Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01249/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 21st October 2013	**On 11th November 2013**
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Before

UPPER TRIBUNAL JUDGE REEDS

Between

NANA AGYENIM BOATENG

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Akindele, solicitor instructed by A&A Solicitors LLP
For the Respondent: Mr Allen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant, a citizen of Ghana born on 28th November 1984 appeals with permission against the decision of the First-tier Tribunal panel (Judge S Taylor and Mr F T Jamieson JP) who in a determination promulgated on 27th June 2013

dismissed his appeal against the decision of the Respondent to make a deportation order against him under Section 32(5) of the UK Borders Act 2007.

The Background

2. The history of the appeal is as follows. The Appellant claims that he entered the UK in 1999 using a Ghanaian passport which was not his, and remained in the UK illegally since that time. It was further claimed that since his arrival he had stayed with an uncle until he died in 2003/2005 and had not attended any schools or colleges. He first came to the attention of the immigration authorities at HMP Winchester on 3rd May 2012.

3. The Appellant has a criminal record during the time of his residence in the United Kingdom. On 18th March 2008, at Thames Magistrates Court, the Appellant was convicted of failing to provide a specimen for analysis and was fined £250 and disqualified from driving for eighteen months. On 16th March 2011 at North West Hampshire Magistrates Court, the Appellant was convicted of two counts of battery for which he received a community order on 12th April 2011. On 22nd March 2012, at North West Hampshire Magistrates Court, the Appellant was convicted of possession of a class A drug, crack cocaine with intent to supply and also possession of heroin with intent to supply and possession of a class B drug namely cannabis/cannabis resin. He was committed for sentence at Winchester Crown Court and on 20th April 2012, the community order was revoked and he was sentenced to a period of imprisonment of sixteen months. The details of the offence and the role played by the Appellant are set out in the sentencing remarks. The trial judge noted the very serious nature of the offences of possession with intent to supply class A drugs namely crack cocaine and heroin. He had been found with nineteen wraps of class A drugs, valued at between £300 and £400, whilst the judge accepted that the Appellant became involved at the behest of others and of playing a lesser role, and giving credit for his early guilty plea it was noted that the Appellant was dealing in drugs and that a prison sentence was inevitable. The Appellant was also in breach of a community order which was revoked. It appears from the criminal papers that there was a charge relating to a prohibited weapon. The Appellant gave oral evidence before the First-tier Tribunal that he pleaded guilty to the offence of possession of a prohibited weapon which was a taser gun which he had in the house but he had claimed that he did not know it was a prohibited weapon. He had kept that in the house which he shared with his partner and children.

4. On 18th May 2012 the Appellant was served with notice of liability for deportation and representations on his behalf were made stating that he came within one of the exceptions on the grounds of his private and family life in the United Kingdom. The Respondent reviewed those representations and concluded that the Appellant did not fall within any of exemptions from automatic deportation. On 28th November 2012 a decision was made that Section 32(5) of the UK Borders Act 2007 applied. The Respondent gave reasons for the decision in a letter dated 28th November 2012. The Appellant appealed against that decision and his appeal was heard on 12th June 2013

before the First-tier Tribunal, by a panel consisting of First-tier Tribunal Judge Taylor and Mr F T Jamieson JP.

Appeal before the First-tier Tribunal

5. At the hearing before the First-tier Tribunal panel, they heard oral evidence from the Appellant and his partner Miss Tyzack. The panel also considered a number of documents that had been produced on the Appellant's behalf. In a determination promulgated on 27th June 2013 the panel dismissed the appeal against the Respondent's decision and did not find that the Appellant came within one of the exceptions listed in Section 33 of the 2007 Act. They reached the conclusion from the evidence in respect of his immigration history that he had entered the UK illegally and made no attempt to make an application for leave to remain or to regularise his status in the UK until served with a deportation order. They further found that contrary to his evidence, he had not entered the UK in 1999 but had only been resident for the last three and a half years since 2010. As to his family life with Miss Tyzack they rejected the evidence that they had been living together for the period that they had maintained but found that they had been in a relationship since the latter part of 2010 but that they had not lived together until January 2012. It was noted that the Appellant had a son with Miss Tyzack namely Dwayne who was born in November 2011 but found that the Appellant had spent little time living with Dwayne and Miss Tyzack noting that Dwayne was 4 months old at the time of his arrest and the Appellant had only spent three months with him since release from prison. In respect of Hayden, Miss Tyzack's son, the panel found that the Appellant was not his natural father nor did he have any statutory or other responsibility for him. They rejected evidence that he would be distressed by the absence of the Appellant noting that the Appellant had lived with Hayden at most three to four months prior to his arrest and for a short period since his release. As to the circumstances in which the relationship was formed it was found that the Appellant had entered illegally, had never applied for leave or sought to regularise his status and that Miss Tyzack knew of this when entering into the relationship. The panel considered that the offences for which the Appellant had been convicted were serious offences as they involved the supply and possession of class A drugs which they found to be "a danger to society". They reached the conclusion that the Appellant could not meet the Immigration Rules, indeed it had not been suggested that the Appellant could and that after balancing all the factors reached the conclusion that the public interest outweighed any argument the Appellant had raised by way of private or family life.

