IAC-AH-SC-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/00679/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 November 2014 and 16 January 2015	**On 29 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

MR DOMINIC NWAFOR
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Jegarajah, Counsel instructed by Prime Solicitors
For the Respondent: Mr Allan (12 November 2014) and Mr Norton (16 January 2015), Specialist Appeals Team

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal dismissing his appeal against the decision by the respondent to refuse him further leave to remain and to make directions for his removal under Section 47 of the Immigration, Asylum and Nationality Act 2006. The First-tier Tribunal did not make an anonymity direction, and I do not consider that such a direction is warranted for these proceedings in the Upper Tribunal.

2. The appellant is a national of Nigeria, whose date of birth is 30 June 1974. He first landed in the United Kingdom on 2 November 2002, and claimed asylum under an assumed identity. His asylum claim was refused, and his appeal against the refusal of asylum was dismissed in an Adjudicator's determination dated 18 July 2003. On 2 April 2004 the appellant made an application for leave to remain in the United Kingdom as the unmarried partner of a British citizen.

3. On 2 April 2008 the appellant was arrested by police officers and subsequently charged with four offences of possessing false identity documents with intent. On 18 June 2008, after pleading guilty, the appellant received a sixteen month prison sentence for these offences, which was reduced to twelve months on appeal.

4. On 12 November 2008 the appellant's appeal against the refusal of leave to remain as the unmarried partner of a person present and settled in the UK came before a panel chaired by Judge Chohan at Wolverhampton Magistrates' Court.

5. In their subsequent determination, the panel saw no reason to disturb the earlier finding of the Tribunal that the appellant had made a false claim to originate from Sierra Leone. He had been in the United Kingdom illegally for a period of six years. In that time he had had a relationship with a woman with whom he had a son D born on 29 November 2003. The appellant had also had a relationship with another woman with whom he had a son J born on 2 January 2004. His current partner was P, whom he had met some time in December 2006. This relationship was ongoing, and the couple had a daughter Y who had been born on 14 December 2007.

6. The evidence before the panel, which was unchallenged, was that the appellant's current partner and his ex-partners cooperated together in order to facilitate contact between the three children.

7. The panel said that if the appellant had no children in this country, and taking into account his adverse immigration history and criminal record, they would have had no hesitation in finding the appellant could be removed to Nigeria. But he was part of a family unit, and the rights of his partner and three children could not be sidelined. They had given due consideration to the cases of **Beoku-Betts** and **Chikwamba**, and if the appellant was to be removed from the United Kingdom there would be an interference with family life which would serve no legitimate purpose and would be disproportionate. So they allowed his appeal on Article 8 grounds.

8. The appellant was subsequently granted discretionary leave to remain in the United Kingdom on 16 September 2011 on the basis of his relationship with P and four children whom he had fathered in the UK: D, J, Y and C.

9. On 9 August 2013 the appellant applied to extend his leave to remain on the basis of his family life. His application was refused on 11 December 2013. The Secretary of State relied on the following provisions of paragraph 322 as justifying the refusal of his application for leave to remain:

(5) the undesirability of permitting the person concerned to remain in the United Kingdom in the light of his conduct (including convictions which do not fall within paragraph 322(1C), character or associations or the fact that he represents a threat to national security;

(5A) It is undesirable to permit the person concerned to enter or remain in the United Kingdom because, in the view of the Secretary of State:

(b) They are a persistent offender who shows a particular disregard for the law.

The nature of the appellant's criminal activities was such that he was a persistent offender who showed a particular disregard for the law. So he failed to "fulfil" sub-paragraphs (5) and (5A) of paragraph 322. On 2 February 2012 he was convicted of battery and given a community order. The Secretary of State was satisfied it would be undesirable to permit him to remain in the United Kingdom in the light of his character/convictions as he represented a threat to the public and it would not be desirable to grant him leave to remain.

