Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00378/2012

THE IMMIGRATION ACTS

Heard at Birmingham	**Determination Promulgated**
on 16th July 2013	**on 23rd August 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

D N H (Jamaica)
(Anonymity order in force)

Respondent

Representation:

For the Appellant: Mr Smart – Senior Home Office Presenting Officer.
For the Respondent: Mr Fripp instructed by Braitch RB Solicitors.

DETERMINATION AND REASONS

1. On 10th May 2013 it was found that a panel of the First-tier Tribunal, composed of First-tier Tribunal Judge Gurung-Thapa and Mr M James (NLM), had materially erred in law in their decision to allow DNH's appeal against the order for his deportation from the United Kingdom. The reasons are set out in the Error of Law Finding dated 13th May 2013. The determination was set aside with there being preserved findings as follows:

30. The respondent in their notice of decision (CC3-CC11) accepts that the appellant has established a family life in the UK with his wife and children. The respondent also accepts that the appellant has lived in the UK since 20th September 2000 and has established a private life by virtue of his length of residence. Even if it was not accepted by the respondent that the appellant has established private life with his wife and children, we would have had no hesitation in finding that the appellant has established a family life with his wife and children for the following reasons.

31. We have had the benefit of hearing evidence from the appellant and the witnesses. We find that there was consistency in their evidence and there was no hint of exaggeration whatsoever. We find the appellant and all the witnesses to be credible.

32. We find that the appellant's return after such a long period of residence and his family life would have sufficiently grave consequences to engage the operation of Article 8 (2). We find that the decision is in accordance with the law and that it is necessary in the interests of the economic well-being of the country the furtherance of immigration control.

2. I comment at this stage that the legitimate aim is not just the economic well-being of the United Kingdom as this is a deportation case which therefore involves the additional legitimate aim of the protection of society against serious criminals as acknowledged in JO (Uganda) [2010] EWCA Civ 10.

Background

3. DNH was born on 26th September 1975 and is a citizen of Jamaica. On 31st May 2012 the Secretary of State made a deportation order against him under the provisions of section 32 (5) UK Borders Act 2007 as a result of his conviction, on 12th September 2006 at Wolverhampton Crown Court, for the offences of s. 18 Wounding with intent and possessing an offensive weapon. He was found guilty after trial on both counts.

4. In his sentencing remarks HHJ Challinor stated:

> [DH], you have been convicted of a serious offence, namely wounding with intent, as defined by section 224 of the Criminal Justice Act 2003 and I regret to have to tell you that I am fully satisfied that there is in your case a significant risk to members of the public of serious harm occasioned by the commission by you of further specific offences, namely offences of violence to the person using a weapon. In coming to that conclusion I look to section 229 of the Act and I am sorry to be quoting provisions at you, but I will try and make it as clear as I can. In that section I consider the following matters:

First of all, this offence, it was largely, I find, unprovoked. You barged into someone in a queue. When restrained you pulled out a knife. The chilling aspect of the case was the speed with which you deployed that weapon. The evidence made it plain that it came out of your pocket like a flash. It was a knife designed to expose the blade by some sort of spring mechanism and then you began to stab repeatedly at Mr Ali who of course was unarmed. His heavy jacket saved him from more serious injury but the two stabs that penetrated his body were both serious; but one nicked his liver. It was on any view a ferocious and potentially lethal attack.

This offence was committed against the background of a pattern of previous offending. I accept that it is not serious previous offending but it involves violence in public and very worryingly includes a conviction for possessing a bladed article.

I am satisfied that you are a man who hitherto has habitually carried knives to use in response to even trivial disputes, and why that should be I do not know. It is hinted at in the report which speaks of you being the subject of a serious attack yourself when you were 17 and it may be that you have been inculcated into a culture of knife carrying people. But that being the case, it seems to me that you fit the criteria of being dangerous as I have defined it.

The presentence report secondly, assesses the risk to the public from you as being high. The psychiatric report from Dr Stafford shows you have little insight into your offending and his opinion is that this could indicate a greater chance of offending in the future and your pattern of offending during the last three years could indicate future offending.

I have also of course considered the mitigation. I have listened with care to what has been said ably on your behalf by Ms Thomas. I have read the letter of Moses White, the letter from your partner, [LU]. I note you have young children; that there is nothing to suggest that you are anything other than a good father and a good husband and one of your children is not well. But I am afraid sympathy to you and your family and dependants must take second place to my duty to protect the public. The purpose of the sentence that I impose upon you is to protect the public.

