2001 the appellant was served with papers as an overstayer and his removal to Jamaica was set for 21 April 2001. However before he could be removed his representatives made an application for asylum on his behalf claiming that he had a well founded fear of persecution in Jamaica.

20. On 10 September 2001 the appellant made an application for an extension of stay as the spouse of his wife. It appears that the asylum claim was dropped. On 29 March 2003 the appellant was granted leave to remain in the UK until 29 March 2004 on the basis

of his marriage. On 16 March 2004 he was granted indefinite leave to remain in the UK. On 26 October 2005 he applied for naturalisation but was unable to provide his driving licence. On 23 May 2006 his application for naturalisation was refused.

21. On 26 April 2001 the appellant was cautioned for the possession of a class B drug, cannabis. On 25 July 2001 at Greenwich Magistrate's Court the appellant was convicted of possessing a class B drug, cannabis, on 20 July 2001. He was fined £40 and costs. On 13 May 2003 at Wycombe and Beaconsfield Magistrate's Court he was convicted of possessing a class B drug, cannabis, on 7 May 2003. He was fined £80 and costs. On 16 June 2003, at the same Magistrate's Court he was convicted of possessing a class B drug, cannabis, on 9 June 2003 and given a conditional discharge for 12 months. On 16 November 2007 at Snaresbrook Crown Court, having pleaded not guilty, he was convicted of possessing a class A controlled drug, cocaine, on 8 September 2006. He was sentenced to 40 months imprisonment. He was sent to prison on 16 November 2007 and released on 28 July 2009. In his sentencing remarks the judge emphasised the seriousness of drug dealing. Whilst the evidence did not seem to indicate that the appellant was "near to the top of the network of drug dealing" the real circumstances were not clear because his case was that he knew nothing about the drugs. The panel who heard the appellant's appeal in 2009 recorded that there was no probation, OASYS or other report before them dealing with the risk of reoffending. There is no such evidence before me.

22. I cannot find any documentary evidence that the appellant has also been convicted for driving without insurance although he accepts that he was convicted in 2001 and points were put on his licence. In his evidence before me the appellant admitted that since his release from prison he has been convicted of drink-driving in February 2012. He was disqualified from driving for nine months, ordered to attend an awareness course and the fine and costs totalled approximately £385.

23. There are five children with whom the appellant claims to have a fatherly relationship. B who was born in 1994 is the daughter of his wife by a previous relationship. He is not her natural father. She lives with the appellant and his wife. C who was born in 2002 is the daughter of the appellant and his wife. She lives with the appellant and his wife. A was born in 2001 and is the son of the appellant and Ms Y. He lives with his mother. D was born in 1997. He is the son of the appellant and Q and lives with his mother in the UK. E was born in 1995. He is the son of the appellant and R. He lives in Jamaica.

24. I find that the appellant has done some work in the UK, mainly in the building trade. He claimed that since his release from prison in July 2009 he had worked approximately 85% of the time. On the other hand he said that he was finding it very difficult to obtain

employment because he did not have his passport and needed to produce this when applying for a job. Whilst he gave a number which he said was his tax reference number and said that he was working through an agency and had started work the day before the hearing he produced no documentary evidence to show any post-release employment. I accept that the appellant has done some work in the UK but I do not accept that it has been for as high a proportion of the time as he claims. Without his passport or other acceptable identity verification documentation it is probable that he would have difficulty in obtaining legitimate employment. The appellant accepts that there was a period during which he was paid Jobseekers Allowance. He has not produced any documentary evidence about this and I find that he has probably received Jobseekers Allowance for periods since his release from prison. He accepts and I find that his wife is in receipt of benefits. He has produced no evidence to show the extent of these. The appellant is in good health.

25. I find that the appellant is currently living with his wife, B and C in a property rented from the local authority. The accommodation consists of two bedrooms, bathroom, kitchen, living and dining rooms. He has lived there since March 2000 but with periods of absence. They met in December 1999 and married in 2001. The first period of absence was in 2000 when he left and went to live with Ms Y. Their son A was born in May 2001. In 2005 or more probably 2006 the appellant and his wife were arguing and going through a very difficult period. The appellant rented a room for about six months where he spent some time. His evidence is not clear as to how much of the time he spent there and how much with his wife. They were separated between 16 November 2007 and 28 July 2009 when the appellant was in prison.

