Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/10710/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 1 May 2013	**On 9 August 2013**
With further submissions on 9 May 2013	……

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR EDWARD ADU-GYAMFI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Lewis, Counsel, instructed by Irving & Co Solicitors
For the Respondent: Ms H Horsley, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal was originally listed before me on 28 January 2013, when I found that there had been an error of law in the determination of the First-tier Tribunal. I set

out below the chronology of this appeal, which repeats large extracts from the Decision I gave following that hearing.

2. The appellant is a national of Ghana, who was born on 27 April 1977. He arrived in this country on 8 October 1994 (aged 17) together with his mother and younger brother, in order to join his father, who was a British citizen living in London.

3. The appellant was granted indefinite leave to remain in this country, together with his mother and brother, on 17 April 1999.

4. While in this country, the appellant formed a relationship with Michelle Stubbs, with whom he had two children, the first, Sharay, born on 6 December 1999, and the second, Amari, born on 8 May 2002.

5. Over a period of about a year, the appellant committed a series of armed robberies of betting shops, using an imitation firearm, in the course of which many victims must have been terrified. In respect of these offences, the appellant was convicted (having pleaded guilty) at Harrow Crown Court on 30 June 2005 of ten counts of robbery, seven counts of having an imitation firearm with intent to commit an indictable offence and one account of attempted robbery. For these offences, on 2 August 2010, he was sentenced to a total of twelve years' imprisonment, reduced on appeal to ten years' imprisonment.

6. In February 2008, the appellant was notified of his liability to deportation, and on 18 April 2009, a decision was made to deport him, which decision was served on him on 18 May 2009. His appeal against that decision was dismissed, and eventually his appeal rights were exhausted on 30 August 2011.

7. Removal directions were subsequently set for 8 December 2011, but following an oral appeal to the Court of Appeal, on 24 November 2011 these directions were cancelled.

8. The appellant was granted bail on 13 January 2012 and shortly thereafter his application to the Court of Appeal was withdrawn. However, on 7 February 2012 the appellant submitted an application to revoke the deportation order, which it seems was accepted as a fresh claim. However, the application was refused by the respondent on 5 April 2012.

9. The appellant appealed against this decision, and his appeal was heard before First-tier Tribunal Judge Davda, sitting with Mrs J Holt (Non-legal Member) at Taylor House on 1 October 2012.

10. In a determination promulgated on 18 October 2012, the panel dismissed the appellant's appeal.

11. The appellant appealed against this decision, pursuant to leave granted on 7 November 2012 by First-tier Tribunal Nightingale.

12. In my Decision I set out the main arguments advanced on behalf of the appellant at that hearing, and I repeat them in this determination.

13. Mr Lewis, on behalf of the appellant, referred the Tribunal to paragraph 43 of the panel's determination in which the panel set out their "conclusion" as follows:

> "We have not had persuasive evidence from the appellant to demonstrate that his removal would significantly impact on him, his children or his family".

14. Mr Lewis, who had represented the appellant before the panel, informed the Tribunal that it was simply not correct that there had not been evidence before the panel to demonstrate that the removal of the appellant would have a significant impact on his children, as well as on himself. Although there was reference within the determination to the evidence given by Mr O'Brien, the father of the mother of the appellant's children (the appellant's former partner) and also to the statement made by Mrs O'Brien, his wife, there was no reference within the determination to Mr O'Brien's oral evidence, which had been that the appellant's removal would have a "disastrous" impact on his (the appellant's) children (Mr O'Brien's grandchildren). The failure to deal with this evidence properly was a material error of law.

15. Mr Lewis acknowledged that the offences were very serious, but submitted that there were cases where the removal of applicants with equally serious criminal records had been held to be disproportionate, depending on the particular facts of their cases. So it was not possible to say that this appellant's removal must be proportionate without properly considering the individual circumstances in his case, and in particular the effect of his removal on his children.