In my view, the tariff sentence, that is to say, the normal sentence of imprisonment which would be appropriate for this offence after a trial, would be seven years imprisonment. I make it plain that because of the delay in sentence in this case, which has been very hard view to bear, I reduce that tariff sentence to one of six years. You have spent six months in custody; I shall give you credit for that in this way. I half the six year sentence to three years; I give you credit for the six months already served, making a two and a half year custodial element.

The sentence is therefore this, for the wounding with intent, there will be a sentence of imprisonment for public protection. The minimum period that you have to serve in custody, from today, is two and a half years. You will then be eligible for release on parole licence, assuming that you are judged safe to be released. Thereafter you will remain on licence for the rest of your life, unless

after a period of 10 years from today you are deemed suitable to have your license revoked.

5. DNH has an established family and private life in the United Kingdom as recognised by Judge Challinor. His evidence is that he has lived in this country, with only a single short break, since late September 1999. He is here lawfully having been granted Indefinite Leave to Remain (ILR) on 19th September 2001 and has been in a relationship with the person who is now his wife (hereinafter referred to as 'his wife' or 'L U-H'), a British citizen, since the year 2000. The couple have three children:

PU-H – born 23rd July 2001

DU-H – born 21st February 2003

Z U-H – born 26th May 2013.

6. Mr Smart has provided a more detailed immigration history which puts the above into its proper context:

8 September 1999	DNH enters the United Kingdom. He is granted leave to enter until 7th October 1999.
3 October 1999	DNH's representatives submit an application on his behalf for an extension of stay on the basis of marriage to LM which took place on 15th September 1999.
20 July 2000	DNH served with a notice of liability to removal as an illegal entrant as he employed a verbal deception to enter the United Kingdom.
4th August 2000	Removal directions set for 4th August 2000, however DNH purchased his own ticket and leaves the United Kingdom on 1st August 2000.
August/September 2000	DNH applied for and was granted entry clearance as the spouse of a British citizen. He was issued with a visa valid from the 8th September 2000 to 11th March 2001.
20 September 2000	DNH re-entered the United Kingdom.
19 September 2001	Application made for ILR on the basis of marriage. Granted on 20th September 2001.

23 July 2003	DNH convicted at Walsall Magistrates Court of using a license with intent to deceive and fined £75.
2 September 2003	DNH convicted at Birmingham Magistrates Court of using disorderly behaviour or threatening/abusive/insulting words likely to cause harassment, alarm or distress and was fined £100.
24 September 2003	DNH convicted at Birmingham Magistrates Court of having an article with a blade in a public place. Fine £100.
15 March 2005	DNH submitted an application for naturalisation.
16 March 2005	DNH convicted of being in charge of a motor vehicle with excess alcohol at Aldridge and Brownhills Magistrate's Court. Fine £150 and disqualified from driving for 12 months.
17 May 2005	Naturalisation application refused due to criminal convictions.
12 September 2006	DNH convicted at Wolverhampton Crown Court of wounding with intent and having an offensive weapon. Sentenced to an indeterminate sentence of imprisonment for public protection under section 225 Criminal Justice Act 2003, with a minimum term of 30 months to be served before consideration for release. No appeal against conviction or sentence.
29 April 2008	DNH divorced L M.
11 November 2008	DNH served with a notice of liability to automatic deportation.
17 February 2009	Deportation order signed and DNH advised. In light of his wish to return to Jamaica it is accepted he did not wish to raise any exceptions under section 33 of the UK Borders Act 2007 and so was given an out of country right of appeal.
2 March 2009	Appeal against deportation order made from within the United Kingdom. Appeal rejected by First-tier Tribunal on the grounds of jurisdiction although the grounds raised were considered in light of section 32 (5) UK Borders Act 2007.

5 May 2010	DNH marries L U-H.
29 May 2012	Deportation order signed on the 17th February 2009 revoked as it was applicable to decisions attracting an out of country appeal only. A fresh deportation order was signed on 31st May 2012.
30 July 2012	Appeal hearing at Stoke Hearing Centre when the First-tier Tribunal allowed the appeal.
10 May 2013	Upper Tribunal hearing at Birmingham Sheldon Court finds error of law.

7. The substantive question for the Upper Tribunal remains whether DNH's deportation will represent a disproportionate breach of Article 8 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).