The Proceedings before the Upper Tribunal

6. Permission to appeal to the Upper Tribunal was sought on behalf of the Appellant and on 25th July 2013 permission to appeal was refused by First-tier Tribunal Judge Sommerville. The same grounds were reissued and an application was made to the Upper Tribunal. Upper Tribunal Judge Storey granted permission on 23rd August 2013. The reasons given were as follows:-

> "But for what I say in the next paragraph I would have concurred with Judge Sommerville in considering that in the overall assessment of proportionality the fact that the panel proceeded on the incorrect basis that the Appellant was at a medium rather than low risk of reoffending did not materially affect the outcome of the appeal.
>
> Whether or not the panel failed to address the relevant legal issues to be decided in the correct order, it is plain that the Appellant could not succeed under the new Immigration Rules and the panel was quite entitled to find that paragraph 399 had not been met because the Appellant had failed to show there were exceptional circumstances. However, leaving aside the extremely confused nature of the grounds (the grounds at 3 totally misread what was found by **MF (Nigeria)** in respect of the new Rules), it does not appear to me that the panel considered the Appellant's case under Article 8 outside the new Rules. That is entirely contrary to **MF**, **Izuazu** and other reported cases. The panel did have regard to the best interests of the child (see paragraphs 22 and 25) but whether it did so in the context of Article 8 outside the Rules is very doubtful."

Appeal Hearing and Submissions:

7. Thus the appeal came before the Tribunal on 21st October 2013. Mr Akindele provided a skeleton argument upon which he placed reliance. There are three grounds that were advanced on behalf of the Appellant by Mr Akindele. Firstly, that the panel did not consider the Article 8 claim of the Appellant under the ECHR standard as set out in the decision of **MF (Nigeria)** and **Izuazu**, secondly that the best interests of the children concerned were not considered in accordance with general Article 8 principles and thirdly that the panel had made a mistake of fact when it noted that the Appellant had been found to be at a medium risk of reoffending and posing a medium risk of harm when the documentation referred to the Appellant presenting a low risk of reoffending.

8. In respect of the first ground he submitted that the panel had failed to follow the guidance in **MF (Nigeria)** and had failed to employ a two-stage approach to the consideration of Article 8 namely that they should have considered whether the Immigration Rules were satisfied and if they were not to then consider the Article 8 claim outside of the Rules under the ECHR as prescribed by the decision of the Upper Tribunal in **MF (Nigeria)**. Mr Akindele conceded that since the grounds were submitted that that case had come before the Court of Appeal and had been reported at **MF (Nigeria) v SSHD [2013] EWCA Civ 1192**. However Mr Akindele submitted that the panel had not considered the proportionality factors properly in respect of this Appellant's case in that the Appellant was clearly able to demonstrate that there was a reasonable difficulty in the Appellant's family relocating to Ghana and the panel did not consider whether the breakup of the family was a proportional one or not. In this respect at paragraph 24 of the decision, they applied the wrong test when they stated that the circumstances of Miss Tyzack were not exceptional. The panel also had failed to take into account or had any regard to the fact that both children were British citizens as was Miss Tyzack and it would be unreasonable to expect them to leave the United Kingdom with the Appellant. As Hayden was not the natural father of the Appellant and his natural father lived in the United Kingdom it

was not reasonable to expect him to leave the UK either. Thus it was an error of law to state that that was an option open to the Appellant's partner. He submitted that the appropriate question was whether it was proportionate to break up the family and that if the panel had considered that question the appeal would have been allowed and that there was no public interest in the breakup of this family.

9. As to the second ground, he submitted that the panel did not consider the best interests of either Hayden or Dwayne his natural child and it was incumbent upon the panel to determine the best interests of the children and weigh that against the public interest which they identified in the case. Nothing was said about the best interests of the children.