10. The respondent also made a decision under the Parent route provided in Appendix FM. Reliance was placed on S-LTR.2.2. The appellant had not disclosed several criminal convictions when his application was submitted on 9 August 2013. These convictions were:

(1) possession of false/improperly obtained ID, imprisonment six months concurrent varied on appeal;

(2) driving a motor vehicle with excess alcohol on 23 September 2011, for which he was fined £100;

(3) battery on 23 September 2011 for which he received a community order;

(4) conviction on 18 January 2013 at Isleworth Crown Court for intimidating a witness or juror with intent to obstruct, pervert or interfere with justice, for which he received a term of imprisonment for ten months;

(5) destroying or damaging property on 24 December 2012.

11. It had been considered whether EX.1 applied to his application. But whilst he had a genuine and subsisting parental relationship with a child, his application fell for refusal under the suitability requirements of the Immigration Rules as set out earlier. As he failed to meet all the suitability requirements, he could not benefit from the criteria set out in EX.1.

The Hearing Before, and the Decision of, the First-tier Tribunal

12. The appellant's appeal came before Judge Symes sitting at Richmond in the First-tier Tribunal on 25 July 2014. The judge's subsequent determination, which runs to 25 pages, was promulgated on 5 September 2014.

13. At paragraph 5 of the determination, the judge set out the appellant's convictions which were listed in the OP Nexus initial assessment profile report for the appellant. At paragraph 6, the judge set out a longer list of alleged offences committed by the appellant in respect of which there had been no conviction. The evidence relating to these alleged offences was contained in two extensive lever arch files which were placed before the judge, and their contents were addressed in a witness statement from PC Iain Ross, which is introduced at paragraph 7 of the determination. The judge broke down the evidence provided by the police as follows: "Evidence provided in relation to impending prosecutions" addressed by him at paragraphs 8 to 10; "Evidence provided in relation to historic allegations for which there had been no convictions" addressed by him at paragraphs 11 to 31; "Two additional arrests in 2014 – provided in a statement by PC Iain Ross" addressed by the judge at paragraphs 32 to 34; and "Police reports provided in relation to the offences of which the appellant was convicted", addressed by the judge at paragraphs 35 to 39.

14. At paragraphs 40 and 41, the judge set the appellant's grounds of appeal. His extension application fell to be considered under transitional provisions for those granted DLR which was they would be granted an extension, provided their circumstances had not changed. It was wrong to say he had not disclosed the offences in question. He had not in fact been convicted of all of them, and he had provided a printout of his criminal record with the application form.

15. At paragraphs 42 to 59, the judge set out the salient contents of the respective witness statements of the appellant and his ex-partner P.

16. At paragraphs 60 to 73, the judge set out the evidence which was given orally at the hearing. PC Hargreaves adopted her statement which in turn adopted the witness statement of PC Ross. Cross-examined, she said that whilst the appellant had not been charged with any offence, his involvement in at least five sex offences made him a candidate for the "high harm" operation against foreign national offenders: he was thought to pose a risk of serious harm to the public. The police were satisfied, without further investigations, that his involvement in five offences of a similar nature made him a real risk to the public because of his arrest history and the volume of intelligence against him, evaluated on the balance of probabilities.

17. In the closing submissions on behalf of the respondent (paragraph 72) it was submitted the evidence established a pattern of risk creating behaviour, involving frequent contact with the police. Nexus intelligence and arrest history were both admissible in this context as relevant to character and conduct. Referring to the previous determination, the appellant's Article 8 rights now had to be considered in the light of the fact that he was not cohabiting with his partner and saw his children only sporadically, paying limited cash towards their upkeep; his lack of gainful employment but that no child could be treated as truly dependent on him.

18. For the appellant it was submitted that there was no convincing evidence supplied of a pattern of behaviour risking harm to the public on the balance of probabilities. The witnesses had not said that they were threatened to withdraw their accusations.

Mostly the appellant's claimed offending arose from social outings that involved alcohol and then sex, followed by spurious allegations. It was not credible that genuine victims would not pursue their cases had they truly been raped. There were British citizen children in this case and he was a role model to children. Surely no mother would leave a child with a person thought to be a criminal, as P had done? The maintenance of £80 weekly was a significant payment and his children's mothers did not complain about the adequacy of financial provision. There had been no family proceedings against him resisting contact and he enjoyed agreed arrangements with three women to assist in caring for their children. His most recent partner had had another child with him after the last Tribunal proceedings, and years later she was still willing to come with him to court. He had learned his lesson and did not represent any danger to the community.