Preliminary issue

8. Mr Fripp raised as a preliminary issue the application of the changes to the Rules to this case. He submitted they had no application and relied upon the decision in MF (Article 8 – new rules) Nigeria [2012] UKUT 00393(IAC) in support of his proposition they have no application in light of the fact that the decision under appeal was taken prior to the amendments to the Immigration Rules which came into force on 9th July 2012. In relation to the issue of retrospectivity the Tribunal stated:

> Retrospectivity
>
> 58. Mr Ahluwalia urged us to find that the provisions of the new rules relating to deportation, A362 in particular, are inapplicable to the appellant's appeal because (i) the deportation order was signed almost two years ago, before any plans were made for the introduction of the new rules; (ii) a fortiori the reasons for refusal letter makes no reference to the new criteria; (iii) there has been no new reasons for refusal letter by the respondent; (iv) "it seems particularly unfair that A is subjected to the new rules given that his appeal was heard 18 months ago on 24.1.2011" and that, had the FtT not erred in law, then his appeal would have been dealt with under the old rules.
>
> 59. We do not find the arguments on this issue all one way. In *Odelola (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2009] UKHL 25 it was held that, unless specified to the contrary, changes in the immigration rules "take effect whenever they say they take effect." (Lord Brown paragraph 39, see also Lord Hope, paragraph 7); see also *R (on the application of Munir and Anor) v the Secretary of State for the Home Department* [2012] UKSC 32. Even though their Lordships in *Odelola* were not agreed as to whether the common law presumption against retrospectivity applied to

the immigration rules, all agreed that the central issue was the fairness of retroactive changes, and that to decide fairness it is necessary to have regard to a range of factors, including the extent to which the value of the rights which the appellant had under the old law or rules is now diminished to any significant extent. If one applied these dicta in the abstract to the context of the new rules on deportation in relation to the appellant, it is difficult to see any significant diminution of the appellant's rights. At the time of the decision he was already subject to s.32(5) of the 2007 Act so that there was a statutory presumption that his continued presence was not conducive to the public good. Further, for reasons given already, we do not consider that the new rules can be exhaustive of the issue of whether the deportation order was contrary to a person's Article 8 rights. Judges have to decide that question by applying existing Strasbourg jurisprudence as interpreted by the higher courts. Under both the pre-9 July 2012 rules (which would have applied if no error of law being found) and the new rules, he was entitled to the protection afforded to him by s.6 of the Human Rights Act which we as judges must always accord.

60. However, whilst for reasons which will become clear the issue is not material to the outcome of this case, we think that the arguments against treating A362 as having retrospective effect carry more weight. In *Odelola* their Lordships were concerned with decisions of the Secretary of State made under the rules in force on or after that date. The case did not establish that new rules are capable of governing appeals heard after that date in respect of decisions taken before it. Since the new rules concern how the Secretary of State decides claims, it would need very clear words to show that A362 was intended to bind courts and tribunals hearing appeals against decisions that were made and appealed before A362 came into force. The wording of the new rule (which refers to "…when the notice of intention to deport or deportation order, as appropriate, was served") is not couched in language one would expect if its retrospective effect was as contended for by Mr Deller; it does not say, for example, "regardless of when the decision was made". We remind ourselves that when s. 85A of the 2002 Act was brought into force, the drafters decided that an elaborate transitional provision was needed, as regards the effect of that section on current appeals: see *Alam* [2012] EWCA Civ 960. If one of the purposes of A362 is to regulate appeals against decisions taken long before 9 July 2012, it is difficult to see that this is within the scope of the enabling power to make rules under s.3(2) of the Immigration Act 1971. Further, If Mr Deller were right then, if the FtT when hearing this appeal had not been found to have erred in law, its determination would have been (and could only have been) made under the old rules, yet solely because an error of law has been found, it would transmogrify into a case under the new rules. For these reasons we are not persuaded that the new rules apply to the decision under appeal in this case. However, in case we are wrong in that conclusion we shall proceed to address the situation of the appellant under the new rules.

9. In Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC) Tribunal stated:

Relevance of the 'new' immigration rules to our decision

81. The Secretary of State submits that the tribunal is required to determine the issue of whether the appellant's deportation would lead to a breach of Article 8 ECHR by reference principally to whether he meets the requirements of the 'new' rules. It was asserted that, if he does meet the requirements of those rules, then his appeal ought to be allowed because those rules reflect where the public interest lies; however, if he does not meet the requirements of the new rules then his appeal ought to be dismissed.

82. The application of the new rules to appeals against decisions of the Secretary of State made prior to the 9 July 2012 has recently been considered by the Upper Tribunal [Upper Tribunal Judges Storey and Coker] in the reported decision of MF (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC). The tribunal was not persuaded that the new rules had retrospective effect such that they were of application to decisions of the Secretary of State taken prior to 9 July 2012. It further concluded that the new rules were not conclusive of the Article 8 issue; there were two questions, (i) whether the decision is in accordance with the Rules and (ii) whether it is accordance with the law as interpreted by the senior courts whose decisions are binding. The tribunal noted a number of respects in which the new rules appeared to apply tests that have been disapproved of by the courts.

