Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/13445/2012

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 July 2014	**On** 15 January 2015

Before:

Upper Tribunal Judge Jordan

Between

The Secretary of State for the Home Department

APPELLANT

and

Cumali Turhan

RESPONDENT

Representation:
For the Appellant: Mr N. Bramble, Home Office Presenting Officer
For the Respondent: Mr K. Mak, MKM Solicitors

DETERMINATION AND REASONS

Part 1 – the finding of an error on a point of law

1. On 20 July 2014, I determined that a panel of the First-tier Tribunal had made an error of law in the making of its determination. I set aside the First-tier Tribunal determination and adjourned the remaking of the decision to be resumed on the First Available Date after 1 September 2014 limited to submissions only. My reasons for finding the error set out the background in some detail and I can do no better than set out those reasons now in full.

Introduction and immigration history

2. The Secretary of State appeals against the determination of a panel (First-tier Tribunal Judge Fitzgibbon QC and Mr A. Armitage) allowing Mr Turhan's appeal against the decision of the Secretary of State to make a deportation order against him. For the sake of continuity, I shall refer to Mr Turhan as 'the appellant' as he was before the First-tier Tribunal.

3. The deportation decision was the culmination of a series of criminal convictions and comes in the wake of an earlier decision to deport the appellant which the appellant successfully appealed to the Tribunal.

4. The appellant's conduct arises in the context of domestic violence committed upon his wife and subsequently misconduct towards his partner and the appellant's repeated violations of orders made by the Courts designed to prevent him contacting them.

5. The appellant was born on 25 January 1979 and is a national of Turkey. He arrived in the United Kingdom on 4 May 2003 as the spouse of a British citizen. On 14 April 2004, he was granted indefinite leave to remain. Their son, A, was born on 7 July 2005. He is now aged 9.

The appellant's history of offending

6. The appellant has recorded against him a number of convictions, the majority stemming directly or indirectly from the making of a non-molestation order on 11 October 2007 forbidding him, amongst other things, from threatening violence against A or intimidating, harassing or pestering him. The order also prevented the appellant from communicating with his wife. The convictions are:

    (i) 22 June 2006: offences of battery against his wife and criminal damage for which he was sentenced to a community order of the 24 months with supervision.
    (ii) 25 June 2007: for breach of the order, the order was further extended for 3 months.
    (iii) 2 May 2008: (a) for assault occasioning actual bodily harm and (b) breach of a non-molestation order, the appellant was sentenced at Chelmsford Crown Court to 12 months imprisonment, suspended for two years, with supervision.
    (iv) 27 October 2008: for breach of a non-molestation order, the appellant was sentenced at Chelmsford Crown Court to 11 weeks imprisonment.
    (v) 3 August 2009: for breach of a non-molestation order, the appellant was sentenced at Chelmsford Crown Court to 9 months and one day's imprisonment. In sentencing him, His Honour Judge Goldstaub QC

stated, "*Do not let me see you again because if I do in circumstances of this kind it will be a long sentence, more than 12 months, and you will be at risk of deportation*". [Following this conviction, the Secretary of State, on 5 November 2009, served her first notice of decision to make a deportation order.]

(vi) 16 September 2009: for further breaches, the appellant was sentenced at North Essex Magistrates Court to 3 months imprisonment.

(vii) [26 February 2010, the Secretary of State issued a warning that if he committed any further offences, his removal to Turkey would be reconsidered.]

(viii) 7 May 2010: for 2 further breaches of a non-molestation order, the appellant was sentenced at North Essex Magistrates Court to 8 months imprisonment.

(ix) 6 or 8 August or November 2011: for an offence of sending an offensive, indecent, obscene or menacing message to his partner (not his wife), the applicant was sentenced at North Essex Magistrates Court to 8 weeks imprisonment and made subject to a restraining order.

(x) 7 June 2012: for a breach of the restraining order against his partner, the appellant was sentenced at North Essex Magistrates Court to 18 weeks imprisonment.