19. The judge's findings were set out paragraph 74 onwards. He observed that in **Farquharson (Removal – proof of conduct) [2013] UKUT 146 (IAC)** the Upper Tribunal found that the principles established in **Bah (Liability to deportation) [2012] UKUT 196 (IAC)** should apply to cases where the Secretary of State alleged that the person's character, conduct and associations demand their deportation. Those principles are set out at 46 to 47 and 63 to 65 of **Bah**, and held that the Secretary of State was permitted to rely upon allegations criminal conduct should not result in criminal proceedings even if it involved the omission of hearsay evidence and evidence from un-named or undisclosed sources or anonymous sources. Any specific acts that had already occurred in the past had to be proven by the Secretary of State to the civil standard of balance of probabilities bearing in mind the seriousness of the allegations in question. The weight to be attached to the respondent's materials would depend on its nature, the circumstances in which it was collected or recorded, and the susceptibility of the informant or original informant to error, and the extent to which the appellant was able to comment or rebut it. Furthermore, unsourced assertions do not suffice and evidence would be considered more cogent where supported by other relevant documents (**Farquharson** at 89 to 91). The assessment of future risk based on past conduct must be assessed by the standard of a reasonable degree of likelihood.

20. The judge held at paragraph 76 that in principle the same approach should be taken to a case where those considerations were said to count against the grant of further leave to remain, which turned on similar questions of public interest.

21. At paragraph 77, the judge found that the appellant's convictions did not merit the refusal of his application for leave to remain on discretionary grounds. At paragraph 78, the judge did not consider that there was anything in the impending prosecutions that merited the refusal of his application on discretionary grounds. At paragraph 79, the judge held that that of significantly more substance was the police intelligence in relation to allegations of sexual offending. It was necessary for him to make findings of fact in relation to these, and he said he would do so applying the principles identified above. In reviewing the evidence put together by the police in paragraphs 80 to 82, the judge reached the following conclusion at paragraph 83:

> I find that these are matters which raise real concerns as to the appellant's character, conduct and association. There is a worrying trend in these incidents in which the appellant is accused of sexual aggression, subsequent to which several of the victims withdrew their complaints; I also note that other complainants (male victims of physical violence) in February and July 2005 also withdrew their allegations against him. It is surprising that so many people, apparently unconnected to one another, had chosen to withdraw allegations for reasons that the police recorders essentially unexplained.

22. The judge continued in paragraph 84:

> There are detailed investigation reports as have been set out above. Whilst these accusations had not been proven to the criminal standard, it seems to me the volume of behaviour arising from broadly similar situations, in which women in vulnerable situations were threatened and assaulted, is a matter that is established on the balance of probabilities. There are not only accusations of sexual misbehaviour but also of intimidation and blackmail, in relation to which he was arrested in 2014; his own prepared statement referenced as the second of the allegations in 2014 above (CRSIS 0506157/14) recorded that he owed drug money to particular individuals, indicates that he has been reckless in the company he keeps and he has bought and used drugs…The case that he has put in rebuttal, of being over a significant period, for example, devoted family man who only once left the family home on an isolated evening is quite inconsistent with his behaviour that night by which, within hours, he was receiving oral sex from a person he had only just met in a public bar.

23. The judge also found at paragraph 85 that the appellant had failed to disclose all his convictions in his application.

24. At paragraph 87, the judge said that left the question of whether his expulsion was contrary to his private and family life and that of the children. While he accepted he had an ongoing relationship with the various children whereby he saw them occasionally, the fact remained there had been a significant change of circumstances since his relationship with P broke down. He found her evidence to be credible as to his ongoing role in the life of their children. This was not disputed by the respondent. But there was very limited material from which he could draw any conclusions as to whether the immigration decision was inconsistent with the need to ensure that their welfare was preserved and safeguarded under Section 55 of the Borders, Citizenship and Immigration Act 2009. Whilst the immigration decision represented an interference with his and the children's family life, it was not of the most serious kind.