10. As to the third ground, the panel stated that it had been noted that the pre-sentence report concluded that he was at a medium risk of causing serious harm and a medium risk of reoffending. They went on to state that the Appellant had said there had been an assessment of him as a low risk of reoffending but the panel stated that he had not submitted a written report of this assessment. The evidence at page 19 (First-tier Tribunal bundle) did state that the Appellant posed a medium risk of serious harm to the public and was at a medium risk of reconviction. However a later letter on 15th May 2013 at page 8 noted that upon release from licence he was assessed at a low risk of reoffending. Thus it was a mistake of fact and was material to the outcome. He submitted the determination should be set aside and reheard.

11. Mr Allen on behalf of the Respondent submitted that the decision of the First-tier Tribunal panel did not disclose any material error of law. He submitted that nowhere within the determination did the panel adopt any test of exceptionality when considering the proportionality assessment either under the Rules or outside of the Rules. He submitted that the sole basis upon which permission had been granted by Judge Storey was on the ground advanced that the panel arguably did not consider the two-stage test. There had been no application to amend the grounds for permissions to appeal. However since permission has been granted the Court of Appeal's decision in **MF (Nigeria)** made it clear at paragraphs 43 to 44 that the new Rules were a complete code and that the question of proportionality would be decided when considering the new Rules in the same way as it would have been under the ECHR. In this case the panel considered all the relevant factors which were of relevance and they were addressed by the panel. The panel did consider the best interests of the children by considering the relationship between the Appellant and the children and Miss Tyzack and found that the family life that he had was outweighed by the public interest element in this appeal. That was a matter that was entirely open to them to make on the facts of this case. There was no need to conduct a separate assessment under the ECHR as they did so within the ambit of the Rules and under paragraph 398 of "exceptional circumstances".

12. The panel's conclusion at paragraph 27 listed the factors and upon doing so noted that they had found no exceptional circumstances. The balance conducted by the panel demonstrated that they did carry out a proper weighing of the proportionality

factors relevant in this appeal and it has not been demonstrated that any such factors had been left out of consideration. The balance was a matter for the panel.

13. As to the risk of reoffending, it was submitted that it was not a mistake of fact. At paragraph 19 there was a letter which the panel relied upon stating that the Appellant posed a medium risk of harm and was at a medium risk of reoffending. That drew on evidence from the presentence report. Thus it was not a straightforward mistake of fact, it was simply a question of weight and whether or not the panel should have given weight to the second letter which said that he was at a low risk of reoffending. In any event both Upper Tribunal Judge Storey and Judge Sommerville did not grant permission on that ground noting that any error would not have been material. Looking at the determination as a whole, it could not be asserted that the First-tier Tribunal panel made any material error of law in this respect and that it was plain from the determination that the balance was in favour of the public interest element of deportation irrespective of the risk of reoffending.

14. As to the best interests of the children, there was specific reference to the best interests of the children at paragraph 25 and that matter was weighed in the balance by the panel also. The panel noted Section 55 and the decision of **ZH (Tanzania)** thus they expressly considered the best interests of the children but having done so did not find that their interests outweighed the other countervailing factors in this case. Thus he submitted the determination should be upheld.

15. Mr Akindele by way of reply reiterated his submission that there had been a mistake of fact which should lead to the determination being set aside as a whole. Secondly, he submitted that the best interests of the children deserved more consideration than the panel had given it at paragraph 25.

16. At the conclusion I reserved my determination.

My Assessment

17. I commence by setting out the relevant provisions of the Immigration Rules relating to deportation and Article 8, as introduced by the Statement of Changes in HC 194 on 9th July 2012, at paragraphs 396 to 399B.

> 396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with Section 32 of the UK Borders Act 2007.
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> 397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

Deportation and Article 8

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would not be reasonable to expect the child to leave the UK; and

(b) there is no other family member who is able to care for the child in the UK; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or

(b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the **country to which he would have to go if required to leave the UK.**

399B. Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted.