7. On any view, this is an appalling history of wrongdoing which has extended over a period of seven years. The offences have been directed against women, either his wife or his partner. The terms of the original non-molestation order were expressed in terms of protecting his son but breaches of orders designed to protect his former wife are reasonably likely to threaten his son's well-being if he is present. Whilst there is no evidence whatever of a general propensity to offend, the evidence against women with whom he has shared his life is stark and depressing. More worrying still is the fact that, as recorded above, he has shown an almost total disregard for court orders. There have been at least seven appearances before the courts based on breaches of an order; some concerned multiple offences. Further, the successful appeal to the Tribunal cannot reasonably have been treated by the appellant as a licence to commit further offences; rather, as a warning that, on a further occasion, his appeal would not be treated so sympathetically. If his first appeal was a warning, so too were the express words of HH Judge Goldstaub QC, as was the letter sent by the Secretary of State on 7 March 2012 that further breaches would not be tolerated, if such a warning were needed. (I am unable to say whether the offences for which the applicant was convicted on 7 June 2012 predated this warning.)

The first appeal against a decision to deport the appellant

8. The appellant's first appeal was the subject of a determination promulgated on 18 February 2010. The panel ('the first Tribunal') recorded only the convictions on 27 October 2008 and 3 August 2009, providing a skewed and inaccurate pattern of offending. In the course of the hearing, the appellant gave evidence

that he believed the order was no longer in force because his former wife was in the habit of visiting him with their son at his place of work and had told him they could work out contact arrangement between themselves. That could not have been the view of the courts that sentenced him to imprisonment for the breach. In his first appeal, the appellant was supported by his partner who spoke in warm terms of his fondness for his son and described his former wife's behaviour as harassment. The first Tribunal had before it a court order that was made giving him regular supervised contact which the appellant had exercised until May 2009. It described the relationship with his partner as ongoing and close. On this material, the panel concluded that the only victim of the appellant's offending was his former wife and this would be addressed by resolving problems of contact through proper legal channels. It described the appellant's relationship with his son as very important to the appellant and a close relationship. The panel accepted his assurance that contact needed to be arranged through the correct legal process using solicitors. Finally, the panel concluded that the relationship with his partner was sufficiently close to conclude they would marry once he had been released from detention.

The circumstances when the second appeal was heard and the determination under appeal

9. I am quite satisfied that, when the appellant's second appeal was heard by the second panel, the situation was radically different. In essence, the confidence that was placed by the first Tribunal in the appellant's difficulties with his first wife being resolved by recourse to due legal process and the support he was likely to receive from his partner and future wife were entirely misplaced. The record of offending that I have set out above was not the basis upon which the first panel had reached its decision. Recourse to solicitors had not resulted in the cessation of appellant's behaviour of offending. The appellant's behaviour with his partner had resulted in a restraining order in November 2011 and its breach on 7 June 2012.

10. An examination of the second panel's determination clearly demonstrates how its approach failed to recognise the differences between the situation in 2010 and in 2014. Although it recited the appellant's history of offending, paragraph 10 of its determination makes it plain that the panel was much influenced by the fact the appellant had been engaged in family law proceedings in the Chelmsford County Court in relation to his son. Indeed, as appears from paragraph 16 of the determination, the basis of the appellant's appeal was his representative's submission,

> "*…that the decisive factor in favour of allowing the appeal was the appellant's evidence that he has been engaged in proceedings in the family Court to re-establish contact with Alex, and he was actively contemplating further applications to the Court. His offending behaviour did not give compelling public interest reasons for his deportation.*"

11. It was, essentially, this line of reasoning that resulted in the second panel allowing his appeal for the second time. However, in so doing, the panel persuaded itself that the principle in *Devaseelan* [2002] UKIAT 702 permitted the first panel's view on proportionality to retain its validity, notwithstanding the fact that circumstances had radically changed, that he had committed further offences, that the optimism in relation to progress towards rehabilitation was ill-founded, that his history of offending as seen in 2014 represented a continuing threat to public order and that the current relationship with his son was significantly different. Although the second panel accepted that some of the 2010 findings would have to be looked at again it concluded, in paragraph 29:

> In our view, the appellant's conduct cannot properly be classed as a persistent threat to public order. Though reprehensible, it falls below the level of seriousness to amount to so widespread a threat. No single offence is egregious enough to justify deportation. His criminal record does not indicate that he is more "personally dangerous" now than he was when the Tribunal decided his 2010 appeal.