25. At paragraph 88, the judge held as follows:

> Given my findings as to the appellant's character, conduct and associations, it seems to me that his removal is necessary in a democratic society. He represents a threat to the public interest given the real risk that he would continue to be involved in conduct involving sexual misbehaviour that would lead to further allegations against him, whether or not they proceeded to criminal trial. I consider that this outweighs the family life that he has established here and renders his removal proportionate.

The Application for Permission to Appeal to the Upper Tribunal

26. Ms Jegarajah, who did not appear below, settled the appellant's application for permission to appeal to the Upper Tribunal. In ground 1, she said the point of law raised in this case was one of fundamental importance. The question was whether it was lawful for the police, who were not a formal party to the proceedings, to be permitted to produce unlimited allegations relating to a series of alleged offences for which there had been no conviction.

27. She proceeded to answer this question in the negative. It was both unlawful and unconstitutional. It would mean that any foreign national who had been included under Operation Nexus and whom the police had sought to target (in the absence of convictions of sufficient severity to lead to deportation) could nonetheless rely on police intelligence of insufficient weight to attract a conviction, applying the criminal standard. Effectively foreign nationals are facing a criminal trial using anecdotal evidence substantiated by the police, not a neutral party, in order to accelerate removal. Essentially they were being convicted by another means. The cases of **Bah** and **Farquharson** were distinguishable because:

    (1) those cases did not concern large scale police/UKBA operations such as Operation Nexus and SWAYLE;

    (2) such operations involved a systematic policy by the police and immigration services to submit any and every report of varying evidential quality with a view to influencing an immigration appeal;

    (3) the relevance test was redundant in immigration appeals because the prejudicial material had already been had already been submitted;

    (4) the Tribunal ought to have excluded all materials that did not emanate from a reliable, in other words independent, source;

    (5) it could not be right or fair for Operation Nexus officers to use the Tribunal to effect a removal by avoiding the criminal courts and the criminal standard of proof that served to protect all defendants, whether British or foreign nationals.

28. Ground 2 was that the judge had erred in failing to treat the determination of Judge Chohan as a starting point. There had been no engagement with the previous judicial findings at all, and this omission gave rise to a fundamental error in respect of the judge's Article 8 assessment.

The Grant of Permission to Appeal

29. On 13 October 2014 First-tier Tribunal Judge Shimmin granted permission to appeal, holding that both grounds of appeal disclosed arguable errors of law.

The Error of Law Hearing on 12 November 2014

30. At the hearing before me, Ms Jegarajah developed the arguments raised in her grounds of appeal. She also applied for permission to raise a third ground of appeal, which was that the judge had erred in law in not considering Section 117B(6) in his proportionality assessment.

31. Mr Allan did not object to this third ground of appeal being raised at a late stage, and accepted that it had merit. Whilst it was understandable that the judge had not considered Section 117B of the 2002 Act which did not come into force until three days after the hearing (28 July 2014), in his view, following **YM (Uganda),** the judge should have considered the impact of Section 117B(6). But there was no merit, he submitted, in the first two grounds of appeal, and he relied on the extensive bundle of authorities by way of rebuttal to the central charge made by Ms Jegarajah, which was that it had been unlawful and unfair for the First-tier Tribunal to take into account evidence of a series of alleged offences by the appellant which had not been proved to the criminal standard.

Reasons for Rejecting Grounds 1 and 2

32. Judge Symes correctly summarised the law as stated by the Upper Tribunal in **Farquharson** and **Bah**.

33. In **Farquharson**, a presidential panel held inter alia as follows (as stated in the head note):

    (1) Where the respondent relies on allegations of conduct and proceedings for removal, the same principles apply as to proof of conduct and the assessment of risk to the public, as in deportation cases: **Bah [2012] UKUT 196 (IAC)** etc. applicable.

    (2) A criminal charge that has not resulted in a conviction is not a criminal record; the acts that led to the charge may be established as conduct.

    (3) If the respondent seeks to establish the conduct by reference to the contents of police CRIS Reports, the relevant documents should be produced, rather than a bare witness statement referring to them.

    (4) The material relied on must be supplied to the appellant in good time to prepare for the appeal.