18. I have considered the grounds and the submissions made by the parties. In the original grounds advanced on behalf of the Appellant before the First-tier Tribunal and before Upper Tribunal Judge Storey, it was asserted that the panel did not consider whether the Appellant was able to benefit under the Immigration Rules (see paragraph 3 of the grounds as originally drafted) and that the panel failed to carry out Article 8 analysis "outside the Rules". The First-tier Tribunal observed that the grounds seeking permission were "difficult to follow" (see paragraph 3) and also correctly observed at paragraph 4 that the panel did consider the Immigration Rules and that in any event, the grounds did not contend that the appeal should have succeeded under the Rules. Upon renewal of the grounds in the same form, Upper Tribunal Judge Storey also correctly identified that it was plain that the Appellant could not succeed under the new Immigration Rules but that whilst the panel were entitled to find that paragraph 399 had not been met because the Appellant had failed to show that there had been "exceptional circumstances", the panel did not consider the Appellant's case under Article 8 "outside the Rules" under the ECHR under a two-stage test as envisaged by the case of **MF (Nigeria)**. Both before the First-tier Tribunal and before the Upper Tribunal, the grounds advanced on behalf of the Appellant relating to the mistake of fact was not found to be material to the outcome of the appeal. Thus there was only one ground upon which permission had been granted. No application has been made to amend the grounds.

19. Since permission has been granted, the decision of **MF (Nigeria)** has been the subject of further appeal before the Court of Appeal and now reported as **MF (Nigeria) v SSHD [2013] EWCA Civ 1192**. Since the grounds were settled, Mr Akindele has now

produced a skeleton argument. The grounds upon which he seeks to challenge the panel's determination are set out at page 7, they are threefold, namely:-

(i) the mistake made in the assessment of risk of reoffending is material because it formed the part of the matrix for the proportionality assessment,

(ii) the Tribunal did not consider the Article 8 claim of the Appellant under the ECHR standards as prescribed by **MF (Nigeria)**,

(iii) that the best interests of the children were not considered in accordance with the general Article 8 principles.

However it is plain from the oral submissions and the content of the skeleton argument that the grounds now advanced and the emphasis has changed from those that have been put before the Tribunal when seeking permission. They have changed from the ground advanced that the panel did not consider the Article 8 claim of the Appellant under the ECHR and that what really is the focus of challenge relates to their actual assessment of the proportionality exercise, whether under the Rules or outside the Rules. There has been no application made to amend the grounds for permission to appeal. Nonetheless I have considered the submissions made by Mr Akindele.

The decision of the Court of Appeal in **MF (Nigeria)** demonstrates that the first step undertaken under the new Rules is to decide whether the deportation of the Appellant would be contrary to an individual's Article 8 rights on the grounds that (i) the Appellant falls within paragraph 398(b) or (c) and one or more of the conditions set out in paragraph 399(a) or (b) or paragraph 399A(a) or (b) applies. In this appeal the Appellant fell within paragraph 398(b) as deportation was deemed conducive to the public good as he was convicted of an offence for which he was sentenced to a period of imprisonment of less than four years but at least twelve months. Thus the appeal had to be decided under the Rules under paragraphs 399 and 399A. As observed by First-tier Tribunal Judge Sommerville, whilst the grounds asserted that the panel should have considered the Immigration Rules, it was not the Appellant's case that he could meet the Rules. Indeed he could not meet paragraphs 399 or 399A. In that event, paragraph 398 applied and that "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors".

20. At paragraph 14 of the decision of **MF (Nigeria)** the Court of Appeal made reference to a document entitled "Criminality Guidance For Article 8 ECHR Cases". The latest version having been issued in March 2013 to assist caseworkers in applying the new Rules. The document referred to what was said about the phrase "exceptional circumstances" where it appears in paragraph 398:-

> "In determining whether a case is exceptional, decision makers must consider all relevant factors that weigh in favour and against deportation.

> 'Exceptional' does not mean 'unusual' or 'unique'. Decision makers should be mindful that whilst all cases are to an extent unique, those unique factors do not generally render them exceptional. For these purposes, exceptional cases should be numerically rare. Furthermore, a case is not exceptional just because the exceptions to deportation in Rule 399 or Rule 399A have been missed by a small margin. Instead, 'exceptional' means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that deportation would not be proportionate. That is likely to be the case only very rarely."

21. It is further clear from the decision of the Court of Appeal at paragraph 39 that the new Rules do not import test of exceptionality. Nonetheless the decision further makes it clear that the new Rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of the proportionality test as required by Strasbourg jurisprudence. What is required is applying a proportionality test whether under the Rules or outside the Rules; what matters is that it is required to be carried out if paragraph 399 or 399A do not apply. Furthermore, paragraph 398 expressly contemplates weighing other factors against the public interest and this includes factors relevant to proportionality under the ECHR.