The error on a point of law

12. Each one of those four reasons is factually or legally inaccurate. This was a man who had accumulated 9 convictions, some for multiple offences. If by reference to *'public order'*, the panel meant to infer that the appellant was not a danger to the public at large but only to his wife or partner, the panel was legally incorrect. I cannot see how, rationally, 9 convictions cannot properly be classified as persistent. All the offences were a threat to public order; public order demands the appellant behave appropriately towards his wife, partner and son and comply with lawful injunctions made against him to protect them. Furthermore, the panel clearly misunderstood the effect of repeated offending. It goes without saying that if the appellant had only committed a single offence for which he had been sentenced to 8 weeks imprisonment, that behaviour would not merit deportation if that alone was the reason for the Secretary of State's decision. To suggest, however, that a number of minor offences cannot merit deportation because no single offence is serious enough to justify it, entirely misses the point and, in essence, sanctions repeated offending of a type that is serious but when considered separately is not sufficient to merit removal on its own. Furthermore, his criminal record did indeed indicate he was more personally dangerous than he was when the Tribunal decided his 2010 appeal. In 2010, the Tribunal only had regard to 2 offences against a single victim. By 2014, it had become 9 offences against 2 women and a worrying pattern of misconduct towards his partners. Regrettably, I have concluded that the panel's conclusion in paragraph 29 was irrational and Wednesbury unreasonable.

13. It does not seem to me that it matters that the panel went some way in the determination to recognise the seriousness of his offending by saying it did him '*little credit*' (paragraph 27) or, in paragraph 29, that

> …we acknowledge that his persistent flouting of Court orders indicates a lack of respect for the law, which aggravates the seriousness of his offending *to some extent.*

14. The limitation imposed by the panel in the words '*to some extent*' demonstrates with unquestionable clarity that the panel simply disregarded the true effect of the appellant's repeated offending.

15. More important still, was the panel's attitude towards the order that was made by His Honour Judge Newton [now Newton J] at Chelmsford County Court on 10 October 2013. The appellant was described as having "*the benefit of*" this order but, in reality, the order effectively slammed the door against the appellant. It was directed that (i) he should have no direct contact with his son; (ii) the appellant should make no further applications under s. 8 of the Children Act 1989 (that is, for either residence or contact) without leave of the court for three years. The meagre benefit derived from the appellant was the Court's encouragement that he write a single appropriate letter *not* directly to his son but to the child's guardian and, *if the reaction were positive,* to send letters or cards *once or twice a year*.

16. The Tribunal's classification of the effect of this order as providing the appellant with a meaningful relationship with his son appears to have overlooked the implicit prohibitions contained within the order: the appellant was not to see his son. This situation was to prevail for at least three years. The appellant was not to speak to his son. He was not to be permitted the opportunity to vary this prohibition save with the leave of the court. He was not to be permitted to write to his son directly. It was only if the child's guardian sanctioned it that the appellant was even able to send his son a letter or card and then only once or twice a year.

RS (immigration and family court proceedings) India [2012] UKUT 00218

17. It is difficult to see how this could be equated with the circumstances in *RS (immigration and family court proceedings)* India [2012] UKUT 00218 (IAC) on which the panel so heavily relied in paragraphs 35 and 36 of its determination. In *RS*, the panel (McFarlane LJ, Blake J and Upper Tribunal Judge Martin) considered the interplay between family proceedings involving children and removal proceedings affecting one of the parents involved in the family proceedings.

18. RS had arrived in the United Kingdom in September 2000 but remained without leave after March 2001. On 12 November 2004 he married a UK born British citizen of Pakistani ancestral origins who gave birth to the couple's daughter, H, on 4 April 2005. On 27 June 2008 the appellant made an application to remain on the grounds of marriage which remained outstanding when, on 29 June 2009, he was convicted of possession of a false identity

document and given a sentence of twelve months imprisonment rendering him susceptible to automatic deportation pursuant to s. 32 of the UK Borders Act 2007. On release, the appellant returned to the matrimonial home.

19. RS appealed to the First-tier Tribunal against the decision to deport him relying on the family life he enjoyed in the United Kingdom with his British citizen wife and daughter. Whilst RS was still detained, the local authority had become concerned about H's welfare as a result of concerns about the mother's mental health and her ability to cope with the child alone. An urgent visit to the house revealed it was in a very poor state of cleanliness, and H had not been fed or clothed properly. The child was taken into interim care.