    (5) The judge has a duty to ensure a fair hearing is obtained by affording the appellant sufficient time to study the documents and respond.

34. Ms Jegarajah did not identify any decision by the Court of Appeal which undermines **Farquharson**. The high water mark of her case is that in **AG (Ivory Coast) C5/2012/1442**, permission to appeal was granted by Sir Stephen Sedley in an order dated 5 December 2012. Apparently his reasons for granting permission to appeal were as follows:

> It is cogently arguable the introduction of highly prejudicial police intelligence reports was procedurally and substantively impermissible. The issue is arguably nothing to do with weight. What Hickinbottom J said in this regard in **V**, paras 46 ff, may well call for re-examination. In the present case, where the **Maslov** question was critical, the reports are capable of having tipped the balance.

35. However, the Court of Appeal did not go on to decide the point. Moreover, when granting permission to appeal, Sir Stephen Sedley did not have the benefit of the presidential panel's reasoning in **Farquharson**, which had not yet been decided. As a consequence of the consent order made in **AG** on 28 February 2013 by the Court of Appeal, **AG's** appeal came back before the Upper Tribunal on 19 July 2013. At paragraph 54 of the subsequent decision Upper Tribunal Judge Kekic said:

> It is alleged that the respondent introduced 'materials that are now accepted were included unlawfully'. It is recorded in paragraph 14 of the statement of reasons annexed to the order of the Court of Appeal the respondent no longer relied on the police intelligence reports. The Court of Appeal declined to adjudicate on the point. We had not been shown any evidence which either states or implied that the respondent accepted that this material was included unlawfully. No such inference can be drawn from the fact that it was no longer relied on by the respondent. We find there has been no acceptance or finding that the materials were included unlawfully. The evidence before us does not establish that it was included unlawfully.

36. As well as seeking to argue that the reception of police intelligence material is unlawful in principle, it is also possible to discern three subsidiary arguments advanced by Ms Jegarajah.

37. The first is that such evidence does not meet the criterion of reliability, which is specified in the applicable guidance as to the evidence required to support a decision that a person's behaviour calls into question their character and/or conduct and/or associations to the extent that it is undesirable to allow them to enter or remain in the UK. I consider the judge has given adequate reasons for finding the evidence to be reliable.

38. Secondly, it is argued that the respondent is in effect abusing the green light that it was given in **Farquharson** to pursue large scale combined police and UKBA operations such as Operation Nexus and SWAYLE. This submission does not stand up to scrutiny. If a course of conduct is pronounced by a court to be lawful, it cannot become an abuse simply because it is pursued on a large scale.

39. Thirdly, Ms Jegarajah submits that it was unfair for the respondent to change her case from that put forward in the Reasons for Refusal Letter. As Ms Jegarajah rightly points out, the refusal letter mainly relied on the proposition that the appellant was a persistent offender, as shown by his convictions. According Ms Jegarajah, only two of the five convictions listed (as being ones that the appellant failed to disclose) were correctly attributed to the appellant *as convictions*.

40. I do not find it necessary to crosscheck the list of convictions given by the judge with the list of allegedly undisclosed convictions given in the refusal letter. The key

consideration is that for the purposes of the appeal hearing the appellant knew the case that he had to meet, and he had been given sufficient time to study the two lever arch files of police intelligence material relied on by the respondent, and sufficient time to respond to such material. It is not suggested that the requirements referred to in paragraphs 3, 4 and 5 of the headnote in **Farquharson** were not observed in this appeal.

41. Accordingly, I find that ground 1 of the appeal is not made out. I also find no merit in ground 2. It is apparent from paragraphs 72 and 87 that the judge took the determination of Judge Chohan as his starting point on the question whether the appellant's expulsion was contrary to his private and family life and that of his children. The judge gave adequate reasons for explaining why the decision of Judge Chohan was not his end point. There had been a significant change of circumstances, which included the fact that the appellant's relationship with P had broken down and the fact that the appellant had become a threat to the public.