22. It is now advanced on behalf of the Appellant that the panel did not carry out a proper proportionality assessment. To consider whether they did carry out an assessment of proportionality either under the Rules or outside the Rules, it is necessary to consider their findings of fact. The skeleton argument makes reference to the facts of the appeal at paragraph 15 it is stated: "In the appeal the close bond between the Appellant and his partner and children are well evidenced ---" However that wholly fails to take into account the findings of fact which were made in this appeal from the panel who had the advantage of hearing the witnesses give oral evidence concerning a number of elements of the Appellant's private and family life.

23. The findings of fact made by the panel can be summarised as follows. The panel made the following findings of fact relating to the Appellant's immigration history. Whilst the Appellant claims to have entered the United Kingdom aged 15 in 1999 on a false passport, the panel found no record of his entry. He claimed that he had travelled to the UK with an unknown person with tickets bought by a person who he thought was his father but later found out that it was his uncle. It is claimed that he lived with him until 2002 until he moved out to live with friends in South East London in 2010. The panel found that the Appellant had provided no supporting evidence that he lived with a relative until 2002 or that he lived in South East London until 2010 (see paragraph 20). Therefore they made a finding of fact that the Appellant had entered the UK illegally and had made no attempt to make an application for leave to regularise his status in the UK until served with a deportation order. The panel considered evidence of his residence and that of Beatrice Appiah (see paragraph 20). They found that she provided no evidence of the Appellant's life in the UK prior to his Crown Court conviction other than to say that he was brought to the UK by his father. They found that she had no direct knowledge concerning this matter. While she said that he had lived with her father until his death in 2004 the panel observed that the Appellant's evidence was that he had moved out in 2002

and that the uncle had died in 2005. Consequently the panel found that her evidence added little to the Appellant's evidence and found it to be contradictory. Thus when reaching a conclusion concerning his immigration history and the length of time that he had been in the United Kingdom, the panel found no evidence to support the Appellant's claimed presence in the UK prior to 2010. Thus they were not satisfied that he had been resident in the UK since 1999 and found that he had been in the UK for a maximum of three and a half years that is since 2010. It is right to note that the panel considered his account of an arrest in 2005 but did not find any evidence in support of that.

24. In respect of his private life (see paragraph 20) when the panel asked him how he had spent his life prior to 2010 he said that he had had a series of cash-in-hand jobs but that he had not attended any courses or took part in any studies in the UK. The panel found that the Appellant had failed to provide an address at which he was living prior to meeting Miss Tyzack and there was no evidence of a previous girlfriend, friends or jobs that he claimed had been paid in cash. Thus they concluded at paragraph 25 that the Appellant had shown no record of working or studying in the UK, apart from while serving his sentence, he had provided no evidence of positive engagement to UK society and the Tribunal found "no evidence of the establishment of a meaningful private life, after having been in the UK for three and a half years" (see paragraph 25).

25. As to his family life with Miss Tyzack the panel accepted the oral evidence that the parties had been in a relationship since the latter part of 2010 but they were not satisfied that the parties had been living together prior to that and found that they had not been living together until January 2012. The panel set out its reasons for reaching that finding of fact namely that neither the Appellant nor Miss Tyzack had provided supporting evidence to show living together prior to January 2012 (two months prior to his arrest in March 2012 for the drugs offences). The parties were in a relationship at the beginning of 2011 because Dwayne their child was born in November 2011 and there was evidence to show them living together as a unit in January 2012. Furthermore in his evidence with regard to convictions of battery in March 2011, the Appellant stated that he required accommodation for the night and did not mention the possibility of spending the night with Miss Tyzack and thus that was a further reason for reaching the overall conclusion that whilst they had been in a relationship since the latter part of 2010 they had not been living together until January 2012, two months before the Appellant went into prison.

26. Miss Tyzack had a child from a previous relationship, Hayden Peter Tyzack, born on 3rd January 2008. It was claimed that this child was treated as the Appellant's biological son and that he had always played an active role in Hayden's life. The findings of the panel are set out at paragraph 22. They found the Appellant not to be his natural father and he had no statutory or other responsibility for him. They found Hayden's father remained in contact with him and Miss Tyzack and visited on an infrequent basis. The panel accepted that the Appellant had taken Hayden to school since the end of April 2003 (six weeks prior to the hearing before the First-tier Tribunal panel) but the panel rejected evidence that Hayden would be distressed by

the absence of the Appellant. They found that the Appellant had lived with Hayden at most for a period of three to four months prior to his arrest and had lived with him since release in March 2013 for a further three months. As they said:-

> "The Appellant is not the father of Hayden and consider that two periods of approximately three months, separated by almost a year, would be insufficient to establish a family life with Hayden for the purposes of Article 8 of the ECHR".