83. In the light of the submissions we have received we propose to analyse the case on the factual findings we have reached, both under the provision of the new rules and the law applicable at the time of the original decision. We agree with the panel's decision in MF that a human rights claim that should have succeeded in 2010 applying the law and policy then applicable should not be defeated by new provisions that are in many respects considerably more restrictive.

84. However, we recognise that the issue may proceed on appeal to the Court of Appeal. Further, in principle it may be open to the SSHD to make a fresh decision to deport applying the new rules. Here the substantial delay in this appeal coming before the Upper Tribunal is the responsibility of the appellant. We therefore propose to examine the claim by reference to the new Immigration Rules as well as the principles of law binding on us concerned with the evaluation of Article 8 cases.

10. There is therefore no definitive finding that the Immigration Rules have no retrospective effect in relation to decisions taken prior to the 9th July 2012, although this seems to have been the view of the Panel in MF although they themselves acknowledge that their conclusions may be wrong; hence their consideration of the provisions in the alternative. Guidance is awaited from the Court of Appeal. In both the above determinations the issues were considered both under the new Rules as well as the existing law relating to Article 8 ECHR

for the sake of completeness which I consider to be the correct position to adopt in relation to this appeal.

11. Mr Smart's position is that the new Immigration Rules are applicable in light of the provisions relied upon by Mr Deller in MF and that they are applicable to all deportation decisions outstanding at 9th July 2012 irrespective of when the decision was actually taken.

Discussion

12. DNH cannot succeed under the Immigration Rules. Paragraph 397 of the Immigration Rules acknowledges that a deportation order will not be made if a persons removal will be contrary to the U.K.'s obligations under the Refugee Convention or Human Rights Convention but states that where it would not be contrary to these obligations it will only be in exceptional circumstances that the public interest in deportation is outweighed.

13. Paragraph 398 contains provisions to be taken into account by reference to the actual period of imprisonment to which an individual has been sentenced. Although DNH received an indeterminate sentence the actual period of imprisonment imposed upon him was six years against which a discount was allowed for the six months in custody he had served, giving a minimum period to be served of one half of the six-year term less the six months already served, amounting to a two and a half years custodial element. He was not sentenced to only two and a half year as the sentence was six years. The two and half years was the minimum period of imprisonment he was to serve in accordance with the provisions relating to indeterminate sentences. It is therefore 398 (a) which is relevant namely that the deportation of the person from the United Kingdom is conducive to the public good because they have been convicted of an offence for which they had been sentenced to a period of imprisonment of at least four years.

14. If an individual who does not receive an indeterminate sentence is sentenced to six years imprisonment they would only serve half of that sentence with the rest being served on licence, with any discount for periods served on remand. It is on this basis that I find the sentence was for a period of six years for DNH.

15. Paragraph 399 does not apply as 398 (b) or (c) are not applicable and nor is 399A for the same reason. The provisions under the Rules that as the deportation is not contrary to the Secretary of State's view of what constitutes a proper human right proportionality assessment, as reflected by the provisions of the Rules, means it will only be in exceptional circumstances that the public interest in deportation is outweighed. DNH is therefore not able to succeed under the Rules although it has always been accepted that the main issue in this appeal is the proportionality of the decision under Article 8 ECHR which I shall consider next.

16. In relation to Article 8 ECHR, it is not disputed DNH has an established family and private life in the United Kingdom. This is a preserved finding. There is a considerable volume of written evidence that has been provided on his behalf all of which I have considered in detail. Oral evidence was given at the hearing and leave granted to his wife to file an additional witness statement which I have also considered. The statement confirms the youngest child came home a few days prior to the hearing and has received medical home visits and medication and that there has been one readmission to hospital. His situation is delicate as his lungs were damaged at birth and L U-H claims she needs the support of her husband to help with their three children. Although her parents live next door, they work full-time and so cannot help as much as he can other than at weekends. L U-H states it is not clear whether she can return to work as she hoped to in November to support the family. She has been the main breadwinner since her husband was told he could not work. She believes her husband's continued presence is of great importance to the family.

17. I have also received within a supplementary trial bundle documents in which the older children have responded to a number of typed questions. P U-H states she will feel upset about moving to Jamaica, that she feels happy when she sees her dad and that she would be devastated if she could not see him and that it would take her an awfully long time to get over it, and that it would be like taking a large part of her heart out and throwing it away. She states she will feel extremely saddened that she would not be able to see her father often enough. She likes him to take her to school and to the shop and to tuck her in at night.