42. Mr Allan's concession in respect to ground 3 to the appeal is not determinative of the question of whether the judge did in fact err in law in not applying a statutory provision which was not in force at the date of the hearing. But having exercised my own independent judgment on the matter, I find the concession was rightly given. As judicial consideration of Section 117B(6) might have had a bearing on the outcome of the proportionality assessment under Article 8, I set aside the judge's decision on the Article 8 claim. But there was no error of law in the finding that the appellant should be refused further leave to remain because paragraph 322(5) applied.

Directions for a resumed hearing pursuant to Ground 3

43. I directed that there would be a further hearing before me to remake the decision under Article 8 ECHR. I directed that all the findings made by the First-tier Tribunal would be preserved, save for the finding on proportionality.

44. I gave the appellant permission to produce further evidence relating to his family life *since the date of the hearing in the First-tier Tribunal*.

Hearing on 16 January 2015 to remake decision on Article 8 ECHR

45. The appellant was called as a witness, and he adopted as his evidence-in-chief a supplementary witness statement dated 13 January 2015. His devotion to his children and family had not changed, but there had been significant change with regard to his relationship with his current partner. At paragraph 3 of his previous statement dated 22 July 2014 he had mentioned the fact there were ongoing attempts at reconciliation and that there had been a lot of progress. His current partner P had given evidence about their relationship at the hearing before the First-tier Tribunal. She was very frank and honest about the state of the relationship, and she had not ruled out them coming together again.

46. He could now state categorically that the relationship was back on, and they had decided to put the past behind them. He spent most of his time in her house with the

children, and they were very happy together as a family. They spent Christmas together as a family unit and he was grateful that they had been able to resolve their differences.

47. His partner P was a German national who was exercising treaty rights here. She could not relocate with him to Nigeria or to Sierra Leone where his mother came from. If he was deported it would be a clog in the wheel of his partner exercising her treaty rights in the UK. It was imperative that she should be able to exercise free movement rights; and if he was deported, this might prove difficult. He remained in contact with all his children, and he played a fatherly role as best as he could in the prevailing circumstances.

48. The appellant was asked supplementary questions by Counsel, and was cross-examined by Mr Norton. He confirmed that P had given birth to his child Y on 14 December 2007, and to his child C on 6 February 2011. Y and C lived at his girlfriend's house. He had been sleeping there since December 2014 unofficially. He had a key to the property. They had had an argument in January or February 2013, and so he decided to move out. But between January and December 2013 he still did the school run. He had four children in all by three different women, and they all knew each other. He organised it so that they could all be together from time to time. His son D had moved with his mother and stepfather to Birmingham last year, so he did not see D very often. It worked out at about once a month. His son J lived with his mother in Charing Cross. He saw J twice a month, and it was on these occasions that J also saw Y and C. They got on very well with each other. I was shown photographs of the appellant with his four children.

49. In cross-examination, it was pointed out that in his witness statement the appellant had not said that he was actually living with P and the children. He answered he still had his room at the Beach Road address. The council had not yet approved him as a tenant of the property which P rented from the council. An application was pending.

50. It was put to the appellant that in P's witness statement dated January 2015 P stated at paragraph 5 that they were not living together. He answered that she was going to the council. He did not know whether she made the application or not. But he had given her a copy of his tenancy agreement for the Beach Road address. This was privately rented accommodation in Hounslow ten minutes walk away from P's property.

51. P was called as a witness and adopted as her evidence-in-chief her witness statement dated January 2015 in the appellant's bundle. She was a German national, who had arrived in the UK in April 2003. She and the appellant *were* (past tense) in a loving relationship as partners. They had had two children together, namely Y and C. In paragraph 3 she said:

> As with every relationship with different racial and cultural backgrounds our relationship was difficult. We have had disagreements since the end of 2012 and then

he moved out in January 2013, and after a while we resumed contact. He comes over to the house to see the kids and pick them up to school and for weekends.

52. They had been having reconciliatory meetings with a view to exploring the possibility of reconciliation and to be together as a family unit again for the simple reason that she had seen improvements in his character and his disposition towards her and the children. They believed that for the sake of the children they should settle their differences. The attempt to reconcile was a genuine attempt by the appellant to have a settled family like they used to have previously.