With regard to paragraph 399 of the Immigration Rules, they found that the Appellant was not the father of Hayden and therefore did not have a parental relationship with him, especially as Hayden's father remains in contact. The Tribunal was not satisfied that having lived with Hayden for just three months after his release, that there was a "strong quasi parental relationship had been established".

27. The panel accepted that the Appellant was the natural father of Dwayne born in November 2011. As to the history of family life and his relationship with Dwayne, the panel found that the parties had lived together since January 2012 which was three months prior to his arrest and had also lived together three months since his release. At the time of his arrest, Dwayne was only 4 months of age and the Appellant had spent only three months with him since his release from prison. The panel noted and took into account at paragraph 24 that for the last three months the Appellant had been living at the same address as Miss Tyzack and his son Dwayne but noted the limited time that he had been able to demonstrate strong and deep family links.

28. As to the circumstances in which the relationship was formed they were set out at paragraph 24. The panel found that the set of factual circumstances were not those to demonstrate that the Appellant had leave which had expired but noted that he had entered illegally, had never applied for leave nor sought to seek to remain in the United Kingdom on the basis of any family life until after the deportation order and the basis of the family life relied upon had been for a very limited period. They found that his immigration status in the host state was precarious and that he had entered into a relationship with Miss Tyzack in the full knowledge that he had no leave and that he would be liable for deportation or removal.

29. In relation to hardship for the family of the Appellant being separated from the children and Miss Tyzack , the panel set out its findings at paragraph 24. It had been Miss Tyzack's evidence that she could not cope without the Appellant in the UK and had said that she suffered from depression and also other life events that occurred recently. The panel considered that oral evidence and took into account the letter that had been produced on behalf of her GP which had reported that the depression that she had was due to several problems in her life, including the recent death of her mother as well as the absence of the Appellant. The panel did not find that there would be any hardship for Miss Tyzack in the absence of the Appellant in the event of his deportation. They found that the past history demonstrated that Miss Tyzack was able to call on the assistance of her siblings and her father to a limited extent while the Appellant was in prison and that she could give no viable reason why she

could not call on family or make other arrangements for the care of the children if she continued to work. They found "no basis to conclude that the circumstances of Miss Tyzack in the absence of the Appellant are exceptional".

30. It is in this context that it is now submitted on behalf of the Appellant that the panel failed to have regard to the fact that the Appellant's partner and children are British citizens and thus they were not required to leave the United Kingdom and secondly, the panel failed to have regard to the children's best interests.

31. From a careful reading of the determination, it is plain that the panel knew and took into account that the Appellant's partner, and Hayden and Dwayne were UK citizens. There are references to their nationality and citizenship at paragraph 9 (where it was noted it was accepted that the Appellant was in a relationship with Vicky Tyzack and that she was a UK citizen), paragraph 15 in which Miss Tyzack's evidence that she was a UK citizen was set out again, at paragraph 16 the evidence of Miss Tyzack again was clearly stated where it was noted "she had been living with the Appellant since 2010. She would not go to Ghana, as the children were UK citizens. Hayden was in a UK school and she would not resettle them in Ghana". The submissions made on behalf of the Appellant were recorded at paragraph 18 where it was stated "it was now accepted that no UK citizen should be expected to leave the UK". The panel in its findings of fact at paragraph 25 were not stating that it was reasonable for the family to relocate to Ghana nor did the panel state that she was required to. The panel merely stated that it was an option "open to her", that is an option of choice.

32. It is further plain from the determination that the panel in their findings of fact considered the effects upon the family of the separation from the Appellant in the event of his deportation and that is set out at paragraph 24. The Appellant's partner gave evidence that she would find it difficult to cope without the Appellant and that she was suffering from depression. As set out in the findings of fact recorded earlier the panel did not accept that evidence and reached the conclusion that she had been able to call upon the assistance of siblings and her father to a limited extent whilst he was in prison and she gave no "viable reason" why she could not call on family or make other arrangements for the care of the children if she wished to continue to work. Whilst they said that there was "no basis to conclude that the circumstances of Miss Tyzack in the absence of the Appellant are exceptional", the panel were not importing a test of exceptionality by saying that the circumstances were not exceptional but were entitled to find that there would not be unjustifiably harsh consequences using the words set out at paragraph 14 of **MF (Nigeria)**. This was particularly so in the light and against the background of the findings made by the panel considering the short-lived nature of the family life that the Appellant and Miss Tyzack and the children had in the UK and what they considered to be the limited nature of the Appellant's family life. Those findings in my judgment reinforce the view that the panel were not saying that Miss Tyzack and the children should relocate to Ghana but had considered the effect upon the family of the separation and that was an issue in the proportionality issues that the panel considered.