20. In his immigration appeal, RS said his presence in the household was vital to keeping the family together and in a good state of health and, without it, H would remain in care as his wife could not cope alone. This was supported in a statement made by a social worker. A Probation Officer's report revealed that the appellant had told the author that he used the false Italian passport to obtain employment to provide for his family pending the outcome of his application for indefinite leave to remain as a spouse. His wife was anxious to support the appellant on his release from detention. It was common ground that his wife could not be expected to look after H on her own if the appellant was deported. His wife's family had not provided assistance to her with H when her husband was in prison,

21. The Tribunal decided H's best interests were likely to play a decisive role in the outcome of the deportation appeal and adjourned the deportation appeal until the Family Court had examined the information available to it and determined where those best interests lay. The care proceedings had been outstanding for more than two years but the most important question in the case was likely to be resolved within a few weeks. The most favourable outcome to the appellant was that a carefully structured plan with continuing local authority involvement would be needed if it is concluded that H was to be returned to her parents.

22. The panel stated there was no universal obligation that a period of discretionary leave had to be granted where family proceedings were unresolved but, in the circumstances of RS's appeal, the short period of adjournment anticipated before decisions were made as to where H's interests lie meant the panel should not attempt to decide the immigration appeal until after the decision of the Family Court was known. If it were to conclude that H should be permanently removed from the care of her parents, the appellant's deportation would not be unlawful. If the family court were to have decided there was a prospect of H returning to her family, the panel directed the parties to make written representations to the Tribunal, on receipt of which the Tribunal would decide whether a further oral hearing was required. If it did not, the Tribunal would then make its final determination.

23. RS is not authority for the proposition that the IAC should await the outcome of proceedings in the Family Court in all cases. The decision was plainly justified in the case of RS because, due to his wife's inability to look after H, there was the stark choice between the child remaining with her parents or going into care. Contrast this with the Court's assessment of the appellant's role with his son, A. There is no suggestion that the appellant appealed the order made as recently as 10 October 2013. He has, however, applied to the court for more substantial contact but this application is barred unless he first obtains permission to make that application. The family proceedings in Mr Turhan's case have already been lawfully determined in such a way that the inescapable conclusion is that it is currently not in the child's best interest for his father to meet him, see him, contact him or communicate with him. The appellant has no more than an application for permission to seek to review the earlier decision. The application, dated 2 April 2014, was made less than 6 months after HH Judge Newton decided the child's best interests on 10 October 2013. There is no material before me to suggest that circumstances have changed significantly over so short a period.

24. The Tribunal in the current appeal noted the appellant's '*sincere wish*' to resume contact with his son but gave no thought at all to whether it was in the son's best interest to see his father given the terms of the order prohibiting him from doing so. (In paragraph 15 of the determination, the panel attached no weight to the reference in the Secretary of State's letter to the claim that '*social workers reported that A had been exposed to his aggressive and violent behaviour*' because no evidence had been adduced of reports by social workers. But how could the Secretary of State produce those reports?) In my judgment, the order of HH Judge Newton went a significant way in establishing that there must have been *something* wrong in the appellant's relationship with his son to justify the order the Judge made.

The proceedings in the Family Court at Chelmsford

25. Mr Mak has produced a copy of the order dated 15 May 2014 that was made in the Family Court at Chelmsford by Her Honour Judge Murfitt in relation to the appellant's application for permission to apply for a contact order in light of the order made on 10 October 2013. The timescale for compliance with the various directions suggests that consideration by the Judge on the papers should take place within the next few weeks. In the event that permission is refused, the appellant would have a further right to renew permission at an oral hearing.

The intended effect of the First-tier Tribunal's decision

26. The second panel allowed the appeal both under the Immigration Rules and Article 8. I am, however, puzzled by what the First-tier Tribunal was intending to achieve and, in particular by what is meant by allowing the appeal under the

Immigration Rules. This may have arisen from its misunderstanding its function in a deportation appeal. The intrinsic logic of the panel's finding that the appellant's record of misconduct did not amount to sufficiently serious misconduct or a persistent threat to public order to justify deportation would suggest that the Tribunal was intending to challenge the lawfulness of the Secretary of State's decision. The remedy after such a finding is for the Secretary of State to provide the appellant with some form of discretionary relief consistent with the Tribunal's findings. Paragraph 29, as I have set out and considered above is not time limited in its effect.