18. DU-H said he will be sad and unhappy if he had to go to Jamaica, he feels happy when he sees his father, will feel sad and worried if he could not see him and will be sad about leaving him if his father went to Jamaica. His likes his father taking him swimming, playing football, and cooking dumplings.

19. The above are plausible feelings/emotional expressions by young children in a situation where there is the prospect of being separated from one of their parents and I accept that so far as the children are concerned they would ideally like the family to remain together.

20. I accept this is a close family unit and it is important to note this is not a case in which it is suggested L U-H or the children are expected to leave the United Kingdom as they are British nationals and European citizens. It is a family splitting case.

21. Guidance of the approach to be taken in assessing the public interest in the balancing exercise has been provided by the Tribunal in Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT 00046(IAC). The Tribunal said that so long as account is taken of the following basic principles, there is at present no need for further citation of authority on the public interest

side of the balancing exercise. The following basic principles can be derived from the present case law concerning the issue of the public interest in relation to the deportation of foreign criminals:

(i) In a case of automatic deportation, full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place.

(ii) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them.

(iii) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge.

(iv) The appeal has to be dealt with on the basis of the situation at the date of the hearing.

(v) Full account should also be taken of any developments since sentence was passed, for example the result of any disciplinary adjudications in prison or detention, or any OASys or licence report.

22. Further guidance on how the balancing exercise should be conducted has been provided in the cases of Boultif v Switzerland [2001] ECHR 54273 as confirmed by Uner v the Netherlands [2007] Imm AR 303. In those cases the Court said that in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued, the following criteria had to be considered.

(i) The nature and the seriousness of the offence committed by the Appellant;

(ii) The length of the Appellant's stay in the country from which he or she was to be expelled;

(iii) The time that had elapsed since the offence was committed and the claimant's conduct during that period.

(iv) The nationalities of the various parties concerned;

(v) The Appellant's family situation, such as length of marriage and other factors expressing the effectiveness of the Appellant's family life;

(vi) Whether the spouse knew about the offence at the time he or she entered into the family relationship;

(vii) Whether there are children in the marriage and if so their ages;

(viii) The seriousness and the difficulties which the Spouse is likely to encounter in the country of the Appellant's origin;

(ix) The best interests and well being of any children of the Appellant; and in particular the seriousness of any difficulties that they would be likely to encounter in the country to which the Appellant would be expelled;

(x) The solidity of social, cultural and family ties with the host country and with the country of destination.

23. In relation to these individual elements I find as follows:

24. The nature and the seriousness of the offence committed by the Appellant: the index offence committed by the appellant is very serious as it involved not only the use of a bladed weapon but extreme violence against an innocent bystander. HHJ Challinor specifically states that DNH has been convicted of a serious offence as defined by paragraph 224 Criminal Justice Act 2003. Section 224 (1) states an offence as a 'specified offence' if it is a specified violent offence or a specified sexual offence. A specified violent offence is defined in Part 1 of Schedule 15 of the Act. It is not disputed before me that this includes offences of the nature of those committed by DNH. Examples of such offences include manslaughter, an offence under section 18 of that Act (wounding with intent to cause grievous bodily harm), an offence under section 20 of that Act (malicious wounding), an offence under section 47 of that Act (assault occasioning actual bodily harm).

25. Section 224 (2) defines a serious offence as a specified offence punishable in the case of a person over the age of 18 by imprisonment for life or imprisonment for a determinate period of ten years or more. HHJ Challinor specifically referred to section 229 of the Act which provides statutory provisions for the assessment of 'dangerousness'. HHJ Challinor found DNH posed a significant risk to members of the public of serious harm occasioned by the commission of further specified offences, which might include one or more of the offences outlined above, together possibly with others more fully detailed in the relevant schedule to the Act.

26. The length of the Appellant's stay in the country from which he or she was to be expelled; I have set out the chronology above which shows DNH has been in the United Kingdom since the September 2000, a period of nearly thirteen years.

27. The time that had elapsed since the offence was committed and the claimant's conduct during that period: the offence was committed on 18th May 2005 but DNH was only sentenced in 2007 after being convicted at trial. There is no evidence of him having committed further offences and his conduct in prison is said to have been exemplary. He is currently on bail and was released at the end of his minimum term as a result of a positive assessment and report to the Parole Board. He has not reoffend since he has been in the community although he has been aware of the pending deportation proceedings and is the subject of the licence which, if the terms are breached, may result in his being readmitted to serve the remainder of his sentence.