16. On behalf of the respondent, Ms Tanner suggested that the panel had probably meant to say that it had not heard persuasive evidence to show the removal of this appellant would be disproportionate, although that is not what is actually said. However, even if there had been an error in the terminology used in paragraph 43, the respondent would submit that the panel had taken into account the relevant evidence relating to the appellant's family life, and in particular, at paragraph 41, had considered the interests of the children as being to remain in the UK with their mother. Also, the panel had reached sustainable findings as to the nature of the crime, taking into account the length of sentence imposed. This appellant could not be said to be such a devoted father, because of his convictions. He had not set an example, and he had removed himself from the company of his children because of his actions.

17. The panel was also entitled to find that the appellant was a continuing risk to the community, as it did at paragraph 40. The panel was right to refer to his not having provided any details of employment.

18. It was accepted that it was inescapable that deportation would break up the family and that the appellant's children would lose contact with their father, but that was the nature of deportation. However, as against that, there was the deterrent and also the revulsion element which had to be considered, as set out in *N (Kenya)*. The

likelihood of re-offending was only one aspect which had to be considered by the Tribunal. The need to deter other potential criminals and to express the revulsion of the public were also important factors. In those circumstances, even though once caught the appellant had apologised and was remorseful, removal was still proportionate.

19. The nature of the family life had been recorded, but although the children would not like the removal of their father, it was still entirely proportionate, because that was what happened when serious crimes had been committed. The children lived with their mother and they had other relatives they could turn to.

20. When one considered the history of the previous appeal, the deportation decision having been upheld in November 2011, there was really very little which had happened since then to make removal disproportionate.

21. I found an error of law, and gave my reasons as follows, at paragraph 20:

> "Albeit with some hesitation, I find that the panel's determination did contain a material error of law, such that the decision must be set aside and re-made by the Upper Tribunal. Although the panel may have meant to say that it was not persuaded that the impact on the appellant's children was so significant as to outweigh the factors in favour of his removal such that the removal would be disproportionate, that is not what is said at paragraph 43. Having heard Mr Lewis's submissions with regard to the evidence which had been given before the First-tier Tribunal, which is simply not recorded in the determination, without further explanation, the statement that it has not been shown that the appellant's removal "would significantly impact on him, his children or his family" is not adequately reasoned. I do not consider it would be right to speculate as to what the panel might have meant. Accordingly, the decision will have to be re-made by the Upper Tribunal. "

22. At paragraph 21 I stated that the re-hearing would be limited to consideration of the impact on the appellant's children of his removal, and I also stated as follows:

> "However, I should make it clear that although this evidence should, and must, be before the Tribunal before a decision is made, it by no means follows that even if the impact on the children is significant, this will be sufficient to outweigh the factors in favour of deportation. The offences, as Mr Lewis has acknowledged, are vey serious indeed, and even if the impact of removal on the appellant's children is significant, this might still be outweighed by those factors which will be relied upon by the respondent. The reason why I have found an error of law in the panel's determination is because it is not evident from this determination that the impact on the children was properly taken into account at all."

23. Among the directions which I then gave was that the evidence would be limited to considering the impact of the appellant's removal on his children.

24. The appeal then came back before me for hearing on 1 May 2013.

The Hearing

25. On behalf of the appellant, Mr Lewis informed the Tribunal that the evidence would be limited to the appellant and his father-in-law; the appellant would also rely on the witness statements which had been filed with the Tribunal. I also heard submissions on behalf of both parties.

26. As I recorded the evidence and submissions contemporaneously, and my notes are contained within the Record of Proceedings, I shall not set out below everything which was said to me during the course of the hearing, but shall refer only to what is necessary for the purposes of this determination. However, I have taken into consideration everything which was said, as well as all the documents which are contained within the file, before reaching my decision.

27. The appellant relied on the statements he had made, and described his relationship with his children before he went to prison as warm, affectionate and loving. He claimed that he "couldn't stop what I was doing", because he had "a problem at the time". This was a gambling problem; this was an addiction. He knew that what he was doing was wrong, but it was an illness and he could not pull himself away. He was relieved when he was caught, and had co-operated fully with the police. He had received treatment whilst in prison.