27. However, in paragraph 37 the panel in its application of RS took a more limited few which is inconsistent with its earlier view that the decision to deport was itself unlawful because the underlying offending might properly be disregarded. Such a limited view would not, of course, have been necessary if the Tribunal had indeed concluded that it was unlawful or disproportionate to remove him. In paragraph 37, it is clear that the panel is drawing back from providing the appellant with an indeterminate right to remain. Instead, in doing so, the panel appears to be confusing the two quite separate strands of the appeal.

The legal effect of a successful challenge to a decision to deport

28. In *George, R (on the application of) v SSHD* [2014] UKSC 28 (4 May 2014), the Supreme Court considered the effect of a successful challenge to a deportation order. The Court posed the question:

> If a criminal who previously had leave to remain in this country is liable to deportation because of his offences, but cannot actually be deported because to remove him would infringe his rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms, with the result that the deportation order is revoked, what is the status of his previous leave to remain?

29. Lord Hughes (with whom Lord Neuberger, Lord Clarke, Lord Carnwath and Lord Toulson agreed) stated that it was common ground that the making of a deportation order rendered his leave to remain invalid. It did not say that the decision to make the deportation order had that effect. This, it was said, is the effect of s. 5 (1) of the Immigration Act 1971 which provides:

> 5(1) Where a person is under section 3(5) or (6) above liable to deportation, then subject to the following provisions of this Act the Secretary of State may make a deportation order against him, that is to say an order requiring him to leave and prohibiting him from entering the United Kingdom; and a deportation order against a person shall invalidate any leave to enter or remain in the United Kingdom given him before the order is made or while it is in force.

30. A challenge to the immigration decision (that is the decision to make the deportation order) does not invalidate the appellant's pre-existing leave. Once

the deportation order is made, section 5(2) of the 1971 Act does not mean that if the deportation order is revoked, the invalidation by section 5(1) of leave to remain is retrospectively undone; the previous leave to remain does not revive. Hence, Mr George remained liable to deportation, even though it could not be carried out. His position in the United Kingdom had to be regularised, but that did not entail a recognition of indefinite leave to remain. The Secretary of State's was entitled to grant to him periods of successive limited leave.

31. In Mr Turhan's case, I am not aware that a deportation order has been made; hence, the process has not advanced to the stage where the appellant's current leave has been invalidated. This does not amount to his being granted leave to remain under the Immigration Rules or allowing the appeal under the Immigration Rules. Paragraph 364 did not offer the appellant a right the breach of which gives rise to a right of appeal. It defined a process which was itself subject to paragraph 380 of the Rules namely that a deportation order could not be made against any person if his removal in pursuance of the order would be contrary to the United Kingdom's obligations under the ECHR:

> 364. …while each case will be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport. The aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects. In the cases detailed in paragraph 363A deportation will normally be the proper course where a person has failed to comply with or has contravened a condition or has remained without authority.

32. Paragraph 364 offers an appellant no substantive right to remain and an appellant is not, therefore, entitled to his appeal being allowed under paragraph 364 of the Immigration Rules.

Limited leave pending the outcome of the permission application

33. The panel's decision that the appellant's removal would violate his human rights was generous and did not properly reflect the highly speculative nature of the proceedings he was engaged in, namely, the seeking of permission to re-visit a decision that had been lawfully made only very recently. There was no evidence that it would result in a benefit to A; the determination spoke of the benefit to the appellant: '*Set against his conduct…we have to consider the nature of his relationship with [A].'* Mark this approach; it says nothing about the nature of the relationship of A with his father. Yet, the benefit to the appellant is of a much lower order since his own conduct has forfeited significant consideration being given to it.

34. Nevertheless, if we construe the panel intending to grant the appellant a limited right to remain until the outcome of the family proceedings, it was open to the panel in accordance with *RS* principles to stay removal pending the decision of the Family Court at least in the permission application.