28. The nationalities of the various parties concerned; DNH is a Jamaican national. The children and his wife are British citizens. DNH and L U-H have been married since May 2010, a period of three years.

29. The Appellant's family situation, such as length of marriage and other factors expressing the effectiveness of the Appellant's family life: is not disputed there is family life between DNH, his wife and their children. They live in a close family unit.

30. Whether the spouse knew about the offence at the time he or she entered into the family relationship ; the chronology shows that not only did DNH marry his wife after he was convicted of the offences, they were both aware of the Secretary of State's intention to deport him from the United Kingdom. The youngest child was also conceived and born in circumstances in which it was known DNH's immigration status is precarious and there is a real risk that he will be removed.

31. Whether there are children in the marriage and if so their ages: see above regarding the dates of birth of the three children.

32. The seriousness and the difficulties which the Spouse is likely to encounter in the country of the Appellant's origin: as stated above this is a family splitting case and it is not suggested that either L U-H or the children shall be removed to Jamaica with him. They are British citizens and so are entitled to remain in the United Kingdom. They are also European citizens who are entitled to enjoy the benefits flowing from such status within the boundaries of the European Union.

33. The best interests and well being of any children of the Appellant; and in particular the seriousness of any difficulties that they would be likely to encounter in the country to which the Appellant would be expelled: I accept that the best interests of children will be served by them continuing to be brought up in a stable family environment including their mother and father. The children have no experience of living in Jamaica and, as stated, it is not expected that they will have to live there.

34. The solidity of social, cultural and family ties with the host country and with the country of destination: DNH has strong cultural and family ties to the United Kingdom. He has not suggested he has no ties to Jamaica and I note that when he was initially served with the decision to deport he agreed to return voluntarily to Jamaica. There is no evidence he will not be able to return there and continue to live an independent life in the country he grew up in and of which he has relevant life experience. I also note Section 6 of the OASys report in which it is recorded that his mother and siblings live in Jamaica with whom he has a supportive relationship and to whom he writes on a regular basis. It is recorded that he was upset at not being able to return to Jamaica on his release and, although he would like to remain in the United Kingdom with his family, he did not advise the author of the report of any adverse consequences should he be returned to Jamaica where in fact he has another child, a 13-year-old daughter.

35. The most up-to-date information regarding the risk posed by DNH is that provided by Staffordshire and West Midlands Probation Trust in letters dated 7th May 2013 and 9th May 2013 to be found in DNH's supplementary trial bundle. They assess DNH as posing a medium risk of harm to the public as a result of his aggressive behaviour although I note and take into account the positive elements of the report based upon progress made to date by DNH and referred to be Mr Fripp in his intervention during the course of Mr Smart's submissions. I have also noted the latest OASys report and the assessment of risk by the author of that document in section R10 as medium, a reduction from 'high' in the earlier report, stating that the risk is to the general public, the nature of the risk is violence and aggression resulting in physical injury, the risk is likely to be greatest when in conflict in disputes with others, if a weapon is being carried, but is not assessed as being immediate. The factors likely to increase risk are if DNH places himself in unsuitable environments/situations of potential conflict with others.

36. It is also recorded in that section :

> Parole 24/11/2011 – DNH was initially assessed as presenting a high level of serious harm to the public and known adult at the point of his sentence. This assessment was based on the fact that the offence was unprovoked and DNH's causal use of a weapon demonstrated a propensity towards violence which was perceived as concern due to there being an imminent risk of further similar offending behaviour. DNH has worked hard since his last parole hearing to address the identified areas of concern relating to his risk. Although DNH had initially expressed reservations about moving into the therapeutic community at HMP Dovegate, I consider that he has benefited enormously from his time there, demonstrated by his significant change in attitudes and thinking in regards to his offence. DNH now takes full responsibility for his offence and accepts that his poor thinking and attitudes leads to him behaving in an unacceptable way. DNH now

> recognises what his triggers in relation to his offending and how to avoid them. Risk now assessed as medium to the public and not deemed imminent.

37. It is also relevant that DNH received an indeterminate sentence. This is a prison sentence where the court sets the minimum term of imprisonment an offender must serve before becoming eligible to be considered for release by the Parole Board. There are two types of indeterminate sentence: imprisonment for life and imprisonment for public protection (IPP). Once an offender has served the minimum term set by the court, the Parole Board will decide whether the offender can be released as illustrated by the copy passage set out above. DNH is the subject of an IPP. He has been released but remains subject to an IPP licence and may be recalled to prison if at any point he is considered a risk to the public. He was originally release to a hostel but returned to the family home in September 2012. After ten years he may apply for the licence to be cancelled. This decision is at the discretion of the Parole Board and Mr Fripp referred to the reduction in his need to attend the Probation Service offices and their support for him remaining in the United Kingdom. The imposition of such a sentence represents the view taken by the Sentencing Judge regarding the need to protect the public from potential future harm caused by DNH at that time.