53. She could now confirm that they had had a successful reconciliation and very fruitful discussions, and she could categorically state that they were back together as a family. They were not living together at the moment because she needed to inform the council so that the appropriate amendment on rent and council tax could be made. He was in the house almost all the time and he spent weekends at the house. They had spent Christmas together as a family unit, and he had bought gifts for the children.

54. The appellant loved his children and they also loved him. He played a very active role in their upbringing, even though they did not live together as a unit. They had been living together for about five years. They hoped to resume cohabitation very soon when the benefits issue was sorted out. The children went to him for weekends, and he also visited them. He contributed financially between £80 and £120 a month. He took the children to school and picked them up from school.

55. P was asked supplementary questions by Counsel, and was cross-examined by Mr Norton. She had had an up and down relationship with the appellant. Their relationship was now better. They were working on their relationship. She had not yet applied to the council. The appellant had his own address. He was not with them. He did not live with them, but it was her intention that they should live together.

56. The appellant had started staying overnight from December. On the days when she went to work (which was three to four times a week, whereas the appellant had said that it was five times a week) he would come round before she left the house at 3.30am and spend the rest of the night at the house. Even after he had moved out in January 2013, he had done that. My attention was drawn to paragraph 3 of her witness statement before the First-tier Tribunal in which she implied that they had ceased contact after he had moved out in January 2013. She said they had never lost contact, so that he could maintain contact with the kids. The difference between the state of affairs at the time of the First-tier Tribunal hearing and now was that he was spending more time with her. They were always in contact after he moved out, just not as a couple. The most important thing for her was the help he gave in taking the children to school. He stayed a few nights every week.

57. Ms Jegarajah submitted that the decision appealed against was not in accordance with the law as the Secretary of State failed to take into account that the appellant was in a durable relationship with an EEA national exercising treaty rights here. At

the time of the hearing in the First-tier Tribunal there had been a breakdown in the relationship, but that was a temporary blip. The couple were now reconciled, and having regard to the long-term history of the relationship and the children born out of it, the relationship should be characterised as a durable one. It followed that the respondent would need to invoke Regulation 21 of the Regulations 2006 in order to justify the refusal of the application, following **YB [2008] UKAIT 0062**. Durable was not the same as romantic. The relationship between the appellant and P had endured over the years, and it was intact.

58. Alternatively, it was not proportionate to remove the appellant having regard to Section 117B(6) of the 2002 Act as amended by the Immigration Act 2014. It was not reasonable for any of the appellant's children to follow him abroad.

59. On behalf of the Secretary of State, Mr Norton submitted that the appellant had not discharged the burden of proving that he was in a durable relationship with an EEA national. There was an expressed intention to reform the family unit which had broken up, but intention was not enough. There was no physical evidence of cohabitation, and there was conflicting evidence about the current living arrangements. The appellant and P were still working things out.

Discussion and Findings

60. It is necessary to distinguish between a durable relationship as *parents* and a durable relationship as *partners*. In order to qualify as an extended family member of P, the appellant has to show that he is in a durable relationship with P as her partner. It is not enough for him to show that, despite the difficulties in their relationship, both of them have maintained contact with each other for the sake of the children, and to enable the appellant to assist P in the children's day-to-day care.

61. In the light of the undisputed facts, I find the appellant has not discharged the burden of proving that he is in a durable relationship with an EEA national. There are historic difficulties in the relationship, which are alluded to by P in paragraph 3 of her most recent witness statement. Relations between her and the appellant deteriorated to the point where P moved out of the family home in January 2013. . It is also necessary to bear in mind that there is an undisturbed finding of fact by Judge Symes that the appellant is not the devoted family man that he claims to be. The judge made this finding in paragraph 84 of his determination, having accepted the evidence tendered by the police that the appellant was a dangerous sexual predator who threatened and assaulted women in vulnerable situations. Since it is the appellant's evidence that he was in an ongoing relationship with P prior to January 2013, it may have been P who complained to the police of common assault in November 2012, and sought a non-molestation order against him: see paragraph 82 of Judge Symes' determination.