26. The only witness statement I have from the appellant's wife is that submitted for the purpose of the panel hearing in 2009. It is unsigned and marked as a "Draft Witness Statement". I accept that she is a British citizen and that her parents and siblings live in this country. In 2009 she claimed to be working full-time as a learning support assistant. She has not said what she is doing now and there is no documentary evidence about any current employment. There is no up-to-date evidence from her as to the state of her relationship with the appellant or whether they have lived together at all times since he was released from prison. In her 2009 witness statement she expressed strong disapproval because the appellant smoked cannabis and she was not able to persuade him to stop. She confirmed the periods of separation to which I have referred and I prefer her evidence that one period was in 2006 rather than 2005. She made it clear to the appellant that if he reoffended after release from prison she would not allow him back into the lives of their children. I have not been told her views on his drink-driving

conviction. However, she said that he was a good father to the children. In 2009 she said that she was depressed. At that stage she said that she would not be able to relocate to Jamaica. She had only been there on holiday. The children were settled here; she would not be able to obtain a good education for them in Jamaica and she did not think that the country was a safe place to raise her daughters. Some of this evidence is confirmed by others and I accept her evidence as to the position and her views in 2009.

27. I find Ms Y to be a credible witness. She is a British citizen and a teacher of English as a foreign language to adults. Apart from A she has two younger children. The appellant is not their father. A lives with her but most weekends goes to stay with the appellant and his wife. He gets on well with B and C. There is not much communication between her and the appellant's wife. She described the appellant as like a father to A and that A looks up to and respects him. She thought that A would be devastated if the appellant had to leave the country and she considers him to be a good influence in his life. The appellant gives her money from time to time when he can. A has been in touch with the appellant from his birth until now, apart from the time when the appellant was in prison.

28. I find the appellant's mother-in-law to be a credible witness. She is a British citizen. She provided an unsigned and undated draft witness statement in 2009. She also gave evidence before me. She said that she was not aware of the appellant having spent any periods apart from her daughter since he came out of prison. She saw her daughter regularly and often stayed with her and the appellant. She confirmed that the appellant and her daughter were living with B and C. A and D often came to stay. She regarded the appellant and her daughter as having had their ups and downs and quarrels. When asked what was wrong with her daughter and why she could not attend the hearing she mentioned tummy trouble and said that there was always something wrong. Asked about her daughter’s mental health she said that she always seemed to be ill and got depressed.

29. I find B to be a credible witness. She is a British citizen. She is living with her mother, her sister C and the appellant. She calls the appellant by his first name. She is in touch with her natural father who went to Spain but returned recently. She calls him Dad. She has a good relationship with the appellant. Her mother was unable to attend the hearing because she was unwell. She confirmed that A and D would come and stay most weeks. She regards them as her brothers. She is in college studying accountancy. She passed seven GCSEs at grade C. She said that the appellant and her mother had lived together since he came out of prison.

30. I have letters from C, A, B and Ms Y. I have addressed the evidence of B and Ms Y, who gave oral evidence. C and A ask that the appellant should not be sent back to Jamaica. They speak of him as a caring and attentive father figure. A says that the appellant supports and encourages him at his cricket club.

31. Section 32 (1) of the UK Borders Act 2007 ("the 2007 Act") defines a foreign criminal as a person who is not a British citizen who has been convicted in the United Kingdom of an offence and, as in this case (Condition 1), has been sentenced to a period of imprisonment of at least 12 months. Under section 35 (4) of the 2007 Act, for the purpose of section 3(5)(a) of the Immigration Act 1971, the deportation of a foreign criminal is conducive to the public good. In these circumstances the Secretary of State must make a deportation order subject to Section 33 of the 2007 Act which sets out statutory exceptions one of which is whether the removal of the appellant in pursuance of the deportation order would breach his Convention rights. The appellant claims that his removal would infringe his Article 8 human rights and those of his wife, children and family.

32. I have considered whether I should apply the new Immigration Rules (HC 194) introduced on 9 July 2012. In the light of the determination in MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC) and in particular paragraphs 58 to 60 I conclude that the application of the new rules is not retrospective. The respondent's decision in this case was taken as long ago as 12 January 2009. I am not persuaded that the new rules applied to the decision under appeal in this case. In the circumstances I consider the Article 8 grounds in the light of the established jurisprudence and follow the framework set out in Razgar [2004] UKHL 27.