38. Whilst DNH was in prison his wife clearly received support and the evidence shows that her parents live next door although she claims they are in employment and only able to assist at weekends. It is likely that other periods of assistance are available but I appreciate that if they have working commitments these will take precedence. I note that L U-H has been the primary breadwinner of the family although she has currently not returned to work and that if DNH is removed she may not be able to do so and may become reliant on public funds. Such an economic argument is a matter for Parliament as the Secretary of State who has no choice but to make a deportation order as a result of the statutory provisions and the fact his removal is, as a result, to be found to be conducive to the public good.

39. I find there is insufficient evidence to show that it is imperative for DNH to remain in the United Kingdom for the sake of the welfare of any of the children although his presence here is, I accept, something that must be seen to be in the children's best interests. Although L U-H will no doubt be distressed if he is removed from the United Kingdom there is insufficient evidence to show that she will not be able to cope personally or that the children will suffer disproportionately if she has to parent them as a single parent. There are many such parents in the United Kingdom successfully bring up their children and separation as a result of divorce is an all too common phenomena in modern families, albeit that in most situations the father figure remains in the country and has face to face contact with the children. I accept that a deportation order will have the effect of limiting contact to indirect contact and visits to Jamaica, when funds allow, and that the deportation order will remain in force for a

considerable period of time due to the nature of the offence. I do not accept that assistance from L U-H's family will not to be forthcoming especially before, during, and immediately after the removal process and whilst the family adjust. The evidence suggests a supportive family and extended family unit. It has not been shown that professional medical or social assistance will not be available to assist L U-H and the children either, if required. In relation to the baby I note L U-H's evidence that he requires medical care as a result of lung damage and that during this time DNH has provided practical and emotional support but again it has not been shown that whilst preferable, such support is determinative of the issues I have to consider.

40. The weight to be given to family life created a time when it was known an individual's immigration status is precarious has been the subject of decisions by the European and domestic courts. In R (on the application of Nagre) v Secretary of State for the Home Department [2013] EWHC 720 (Admin) Mr Justice Sales held the family life between the Claimant and his partner was precarious because it was established at a time when the Claimant had no right to be in the UK. The approach to such cases in the European Court of Human Rights ("ECtHR") was that removal was disproportionate only exceptionally. A material consideration was whether there were insurmountable obstacles to the relocation of the resident partner to a claimant's country of origin to continue family life there: Rodrigues da Silva and Hoogkamer v Netherlands (2007) 44 EHRR 34 applied. That question was not always decisive. A range of factors bore upon the question of proportionality. In Nunez v Norway (Application No. 55597/09) ECtHR (Fourth Section), although allowing the appeal, the ECtHR said that an important consideration was whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious. Where this was the case, the removal of a non-national family member would be incompatible with Article 8 only in exceptional circumstances. In R (on the application of Mahmood) v Secretary of State for the Home Department [2001] INLR 1 the Court of Appeal said that "Knowledge on the part of one spouse at the time of marriage that rights of residence of the other are precarious, militates against the finding that an order excluding the latter spouse violates Article 8 and in Y v Russia (Application No 20113/7), reported in 2009, ECtHR (First Section) the ECtHR appeared to suggest that, where family life was created at a time when the persons involved were aware that the immigration status of one of them was precarious, then removal of the non national family member would only be incompatible with Article 8 in exceptional circumstances.

41. Sales J in Nagre referred to the case of Rodrigues da Silva and Hoogkamer v Netherlands (2007) 44 EHRR 34, in which the ECtHR explained the approach at para. 39, and included the following comments: "…. Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was

such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Art.8 ."

42. Whilst our domestic courts have resisted the imposition of an 'exceptionality' test in its case law and prefers a different test of 'reasonableness' this is a specific term repeated on a number of occasions and applicable in European law when considering Article 8. I accept this is only one factor and have approached the assessment on the basis it is not determinative on the facts, especially as the two older children were born before deportation action was commenced.