28. While in prison, the children had visited him twice a month, or more if there was a special day. Sometimes they could stay all day. The prison where he was receiving treatment was different from a normal prison; he was allowed to play with them and even go to a cafeteria area. It was almost as if he was not in prison when he was with them. His son always cried when it was time to go.

29. Mostly Peter and Kim, that is their maternal grandparents, would bring them, after his ex-partner stopped coming in 2009.

30. The appellant then described his relationship now with his children, which he described as close. Even though his ex-partner, the children's mother, did not like him, she did not stop him seeing his children. He believed that he was a good influence on them, and one of his son's teachers had told him that since he was taking him to school, his son had improved; he thought that was important.

31. In cross-examination, the appellant said that he did not have a letter to the effect that his son's behaviour had improved, this was an oral conversation. He also did not have evidence apart from photographs as to how often his children had visited him. His ex-partner's parents had always come together with the children, and the visits usually lasted about two hours.

32. When he moved from this prison, he saw the children a little less. The appellant accepted that his ex-partner looked after his children, and that she was a good mother. Although there were concerns, there were no major concerns.

33. Mr O'Brien's evidence can be summarised shortly. He is the father of the appellant's ex-partner, that is the children's grandfather. He is a former prison officer; his wife still works in the Prison Service. He believes that the appellant is a positive influence on his children, in particular his son, because the appellant's son now has "someone to look after him". The appellant can help his son and give him advice. When it was suggested to Mr O'Brien by the Tribunal that it could be said that the appellant was not the best role model Mr O'Brien agreed, but said that the appellant had become more experienced and that he was not the same person he had been. He had had an addiction, which was like a disease. He was brilliant with his children. If he was taken out of the equation, it would be difficult for them. Mr O'Brien thought a boy needed his father, because a boy would always listen to his father, "he is the leader". The children would be devastated if their father was deported.

34. In cross-examination, Mr O'Brien said that he had visited the appellant in prison as soon as he had been sentenced; that was once he had settled in. After his daughter had stopped seeing the appellant in 2009, Mr O'Brien still took the children out on a regular basis, as much as he could. That was once a month, or every five or six weeks. He could not remember where he was in 2009, and did not remember which prisons he had been to, but he went to every prison he was in. The appellant went to his mother on release from prison. Mr O'Brien always went with his wife, and took the children.

35. The appellant's ex-partner had coped with the children, on her own, but with his help. They would help out if the children needed anything. The appellant tried to be a father from prison, but their daughter had him and his wife who were all trying to help her get through. Although there were a few problems, the children were safe. While he accepted that the position of the children was not ideal, and they would be better with both parents, there was never a need for Social Services to get involved.

36. The last time the school had contacted their daughter about her son's behaviour was about three years ago. He was getting into fights and being disruptive, but they left it to his daughter to sort out, and they (that is Mr O'Brien and his wife) talked to him as well. His granddaughter had not had any problems with school, but it was not good for her either not having a father about. Since the appellant had been released from prison, she had really blossomed, and had come out of herself.

37. Although Mr O'Brien, had a good relationship with his grandson, he would never be his dad. However, he did like to think that he could be a role model in his life. He thought that his grandson had been getting into trouble and having fights because he was frustrated at not having his dad about but now he was as good as gold. Mr O'Brien accepted that his grandson was older now, but he had also been encouraged to do stuff by his dad.

38. When it was suggested to him that his behaviour might have improved because he was getting older and had his mum and grandparents to support him, Mr O'Brien said that he still needed his dad. He feared that he would go back to where he had

been before if his father was deported. Especially now, when he would be very vulnerable to peer pressure and gangs and so on.

39. In re-examination, Mr O'Brien said that although he and his wife were trying to support their grandchildren, grandparents could not have the same connection as a father. His grandson worshipped his father and Mr O'Brien was "100% convinced" that he would be a good influence on him, much better than he or their grandmother could be.

Submissions

40. On behalf of the respondent, Ms Horsley relied on the refusal letter dated 5 April 2012 (giving the reasons for refusal to revoke the deportation order). This was an appeal against the refusal to revoke that order. The deportation order had already been signed and the appellant had lost his appeal against that order. However, the refusal of that appeal was still relevant and was a starting point for this Tribunal. There had been no change in circumstances since the making of a deportation order such as should lead to that order being revoked.