35. If the Family Court refuses permission to pursue any further contact order, that will be the end of the appellant's claim that removal would violate due respect for his rights to private and family life. There is no suggestion that the private life that he has developed is sufficient to prevent his removal; his appeal has never been advanced on this basis. There is no claim that the relationship with his former wife or partner currently renders removal disproportionate. It is only the relationship that the appellant has with his son that forms the basis of a family life claim and it is not the appellant's relationship with his son that would render his removal disproportionate but the relationship that his son has with the appellant. By refusing permission, the Family Court, on the basis of a much greater understanding than the IAC possesses of the family dynamics, will have decided that the child's best interest are not served, even arguably, by permitting a further application to be made. In the event of a refusal, therefore the outcome is certain. The deportation decision was lawfully made by the Secretary of State and the effect of deportation is not to violate the human rights of any of those involved. The current order permits conditional contact by letter once or twice a year and this can be achieved as well from Turkey as from within the UK.

36. If, however, the Family Court grants permission, the IAC will then have to give consideration to the impact of this decision upon the appellant's removal. The fact that permission is granted, indeed, the fact that the Family Court decides that it is in the best interests of the child for his father to remain in the United Kingdom, is not determinative. Were it to be so, there could be no deportation of a foreign criminal, however serious his offending may be, provided he establishes he has in the United Kingdom a child with whom he has a normal loving relationship. Where such a relationship exists, it will always be in the child's best interests for it to continue. However, as the case law makes clear, where the father's right to remain is weak (either because of a failure to meet the requirements for entry clearance or leave to remain or because of criminal offending) removal is permitted where it is proportionate. See, for example, *Harrison (Jamaica) v Secretary of State for the Home Department* [2012] EWCA Civ 1736.

37. It will probably require an express finding by the Family Court that the appellant's presence in the United Kingdom is necessary in order to avoid significant prejudice to the welfare of the child before the interference with family life is sufficiently serious to engage Article 8 and the proportionality balance. Nevertheless, the Tribunal will always pay the closest attention to what the Family Court says as to the child's needs in deciding where the

proportionality balance lies, weighing the public interest in removal of non-nationals whose immigration history or misconduct merits removal against the harm this will occasion to a child involved in the case.

38. We are where we are. The appellant's application has advanced at least as far as the directions of 15 May 2014 suggest. There is merit in allowing the application for permission to be decided if only because were the application to be refused (on paper or at a renewed oral hearing) the situation will then be clear-cut. I have already found that there has been an error of law but the underlying conclusion of the First-tier Tribunal to await the outcome of the appellant's application to seek permission to seek further contact with his son was not in itself irrational or unreasonable. Insofar as the determination permitted the appellant to remain '*pending the outcome of the family proceedings*' this was too open-ended without knowing more of how long that process would take and whether it would require the appellant's presence. If, for example, upon re-examination, the Family Court decides to extend the scope of letter-writing or other forms of indirect contact, there will be no requirement for the appellant's presence in the United Kingdom, albeit the family proceedings will remain pending. If the Court decides a gradual re-establishment of links, it may take years and it may be inappropriate to delay the decision on removal indefinitely.

39. Clearly, if the family proceedings are likely to be relatively swift, the appellant's presence in the United Kingdom for a short period will have little impact upon the general principle of enforcement of immigration control. If it is likely that the family proceedings will continue for a period of years, it may well be disproportionate to permit the appellant to remain, at least if the outcome is speculative.

40. If permission is granted, the decision to defer removal still further would require the Tribunal to be provided with an accurate time-table as to the likely progress of the application. Consideration will have to be given to the material that the Family Court is likely to make available to the Tribunal, perhaps by way of a summary or an extract from its judgment. If the Tribunal is not to receive material that is likely to assist it in deciding where the balance lies, there may be little advantage in awaiting the outcome of the family proceedings. If the only material that is to be released to the Tribunal is a contact order, that is unlikely to assist it since a contact order by itself will not determine the appeal in the appellant's favour. In such circumstances, the Tribunal may consider proceeding on the hypothetical basis that contact will be permitted and decide proportionality on that hypothesis without awaiting the outcome. (If the eventual outcome is that there be no more contact than presently permitted by the order of HHJ Newton, this will not prevent removal because there will be no underlying finding of fact that the child's best interests are served by preventing removal.)