43. Not withstanding the progress DNH has made with regard to his offending behaviour and the reduction in the assessment of risk and his, to date, success in the community setting, he still has been assessed as being a medium risk of reoffending. The Sentencing Judge noted there have been other offences in the past, including possession of a bladed instrument, the escalating nature of the offending in terms of seriousness, and the need for the long term protection of society as represented by the nature of the sentence handed down.

44. It is also important to note this is an appeal against an automatic deportation decision. In Richards v Secretary of State for the Home Department [2013] EWCA Civ 244 the Jamaican claimant arrived in the United Kingdom in 1999 and had a daughter aged six. He had a number of serious drugs offences. The UT dismissed his appeal. The Court of the Appeal upheld the decision and said that the important point was that the strong public interest in deporting foreign criminals was not merely the policy of the Secretary of State but the judgment of Parliament. That gave it special weight which the courts needed to recognise.

45. In the later case of SS (Nigeria) [2013] EWCA Civ 550 at paragraph 55, Laws LJ stated:

> 55. None of this, I apprehend, is inconsistent with established principle, and the approach I have outlined is well supported by the authorities concerning the decision-maker's margin of discretion. The leading Supreme Court cases, *ZH* and *H(H)*, demonstrate that the interests of a child affected by a removal decision are a matter of substantial importance, and that the court must proceed on a proper understanding of the facts which illuminate those interests (though upon the latter point I would not with respect accept that the decision in *Tinizaray* should be regarded as establishing anything in the nature of general principle). At the same time *H(H)* shows the impact of a powerful public interest (in that case extradition) on what needs to be demonstrated for an Article 8 claim to prevail over it. Proportionality, the absence of an "exceptionality" rule, and the meaning of "a primary consideration" are all, when properly understood, consonant with the force to be attached in cases of the present kind to the two drivers of the decision-maker's margin of discretion: the

policy's source and the policy's nature, and in particular to the great weight which the 2007 Act attributes to the deportation of foreign criminals.

46. The Court found that whilst the authorities demonstrate there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail.

47. Mr Fripp sought to argue that the exceptions to deportation are also part of the statutory provisions as so should be given equal weight to the requirement to deport contained in the same provisions. The inclusion of the exceptions is an issue noted by the Court of Appeal who, notwithstanding this fact, gave guidance upon the weight to be attached to the fact that once a relevant conviction occurs, absent an ability to prove an applicable exception, an individual must be removed. That Parliament had passed legislation to this effect in the terms referred to by the Court is stated to be indicative of the weight that should be given to such a clear public policy statement when undertaking the Article 8 balancing exercise. It is at this point that the judgment in SS (Nigeria) is of relevance and assistance. That decision was also confirmed and followed in the later case of CW (Jamaica) [2013] EWCA Civ 915 in which Lord Justice McCombe stated:

> 34. In considering these provisions in the *SS (Nigeria)* case (supra), Laws LJ considered extensively the law relating to the balance between Article 8 rights and the public interest in deporting foreign criminals, the latter being forcibly emphasised by the statutory provisions which I have just quoted. At paragraph [48] Laws LJ said this:
>
> "….Where such potential deportees have raised claims under Article 8, seeking to resist deportation by relying on the interests of a child or children having British citizenship, I think with respect that insufficient attention has been paid to the weight to be attached, in virtue of its origin in primary legislation, to the policy of deporting foreign criminals."
>
> At paragraph 54, the learned Lord Justice added:
>
> "I would draw particular attention to the provision contained in s.33(7): "section 32(4) applies despite the application of Exception 1…", that is to say, a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on Article 8. I said at paragraph 46 that while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed."

48. The question therefore, when balancing the competing interests, is whether the scales fall in favour of DNH and his family or the Secretary of State. Having very carefully considered all the elements of this appeal relied upon by DNH, the detailed submissions made on his behalf by Mr Fripp, and those of Mr Smart for the Secretary of State, I do not find that it has been established that the case under Article 8 is sufficiently strong to prevail over the extremely pressing public interest in DNH's deportation. I find Secretary of State has discharged the burden of proof upon her to the required standard to prove that DNH's removal from the United Kingdom is proportionate. Borrowing a phrase from the judgment in CW (Jamaica), the Article 8 claim is far from being "very strong". It is impossible to see how, therefore, those claims could outweigh the express declaration of the public interest in the deportation of a foreign criminal, such as DNH, as expressly stated in the statute. The risk of serious potential harm to the public still remains and there is a very strong deterrent element in this appeal in relation to non-nationals who choose to carry knives or other bladed articles and to use them to carry out acts of violence against third parties which is an increasing problem in British society.

Decision

49. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

50. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….
Upper Tribunal Judge Hanson

Dated the 22nd August 2013