41. The Tribunal would be looking at Article 8, but should bear in mind that this was an automatic deportation.

42. Ms Horsley then made submissions as to why, with regard to Article 8, the Tribunal should not look at any factors outside the Rules. It was the respondent's position that the new Rules encompassed the approach to Article 8, and that the guidance issued by the respondent in relation to consideration of Article 8 encompassed a complete assessment of Article 8. That was still the respondent's position notwithstanding the decision of this Tribunal in *MF (Article 8 - new rules) Nigeria [2012] UKUT 00393*. There was then a discussion as to the effect of the decisions in *Nagre [2013] EWHC 720 (Admin),* and *Isuazu (Article 8 - new rules) [2013] UKUT 45*. Ms Horsley appreciated that the higher courts have said that reported decisions of this Tribunal should bind the Tribunal, but in the respondent's view if an applicant could not succeed under the new Rules, there should be no separate assessment as to whether his or her claim could succeed under Article 8. This was not an exceptional case. The new Rules made provisions as to where the best interests of the children lie, when balanced against the public interest.

43. Ms Horsley then addressed the Tribunal on the basis that the Tribunal would follow the guidance given in both *MF* and *Isuazu*, and that the Tribunal would consider whether or not an appellant who did not succeed under the Rules might still have a separate Article 8 claim.

44. This appellant had committed serious crimes which had made him liable for deportation. Case law emphasised the public interest in removing those who commit serious crimes in this country. The respondent relied on various decisions, in particular *DS (India) EWCA [2009] Civ 544* and *A.D. Lee*. Ms Horsley then referred to the observations of the social worker, which, it was claimed, were generalised. However, it was clear that the social worker did not suggest that the children would

suffer maltreatment, loss of safety or impairment of health or development, if their father was removed. These were factors which had been stressed by the court in *Sanade*. Also, when considering the best interests of the children, the Tribunal should have in mind that the House of Lords in *ZH (Tanzania)* was considering a removal, not deportation. The specific issue in that decision was the circumstances in which it would be permissible to remove or deport a non-citizen parent where as a result of that decision a child would also have to leave. In this case, the children would not be required to leave. Also, while the best interests of the children were a primary consideration, this was not the sole consideration. In this case, it was in the best interests of the children to remain in the UK with their mother. The issue here was the effect of the removal of their father on these children.

45. With regard to Mr O'Brien's evidence, Ms Horsley asked the Tribunal to find that he had embellished his evidence. There was no corroborative evidence regarding the prison visit after 2009, and no corroborative evidence from the children's mother. There was also no independent evidence from the children's school, and the social worker had been unable to carry out a complete assessment. Also, the appellant had apparently told the children's mother that the social worker coming to do the assessment was in fact his probation officer. So the evidence as to the impact on the children of the appellant's removal was not entirely satisfactory and was not as great as was made out. Also, the evidence did not suggest anything other than that Ms Stubbs, the appellant's ex-partner, was a good mother who cared for her children's well-being and their development. There were no safety issues or health issues. The children did adapt to the appellant's absence when he was in prison. They had been a family unit up to that point. They had adapted to his absence and to his presence in their lives again. They should be able to adapt should he now be deported.

46. Mr O'Brien's evidence was neither objective nor independent; it was subjective. For example, Mr O'Brien said that the appellant's son would always listen to his dad, and his dad was the leader; he had a view already that the appellant was absolutely needed in his children's lives. So far as his evidence in relation to changes in the personality of the children were concerned, the children were getting older now, which may account for changes in their personalities.

47. It should also be noted that the relationship which the appellant had built up with his children since his release had been built up while his presence here was precarious.

48. With regard to the letters from the appellant's children, the daughter was aware that the appellant was liable to deportation. She has said that she would have to adapt again. The appellant's son was also aware his father could be returned to Ghana. So both children were aware and that understanding went some way to showing they would be able to adapt. The children had written letters, and had the support of their mother and their grandparents, who were very hands-on. This support would not cease.