62. I am not satisfied that there has been a material change of circumstances since the hearing in the First-tier Tribunal having regard to the preserved findings of the First-tier Tribunal. Furthermore, despite the alleged reconciliation, the living arrangements remain largely unchanged from what they were at the time of the

hearing before the First-tier Tribunal. The appellant still lives at a separate address, and he continues to come round in the early hours of the morning to take over the care of the children before P leaves for work at 3.30am. There was conflicting evidence from the appellant and P as to how many nights each week the appellant stayed overnight, rather than coming round just before 3.30am. But even if the level of contact has increased, it is clear from P's oral evidence that the couple are still working things out and they are not yet reconciled. Not only are they not living together from the perspective of the Council, but I am also not persuaded that they are living together unofficially in a relationship akin to marriage. So they are not to be treated as being in a durable relationship.

63. Turning to the appellant's Article 8 claim, he cannot avail himself of the parent route under Appendix FM as he does not meet the suitability requirements. He has a potentially stronger claim outside the Rules, as the best interests of minor affected children are a primary consideration in the proportionality assessment. So far as the appellant's two sons are concerned, the finding of Judge Symes holds good. He found that the appellant had an ongoing relationship with his various children whereby he saw them occasionally. Given the appellant's limited role in his sons' upbringing, his prospective removal will not impact significantly on them. If and insofar as his removal can be said to be contrary to their best interests, it will only be so to a moderate degree, and it does not take very much on the public interest side of the equation to make the threatened interference a proportionate one.

64. Judge Symes accepted the appellant's evidence as to his ongoing role in the life of his daughters Y and C. Nonetheless, he found that the threatened interference with the family life which the appellant enjoyed with all his children, *including Y and C*, was not of the most serious kind. I consider that this finding still holds good. The appellant is not living under the same roof as Y and C, and he is not their primary carer. I accept that it is contrary to the best interests of Y and C to be deprived of regular and direct contact with their father, but it is not shown that his removal will compromise their welfare, having regard to the preserved findings of fact of the First-tier Tribunal referred to earlier when discussing the question of durable relationship.

65. Part 5A entitled "Article 8 of the ECHR: public interest considerations" came into force from 28 July 2014. Section 117A provides:

> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

66. Section 117B lists the following "Article 8: public interest considerations *applicable in all cases* (my emphasis)":

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

67. Sub-sub-paragraphs (a) and (b) of sub-paragraph (6) of Section 117B mirror EX.1(a) of Appendix FM. Under the structure of Appendix FM, if an applicant satisfies the

requirements of EX.1(a) it is not necessary to go on to consider the public interest question. For in Appendix FM the Secretary of State has set out in considerable detail how she believes the balance between Article 8(1) and Article 8(2) should be struck in family life cases; and if a person can bring himself within the relevant qualifying criteria, then ipso facto it is not in the public interest from the SSHD's perspective for them to be removed.

68. I accept that the appellant is not being deported as a foreign *convicted* criminal. I also accept that all four of the appellant's children are qualifying children with whom the appellant has a genuine and subsisting parental relationship, and that it is not reasonable to expect any of the children to follow their father to his country of return. But I do not accept that sub-Section 6 is thereby a trump card for the appellant in the overall proportionality assessment. The public interest considerations listed in Section 117B are not exhaustive or exclusionary. All the considerations set out in Section 117B have to be taken into account when assessing proportionality, but it does not mean that other relevant considerations referred to in the Rules or recognised in the relevant jurisprudence must be ignored. The public interest in the appellant's removal is primarily driven by the public interest in the prevention of crime, rather than by the public interest in immigration control.

69. Having regard to the undisturbed findings of the First-tier Tribunal as to the danger which the appellant poses to the public, I find that the threatened interference is proportionate.

Notice of Decision

The decision of the First-tier Tribunal dismissing the appellant's appeal under the Rules did not contain an error of law, and accordingly the decision stands. The decision of the First-tier Tribunal dismissing the appellant's Article 8 claim outside the Rules contained an error of law, and accordingly the decision is set aside and the following decision is substituted: the appellant's appeal on Article 8 grounds outside the Rules is dismissed.

No anonymity direction is made.

Signed Date **16 January 2015**

Deputy Upper Tribunal Judge Monson