Adjournment - an alternative to the grant of discretionary leave

41. As the decision in *RS* makes clear, there will be cases where it is disproportionate to remove a parent who is involved in litigation involving the welfare of his child. In such a case a temporary grant of leave may be a proportionate means by which the family litigation may be justly determined with a limited impact upon the public interest in immigration control. It should not be assumed that it will be the invariable practice. Given the fact that a decision on permission is likely to be made (if it has not been made already) within a limited period, an adjournment of the appeal will achieve the same effect so as to enable a foreseeable stage in the process to be reached. This is what I propose to do here. I set aside the First-tier Tribunal's decision to allow the appeal to the limited extent on the basis that the respondent should permit the appellant a form of leave pending the outcome of the family proceedings and substitute a decision adjourning the re-making of the decision until the outcome of the application for permission is made known. I shall adjourn the appeal for 6 weeks but I direct that the appellant is to notify the Tribunal as soon as he or his representatives becomes aware of a decision on the permission application and if there is to be a renewed oral application.

42. If permission is refused, I shall re-make the decision on the papers. If permission is granted, the Tribunal will reconsider the directions necessary but the parties must not assume that the Tribunal will sanction the appellant's presence in the United Kingdom pending the eventual outcome of the family proceedings without being provided reasons for doing so. It will be necessary for the appellant to persuade the Tribunal that this is in the child's best interests. In this regard, material from an objective source from the Court or those working for it is likely to carry particular weight.

Part 2 – the re-making of the decision

43. The above are my reasons of 20 July 2014 for finding an error on a point of law. For the sake of continuity I shall resume the paragraph numbering from the earlier decision.

44. The appeal came before the Upper Tribunal at a hearing on 18 November 2014, (Mrs Justice Elisabeth Laing and Upper Tribunal Judge Jordan). Mr Mak informed us that at a hearing in the Chelmsford Family Court on 21 October 2014, HH Judge Murfitt refused the appellant's application for permission to make any further application including a contact order. However, we were informed that the appellant had renewed his application for oral hearing, which by then had not yet taken place.

45. On 28 November 2014, the renewed application for permission was dismissed by HH Judge Murfitt in the Family Court in Chelmsford. I have now been

provided with a copy of the order then made pursuant to the direction given by HH Judge Murfitt.

46. The refusal of permission by the Family Court disposes of any viable claim that the appellant's continued presence in the United Kingdom is required to pursue his application for contact. The refusal also determines any claim that the appellant's continued presence in the United Kingdom is in the best interests of the child. It is not. As I indicated in paragraph 40 above, were permission to be refused, I intended to re-make the decision on the papers pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the outcome being certain. Rule 34(2) provides that before disposing of this appeal without a hearing, regard should be had to any view expressed by either party to that course of action. No response to my proposal was made following service of the Reasons for finding an error on a point of law. No request was made for a hearing when the panel sat on 28 November 2014.

47. For the reasons given in my decision that the First-tier Tribunal made an error of law and, following the decision of Judge Murfitt which for all practical purposes disposed of any residual claim to remain based on his relationship with his child, I re-make the decision now. In doing so, I have regard to section 117 but I emphasise that if these provisions did not apply and I were re-making the decision without giving any consideration to s.117 and the alterations in the Immigration Rules, I would have determined that the appellant's Article 8 claim fails. I would regard the presence of a minor child in the United Kingdom as probably establishing the existence of family life, even if there is no physical contact. On the basis of the appellant establishing a private and family life which would be subject to interference by his removal, the public interest in his removal unquestionably outweighs the interference.

48. Sections 117A-D and the changes to the Immigration Rules are set out and explained by Aikens LJ in paragraph 13-16 of *YM (Uganda) v SSHD* [2014] EWCA Civ 1292 (10 October 2014). Sections 117A-D provide:

> 117A Application of this Part
> (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).

117B Article 8: public interest considerations applicable in all cases
(1)The maintenance of effective immigration controls is in the public interest.