49. The Tribunal had to take into account the public interest element in deporting this appellant. The appellant had committed very serious crimes for which he had received a very heavy sentence. The convictions were the starting point. Although the Tribunal had heard about the motivation for his offences, it was not for this Tribunal to speculate as to what the motive was. He has committed very serious crimes and he did not stop until the police came knocking at his door, even though he was aware of what he was doing.

50. With regard to the risk of re-offending, the offences were so serious that the public needed to be protected. These offences took place over a twelve month period. The public interest in removing this appellant outweighed the Article 8 factors relating to the appellant or his children which suggested he should remain.

51. On behalf of the appellant, Mr Lewis accepted that the appellant's risk of re-offending had been assessed as a medium risk because of the nature of the offences.

52. Mr Lewis relied on his skeleton argument, and the focus of this appeal was the best interests of the children. The appellant had resided in the UK for a significant period of time, lawfully, and indeed for a long period of time he could have applied to be a British citizen. His consistent evidence had been that he got indefinite leave to remain in 1994, so he could have acquired British citizenship before he went to prison in 2005. However, it was accepted that he did not so apply and that theoretically the respondent could have rescinded this citizenship, if granted, although this was very rarely done.

53. The Tribunal was invited to accept the evidence which had been given from the appellant and the witness as to the relationship between the appellant and his children.

54. Although the appellant had committed a series of serious offences, he was not an habitual criminal. He had not committed offences outside this period. His driving offence was for drink driving in 2005 for which he was sentenced to a one year ban and a £400 fine.

55. Although no doubt there was some trauma suffered by the victims, the appellant had written to every one of them, and he had engaged in therapy treatment to overcome his addiction. His actions while detained had not been a response to the threat of deportation. His evidence was that he had engaged in this process because of his desire to be with his children, and his behaviour in prison in connection with his family is consistent with his behaviour before. The evidence was that the treatment programme he had undergone had had a very significant impact on him which is why he was assessed now as a low risk of offending. (I note, however, that it has been accepted that because the offences are themselves so serious, he still for this reason would present a medium risk to society).

56. If this appellant was deported, he would not be able to have contact with his children. Mr O'Brien's evidence was that his daughter would be unlikely to allow

the children to visit him in Ghana and she lacked the financial means for them to do so.

57. According to Mr O'Brien's evidence, the impact on the appellant's children now would be devastating if they were removed. This assessment was plausible. The public interest in removing the appellant should be assessed in that context. We were dealing with an individual whose deportation would impact on the lives of British citizens. There was a public interest in these children being able to develop into contributing members of society, which would be improved by the appellant remaining and being a guiding influence on them. The main individuals who would suffer as a result of his deportation would be these children.

58. With regard to the letters given by the children, their mother had not wanted them to give evidence. She had not been co-operative. She was not co-operative with the social worker either and did not give permission. He had offers of work and he always had had. If he worked, this would also reduce the need for the mother to receive public funds. The appellant had been present in his children's lives for fifteen months since released. To remove him now when there had been an improvement in their lives would have a devastating impact.

59. Mr Lewis also indicated that the appellant's brother, mother and social worker had also attended, and he relied on their statements. He also relied on the statements of Peter Tinkler and Michael Teale, who was the manager of a football club.

60. On 9 May 2013, Mr Lewis appeared before me again in order to enlarge on the submissions which he had made. He informed me that he had discussed with Ms Horsley the further representations he wished to make, and she did not object to his making them, although she did not agree with them. I accordingly agreed to allow Mr Lewis to make these further representations.

61. Mr Lewis informed the Tribunal that he had had instructions from the appellant, and also from the appellant's father-in-law, Mr O'Brien, that the appellant's ex-partner would refuse to allow his children to visit him in Ghana. After the hearing, Mr Lewis realised that he had not put that evidence before the Tribunal, which, in the light of his clear instructions, he should have done. He was very concerned that the Tribunal would not reach a finding that the children would be able to visit the appellant in Ghana, because of his failure to put this evidence before the Tribunal.