33. Contrary to the assertions in the grounds, the panel did take into account the best interests of both children. The findings of fact made are of relevance in this respect. As set out earlier as regards Hayden, the panel found that he was not his natural father and had had no statutory duty or other responsibility for him, his natural father remained in contact with him and Miss Tyzack, that the Appellant had taken him to school for a limited period of six weeks only and rejected evidence that Hayden would be distressed by the absence of the Appellant noting that the Appellant had lived with Hayden at most three to four months prior to arrest and for a short period after release and that two periods of three months separated by one year did not demonstrate that the Appellant had a quasi parental role with him (see paragraph 24). In relation to Dwayne it was noted that he was born in November 2011 and was only 4 months old at the time the Appellant went into prison. It was accepted that the Appellant was Dwayne's natural father but in the light of the history he had had limited time with his son and the panel concluded that there was no long-term commitment to his care. Drawing together those findings the panel concluded at paragraph 25:-

> "With regard to the interests of the children under Section 55 of the 2009 Act, the Appellant's stepson has his father in the UK, who retains an interest in the child and occasionally visits. No evidence has been available from the father on his view of the involvement of the Appellant and his son's upbringing. Prior to the last three months the Appellant had another short period of involvement with the children before his sentence and saw the children at five or six prison visits, he has not been able to show any long-term commitment to their care. He was shown no ability to be able to provide for the children without resorting to criminality. The Tribunal finds that any claimed interest of the children as to the presence of the Appellant is considerably outweighed by the public interest. In accordance with both Section 55 and **ZH Tanzania**, the welfare of the children is a primary but not the only consideration. …
>
> "… The Tribunal is satisfied that the welfare of the children has been given due weight when considered with the other factors in this appeal, and that the deportation is not contrary to Section 55 of the 2009 Act."

34. It is plain from paragraph 25 that the panel did have regard to Section 55 and the best interests of both children. Even if the panel had identified that it was in the best interests of both children to continue in their relationship with the Appellant by him living in the UK, the panel correctly identified that the welfare of the children was a primary and not the only consideration and that on the particular facts of this case "that any claimed interest of the children as to the presence of the Appellant is considerably outweighed by the public interest" (see paragraph 25). The countervailing factors that had been identified by the panel that they weighed in the balance are as follows; firstly the gravity of the offence (the details of the offence were set out at paragraph 23), the merit was noted that he pleaded guilty to serious offences and he was found to be in possession with intent to supply nineteen wraps of class A drugs, both crack cocaine and heroin, with the clear intention of supplying and dealing in drugs. This was not two packages but involvement in an enterprise to distribute the drugs to a number of people on a commercial scale. The panel noted that the judge continued his remarks by underlining the seriousness of the offence and the effect that drug

dealing had on people's lives. Whilst it was recognised he did not have a large number of previous convictions, he was nonetheless in breach of a community service order which had been imposed as a result of two convictions for battery. The panel also noted that had he not pleaded guilty, the sentencing judge had noted that the sentence would have been one in the region of two years. As to the charge relating to the prohibited weapon, the panel took into account the oral evidence of the Appellant in which he claimed he pleaded guilty to the offence of possession of a prohibited weapon which was a taser gun in the house which the police found upon their attendance but claimed that he did not know it was prohibited. Nonetheless he had kept that taser gun in a house which he shared with his partner and children. Thus the Tribunal found:-

> "The Appellant has been convicted of serious offences which are a danger to society, has criminal convictions of violence, being two matters of burglary which the Appellant accepted involved a fight with a boyfriend of one of the Appellant's female friends. In addition, the Appellant has accepted in evidence that he was prepared to keep a prohibited weapon in his house, which he shared with his partner and two young children."

At paragraph 25, the panel noted again when weighing the question of proportionality under Article 8 of the ECHR that: "this Appellant was found to be dealing in class A drugs, which wreck people's lives and are a danger to society". The panel took into account his criminal record concerning a number of offences that he has been convicted of and his breach of the community order, the fact that he had been dealing in drugs (paragraph 25). The panel also took into account his failure to meet the Immigration Rules (see paragraph 25). The Court of Appeal in **MF (Nigeria)** recognised that in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paragraph 398, 399 or 399A (see paragraphs 40 to 41). A further countervailing factor taken into account and weighed in the balance was his immigration history (see paragraph 24), the precarious nature of his existence, having entered illegally and never applied for any form of leave, that he had entered into a relationship with Miss Tyzack in full knowledge that he had no leave to remain and would be liable for removal or deportation having committed criminal offences.