33. I find that the appellant has established a private and family life in this country. Applying the tests set out by Lord Bingham in Razgar his removal would be an interference by a public authority with the exercise of his right to respect for his private and family life. The threshold is not a high one and I find that such interference would have consequences of such gravity as potentially to engage the operation of Article 8. The interference would be in accordance with the law and necessary in a democratic society in the interests of national security, public safety or the economic well-being 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. In this case the primary factor is the prevention of disorder or crime. The final conclusion turns on whether such interference is proportionate to the legitimate public end sought to be achieved.

34. I turn first to the interests of the appellant's children and treat them as a primary consideration. By this I mean not just the first to be considered but also as a matter of substantial importance. I treat as the appellant's children not only his natural children but those

who have to a greater or lesser extent regarded him as a father figure. They are B, C, A, D and E. I have no reports from a social worker or the children's schools except a brief letter from the head teacher of C's school which confirms her attendance and states that the appellant "takes a keen interest in all of the activities at ..... (school) and attends all parent evenings". E lives in Jamaica and does not have a family life with the appellant in this country. If the appellant were to return to Jamaica it is probable that they would see more of each other. The other children either live with the appellant or see him regularly. They get on well together. The appellant is attached to them and they to him. He helps with sport and schoolwork. They do not want him to leave the country and would miss him a great deal if he left. Only two of the children live with him all the time and all but E had to deal with his absence whilst he was in prison. I have no objective evidence as to how the children coped whilst the appellant was in prison or any assessment of the consequences for their well-being if he had to leave the country. All of them appear to enjoy good health. The appellant has some family life with Ms Y but wholly related to their son A.

35. Because she did not attend the hearing and did not provide a witness statement the current relationship between the appellant and his wife is not clear. They have been together since 2000 but there have been serious disagreements and periods of separation, the longest whilst he was in prison. The appellant's wife has recurring health problems and depression although the regularity and seriousness of these are not clear. It is not clear to what extent she has been aware of the appellant's immigration status. However, she is a British citizen as are her children and although she has been to Jamaica on holiday she has not lived there. Her close family are in this country and I conclude that it would not be reasonable to expect her or her children go and live in Jamaica. It would not be reasonable to expect the other children living in this country to go and live in Jamaica.

36. I have been provided with very little information about the appellant's private life in this country although I accept that he has one. In the proportionality balance it adds a little to the greater weight to be attached to family life.

37. At times the appellant has worked the immigration system in his favour. He has been an overstayer. His attendance record as a student is not impressive. In order to remain in this country he made an asylum claim which he dropped as soon as he was able to apply to stay on the basis of his marriage. However, he has had leave to remain in this country for most of the 14 years he has been here. He has one caution and three convictions for using cannabis and did not heed his wife's strong objections to his use of cannabis which he did not hide from her. He has been convicted of driving without insurance. His conviction for dealing in cocaine is a very serious offence for which he was sentenced to 40 months imprisonment. He

was convicted following a plea of not guilty. Since then he has been convicted of drink-driving. The difficulties he has encountered in finding work could increase the risk of further drug dealing. The appellant does not appear to have had any concern for the effect on his children at the time of the offence which led to his conviction for dealing in cocaine.

38. The appellant's deportation would render it unlawful for him to return to this country whilst the deportation order remains in force. As a consequence his deportation would be likely to result in him being separated from his family for a considerable period of time except for visits they could make to him if they could afford to do so and modern means of communication.

39. I have had regard to what is said in SS (Nigeria) v SSHD [2013] EWCA Civ 550 and I attach considerable weight to the fact that Parliament has provided in primary legislation "a well justified imperative for the protection of the public and to reflect the public's proper condemnation of serious wrongdoers". The 2007 Act gives great weight to the deportation of foreign criminals. The appellant was convicted of a serious offence of selling class A drugs. There is no independent evidence of the risk of reoffending but I take into account his attitude to the criminal law shown by the caution and convictions for using cannabis and motoring offences including drink-driving. There is no indication that further evidence about the children, for example from an independent social worker, might make any difference. There is no suggestion of existing problems which might require further investigation.

40. I have made an anonymity direction in order to protect the interests of the children.

41. I find that the appellant’s case under Article 8 and especially the interests of his children is not sufficiently strong to prevail over the extremely pressing public interest in his deportation. I dismiss the appellant’s appeal.

Direction regarding anonymity

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.

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Signed Date 2 July 2013

Upper Tribunal Judge Moulden