Discussion

62. I deal with Mr Lewis's supplementary submissions first. I accept, even though specific evidence was not adduced on this point, that both the appellant and Mr O'Brien believe that the appellant's children would not be allowed by their mother to visit the appellant in Ghana. I do not know whether or not their fears will turn out to be justified, but I am prepared to accept that it is more likely than not that if the appellant is deported, he will not be able to see his children until they are older. I will accordingly take account of this finding when I come to consider whether or not the removal of the appellant would be proportionate.

63. I have noted Ms Horsley's submission that the appellant's Article 8 rights are now covered by the Rules, and if, following the guidance given in *MF*, I had concluded that the removal of the appellant would be in breach of his protected Article 8 rights under existing jurisprudence, I would have invited further submissions from both parties as to precisely what impact the new Rules should have on existing jurisprudence, in light of the recent Court of Appeal decision in *SS (Nigeria) [2013] EWCA Civ 550*. However, by reason of my findings which appear below, I do not need to do so, but need only consider whether or not the removal of this appellant, in light of the evidence I have considered, would be in breach of his protected Article 8 rights, in light of existing jurisprudence.

64. When considering the basic principles which should inform the Tribunal's decision, I have had regard initially to the Court of Appeal judgments in *N (Kenya) [2004] EWCA Civ 1094*, *OH (Serbia) [2008] EWCA Civ 694*, *JO (Uganda) [2010] EWCA Civ 10* and *AD Lee v SSHD [2011] EWCA Civ 348*, and the principles enunciated in those decisions.

65. In *N (Kenya)*, having considered previous case law, May LJ summarised the approach a Tribunal should take in deportation cases at paragraphs 64 and 65, as follows:

> "64. In a deportation appeal… the adjudicator has an original statutory discretion…. The discretion is to balance a public interest against the compassionate circumstances of the case taking account of all relevant factors including those specifically referred to in paragraph 364 of HC 395. Essentially, the same balance is expressed as that between the appellant's right to respect for his private and family life on the one hand and the prevention of disorder or crime on the other. Where a person who is not a British citizen commits a number of very serious crimes, the public interest side of the balance will include importantly, although not exclusively, the public policy need to deter and to express society's revulsion at the seriousness of the criminality. It is for the adjudicator in the exercise of his discretion to weigh all relevant factors, but an individual adjudicator is no better able to judge the critical public interest factor than is the court. In the first instance, that is a matter for the Secretary of State. The adjudicator should then take proper account of the Secretary of State's public interest view.
>
> 65. The risk of re-offending is a factor in the balance, but, for very serious crimes, a low risk of re-offending is not the most important public interest factor…".

66. Judge LJ added as follows, at paragraph 83:

> "83. The 'public good' and the 'public interest' are wide-ranging but undefined concepts. In my judgment (whether expressly referred to in any decision letter or not) broad issues of social cohesion and public confidence in the administration of the system by which control is exercised over non-British citizens who enter and remain in the United Kingdom are engaged. They include an element of deterrence, to non-British citizens who are already here,

> even if they are genuine refugees and to those minded to come, so as to ensure that they clearly understand that, whatever the circumstances, one of the consequences of serious crime may well be deportation…".

67. *N (Kenya)* was considered in the judgments of the Court of Appeal in *OH (Serbia)*. Having considered the judgment of Judge LJ in *N (Kenya)*, at para 83, as set out above, Wilson LJ stated as follows, at paragraph 15:

> "From the above passages in *N (Kenya)* I collect the following propositions:
>
> (a) The risk of re-offending is one facet of the public interest but, in the case of very serious crimes, not the most important facet.
>
> (b) Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.
>
> (c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.
>
> (d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of the Tribunal, resides in the [Secretary of State] and accordingly an appeal against the decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the [Secretary of State] in the context of the facts of the case…".