In those circumstances, it was open to the panel to reach the conclusion that any claimed interest of the children as to the presence of the Appellant which was that it was in their best interests for him to remain, was considerably outweighed by the public interest, was a finding that was entirely open to them on the evidence and the balance of the countervailing factors that they identified as set out above.

35. One of the countervailing reasons referred to the risk of reoffending which the panel made reference to as a "medium risk of reoffending" (see paragraph 25). It has been submitted on behalf of the Appellant that the panel made an error of fact. Mr Allen on behalf of the Secretary of State submits that it was not an error of fact but that it was a matter of weight that the panel preferred the evidence from the pre-sentence report to the evidence in the letter.

36. I have considered the evidence that was before the panel in relation to risk of reoffending and risk of harm to the public. The first document that refers to any risk of harm is at page 19 of the Appellant's bundle which is an undated letter from Officer Stockley of the Offender Management Unit. The letter states: "I have read the pre-sentence report regarding Mr Boateng which states that he is a medium risk of serious harm and also a medium risk of reconviction". The presentence report was not before the panel but the presentence report would have given details as to how the author of the report had made an assessment of the risk that the Appellant posed at the time that it was written. In an updated bundle at page 8 there was a letter dated 15th May 2013 from a probation officer. It was noted in the letter that the Appellant had attended for probation on a weekly basis since being released on licence in March 2013. It was noted that he was engaging well with supervision and sought appropriate help and support to address issues he may have. Reference was made to the Appellant working with education, training and employability and that he would be undertaking weekly literacy classes. The letter goes on to state: "he is assessed as posing a low risk of harm to the public and is also assessed as a low risk of reoffending".

37. What the panel said about this is set out at paragraph 24. They record the following:-

> "The letter from the Offender Management Unit noted that the presentence report concluded that there was a medium risk of the Appellant causing serious harm of reoffending. The Appellant stated that he had been assessed as being at a low risk of reoffending but had not submitted any written report of this assessment."

At paragraph 25 the panel recorded again: "the Appellant was considered to be at a medium risk of reoffending".

38. As can be seen from paragraph 24, the panel's recitation of the evidence from the letter of the Offender Management Unit was not a mistake of fact. There was indeed a letter which noted that the presentence report concluded that there was a medium risk of the Appellant causing serious harm of reoffending. The panel were also right in stating that the Appellant had told them that he had been assessed at being a low risk of reoffending but had not submitted any written report of this assessment. The letter at page 8 was not a risk assessment report although it is right to observe that the conclusion of the probation officer was that he had been assessed as posing a low risk of harm to the public and assessed as a low risk of reoffending. No such assessment had been provided as noted by the panel. Nonetheless whilst I am satisfied there was no mistake of fact in that respect, the letter of 15th May 2013 notwithstanding the lack of assessment report to support it, did state that he was assessed as posing a low risk of harm to the public and of reoffending. However even if it were an error of fact, I do not find it to be a material one or one which would have materially affected the outcome of this appeal on its own particular individual facts as found by the panel. As Upper Tribunal Judge Storey and First-tier Tribunal Judge Sommerville observed, there were a number of weighty countervailing factors identified by the panel and that in any event the legitimate aim of the prevention of crime is not confined to those who are likely to reoffend. The jurisprudence in deportation appeals, indicate that in cases affecting public

confidence in the criminal justice and immigration system, the deportation of offenders has a legitimate role in the deterrence of others who might be minded to offend. For those reasons, I am satisfied that even if that was a mistake of fact it did not materially affect the outcome of the appeal given the number and weight of the other countervailing factors identified by the panel.

39. For those reasons I am satisfied that the panel did carry out a careful and correct assessment for proportionality factors in this appeal and that the decision that they made was entirely open to them on the particular facts of this case.

40. I am satisfied that the panel were entitled to reach the conclusions that they did in this appeal after carrying out a careful assessment of the evidence and reaching a conclusion as to where the balance lay. In this case they found that it lay in favour of deportation. Consequently I find that there is no error of law in the determination of the panel.

Decision

41. The First-tier Tribunal decision did not involve the making of an error of law; the decision stands. The appeal is dismissed.

Signed Date

Upper Tribunal Judge Reeds