117C Article 8 additional considerations in cases involving foreign criminals.
(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless…Exception 2 applies.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part
(1) In this Part—
"Article 8" means Article 8 of the European Convention on Human Rights;
"qualifying child" means a person who is under the age of 18 and who—
(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;
"qualifying partner" means a partner who—
(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, "foreign criminal" means a person—
(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c) who –

(iii) is a persistent offender.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—
(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

49. Section 73(1) of the 2014 Act provides that:

"The Secretary of State may, by order, make such transitional, transitory or saving provision as the Secretary of State considers appropriate in connection with the coming into force of any provision of this Act".

50. Paragraph 3(o) of the Immigration Act 2014 (Commencement No 1, Transitory ...sic) and Savings Provisions) Order 2014 (SI 1820 of 2014) provides that 28 July 2014 is the day appointed for section 19 of the 2014 Act to come into force. There is nothing in the 2014 Act (particularly Schedule 9 which is headed "Transitional and Consequential Provisions") to indicate whether the new statutory rules are to apply to cases or appeals that are pending before a court or tribunal.

51. The 2012 Rules were modified by Statement of Changes to the Immigration Rules of 10 July 2014 (HC 532) which were laid before Parliament on 10 July 2014, ('the 2014 Rules'). Set out below are the relevant 2012 Rules, as amended by the 2014 Rules. The new 2014 provisions are in square brackets with the provisions of the 2012 Rules crossed through which are deleted by the 2014 Rules:

> A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at [28 July 2014] are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.'
> …
> 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.
> [A.398. These rules apply where:
> (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
>
> 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
>
> (c) the deportation of the person from the UK is conducive to the public good [and in the public interest] because, in the view of the Secretary of State, …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~~ [the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.]
> 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 seven 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~~ [it would be unduly harsh for the child to live in the country to which the person is to be deported]; and (b) ~~there is no other family member who is able to care for the child in the UK~~ [it would be unduly harsh for the child to remain in the UK without the person who is to be deported]; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, [or] 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~~ [(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported].

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.~~

[(a) the person has been lawfully resident in the UK for most of his life; and (b) he is socially and culturally integrated in the UK; and (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported].

52. The Statement of Changes in the Immigration Rules HC 532 said, under the heading "Implementation", that the changes set out in paragraphs 14 to 30 of this statement would take effect on 28 July 2014 and would apply to all ECHR Article 8 claims from foreign criminals which were to be decided on or after that date. The changes in paragraphs 14 to 30 include the new 2014 Rules set out above.

53. The appellant is undoubtedly a persistent offender. There are 10 recorded matters against him as set out in paragraph 5 above. Even if the non-custodial sentences are taken out of the account, there remains 6 sentences of immediate imprisonment as identified in the following sub-paragraphs of paragraph 5:

(iv) 27 October 2008: 11 weeks imprisonment;
(v) 3 August 2009: 9 months and one days imprisonment;
(vi) 16 September 2009: 3 months imprisonment;
(vii)
(viii) 7 May 2010: 8 months imprisonment;
(ix) 6 or 8 August or November 2011: 8 weeks imprisonment;
(x) 7 June 2012: 18 weeks imprisonment.

54. No Secretary of State could rationally find the appellant was not a persistent offender. Hence, the respondent is bound to treat him as a foreign criminal. The deportation of foreign criminals is in the public interest. In the case of a foreign criminal, like the appellant, who has *not* been sentenced to a period of imprisonment of four years or more, the public interest requires his deportation. As the appellant does not have a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child and the effect of his deportation on the partner or child would not be unduly harsh, he fails to establish he falls within Exception 2.

55. His deportation from the United Kingdom is conducive to the public good and in the public interest because the Secretary of State is bound to treat him as a persistent offender being a person who has shown a particular disregard for the law. Hence the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances. There are none.

56. As a result of the findings in the Family Court and my consideration of the underlying claim, paragraph 399 does not operate as a clog on removal. The appellant is not a person who has been lawfully resident in the UK for most of his life and is socially and culturally integrated in the United Kingdom. There would be no significant obstacles to his integration into the country to which it is proposed he is deported. Hence paragraphs 399 and 399A do not operate to assist the appellant.

57. The appellant's appeal is dismissed.

DECISION

The Judge made an error on a point of law and I substitute a determination dismissing the appeal on all the grounds advanced.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL
16 December 2014