68. In deciding that the determination of the original Tribunal in *OH (Serbia)* was unsustainable, Wilson LJ continued as follows at paragraph 16:

> "16. In my heart I would wish to propose that this appeal be allowed. The efforts of the appellant to rehabilitate himself and to make himself a useful member of our society are, in the light of his childhood experiences, almost heroic, but my work in the court is supposed to be ruled not by my heart but by my head… In the concluding paragraphs there is, of course, a reference to the seriousness of the offence, and a finding, accepted to be amply founded, that there was a low risk of the appellant's re-offending. But such was only one facet for the public interest engaged by this street stabbing on the part of a teenager armed with a knife. There was there no reference in terms by [the original Tribunal] to the public interest even though such was the matter against which the compassionate circumstances fell to be balanced. There was no reference to the significance of a deportation order as a deterrent. There was no reference to its role as an expression of public revulsion or in the building of public confidence…".

69. In *JO (Uganda*), where the Court of Appeal reviewed the application of "recent Strasbourg case-law on the compatibility with Article 8 ECHR of decision to deport, on grounds of criminal offending, foreign nationals who have spent most of their childhood in the host country", the principle as expressed in *N (Kenya*) and *OH*

(Serbia) were again restated by Richards LJ with whose judgment Toulson and Mummery LJJ agreed. At paragraph 27, Richards LJ stated as follows:

> "It must also be borne in mind, of course, that even if the difficulties do make it unreasonable to expect family members to join the applicant in the country to which he is deported, that will not necessarily be a decisive feature in the overall assessment of proportionality. It is plainly an important consideration but it may not be determinative, since it is possible in a case of sufficiently serious offending that the factors in favour of deportation will be strong enough to render deportation proportionate even if it does have the effect of severing established family relationships".

70. Richards LJ then stated further, at paragraph 29, as follows:

> "There is, … one material difference between [deportation and administrative removal], in that they generally involve the pursuit of different *legitimate aims*: in deportation cases it is the prevention of disorder or crime, in ordinary removal cases it is the maintenance of effective immigration control. The difference in aim is potentially important because the factors in favour of expulsion are in my view capable of carrying greater weight in a deportation case than in a case of ordinary removal. The maintenance of effective immigration control is an important matter, but the protection of society against serious crime is even more important and can properly be given correspondingly greater weight in the balancing exercise. Thus I think it perfectly possible in principle for a given set of considerations of family life and/or private life to be sufficiently weighty to render expulsion disproportionate in an ordinary removal case, yet insufficient to render expulsion disproportionate in a deportation case because of the additional weight to be given to the criminal offending on which the deportation decision was based…".

71. The other authority to which I have initially had regard is that of *AD Lee*, in which Sedley LJ stated as follows, at paragraph 27:

> "27. The tragic consequence [of deportation in that case] is that this family, short-lived as it has been, will be broken up forever because of the appellant's bad behaviour. That is what deportation does".

72. The Court of Appeal's summary at paragraph 21 of *JO (Uganda)* was itself set out at paragraph 8 of the decision of this Tribunal in *Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT 00046*, where the Tribunal set out the basic principles to be applied in deportation cases. These principles, as set out in the head-note, include the following:

> "The following basic principles can be derived from present case law concerning the issue of the public interest in relation to the deportation of foreign criminals:
>
> (a) 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;
>
> (b) 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…".

73. While the interests of children whose lives will be affected by the deportation of a parent must be a primary consideration (and this must also be so when the Tribunal considers a refusal to revoke a deportation decision), I also have regard to the observations of Lady Hale in *ZH (Tanzania) [2011] UKSC 4*, that there can be circumstances where the best interests of the children, although of primary consideration, are not necessarily determinative.

74. Subsequent decisions of the Court of Appeal, such as *AM [2012] EWCA Civ 1634*, have emphasised the need to take account of the public revulsion towards those who have committed serious offences and the need to deter foreign nationals from committing serious crimes.

75. It is against this legal background that I now consider the particular facts in this appeal.

76. I have regard to the guidance given by Lord Bingham in *Razgar* and accept that this appellant has a family life in this country and that his removal would have consequences of such gravity as to engage his rights under Article 8. This removal would be for a lawful purpose, namely the prevention of crime and disorder, and would also be necessary for this purpose. The key question, as it so often is, is whether or not the removal of this appellant would be proportionate for this purpose.

77. I accept, as I have already stated above, that it is more likely than not that one consequence of the appellant's removal is that he will not be able to see his children until they are older. While he will be able to maintain some contact with them, through modern means of communication, this would not be the same as seeing them, and would amount to a serious disruption of his and the children's family lives. I am prepared to accept also, in light of the evidence which has been put before me, that all other things being equal, it would be in the best interests of the appellant's children that he should remain in this country. However, as already noted, the interests of the appellant's children, while of primary importance, are not determinative of this appeal.

78. I accept that the appellant presents a relatively low risk of re-offending, but that because of the very serious nature of the offences which this appellant might commit, he still presents a medium risk to the public. However, I must make it clear that even if I considered that he presented no risk at all of re-offending, for the reasons which I give below, I would still feel obliged to come to the same decision.

79. While I accept that all other things being equal it would be preferable from the children's point of view if their father was present in their lives, I do not accept that it would be "disastrous" for their well-being if he was removed. Mr O'Brien clearly believes they would be better off with their father in their lives, because all families would be better off with both parents, but I have noted that both he and the appellant accept that Ms Stubbs, the appellant's ex-partner, is a good mother, who cares for her children. The appellant said in terms that although he had concerns, Ms Stubbs was a good mother, while Mr O'Brien also accepted that whilst there were a few problems with the children, there had never been a need to involve Social Services. The family was getting by with support from the children's grandparents, although Mr O'Brien did not believe that the grandparents could have the same connection as a father.

80. As I indicated at paragraph 21 of my earlier Decision, even if I found that the impact of the appellant's removal on his children would be significant, it did not follow that this would outweigh the factors in favour of deporting this appellant. It was no doubt difficult for the appellant's family to cope when he was sent to prison; unfortunately, when a man who has a partner and children is sent to prison, his family will usually suffer. That is a sad consequence of his having committed offences sufficiently serious that he had to be imprisoned.

81. Similarly, when a foreign criminal, which is what this appellant is, commits very serious offences, the normal consequence is that he will be deported. Whilst there may be circumstances where the reasons why he should not be deported are so strong that they outweigh the factors in favour of his deportation, in my judgment this is not such a case. While I accept that the children's lives would be happier if their father was still seeing them (although I do not accept that he is such a good role model as Mr O'Brien apparently believes) they will continue to be well cared for even when he is away from them, and they will be able to maintain some albeit a limited form of contact with him. Social Services will not have to be involved and, in my judgment, the family will cope. While the appellant and his children will be separated (as their mother, although not grandparents, might prefer) as Sedley LJ said in *A.D. Lee*, "that is what deportation does".

82. I take account also that the appellant has been in this country since 1994, when he was 17, and was granted indefinite leave to remain in 1999. That is a long period, and this is a factor which I take into account as weighing against deportation.

83. Having given consideration to the reasons why it has been argued that this appellant should not be deported, I also have to consider why it is said that he should. The offences which this appellant committed were extremely serious. Over the course of about a year, the appellant committed ten robberies, in the majority of which he used an imitation firearm. The victims must have been terrified, and even following a plea of guilty, and after appeal, he was still sentenced to a total of ten years' imprisonment. These offences are so serious that, in line with the authorities cited above, it is very much in the public interests to deport this appellant first in order to deter other foreign nationals from committing serious crimes by leading them to

understand that, whatever the other circumstances, one consequence may be that they will be deported, and secondly as an expression of society's revulsion at crimes such as those committed by this appellant and in building public confidence in the treatment of foreign criminals who have committed serious crimes.

84. In my judgment, these reasons why the appellant should be deported outweigh by a wide margin the reasons why he should not. Accordingly, I find that his removal would be proportionate for the legitimate purpose of the prevention of disorder and crime in the widest sense and would not be in breach of this country's obligations under Article 8 of the ECHR. It follows that the appellant's appeal against the respondent's refusal to revoke her deportation decision must be dismissed and he must be deported.

Decision

I set aside the decision of the First-tier Tribunal as containing a material error of law, and substitute the following decision:

The appellant's appeal is dismissed, on all grounds.

Signed: Date: 26 July 2013

Upper Tribunal Judge Craig