Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/25723/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19th June 2018 and 24th September 2018	**On 12th November 2018**

Before

THE HONOURABLE MR JUSTICE LANE. PRESIDENT
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR PAUL ANTHONY SMITH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Haywood (Counsel), Owens Stevens Solicitors
For the Respondent: Mr I Jarvis (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Monson, promulgated on 5th January 2018, following the hearing at Taylor House on 11th December 2017. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matters comes before us.

The Appellant

2. The Appellant is a male, a citizen of Jamaica, who was born on 28th December 1965. He appealed against the decision of the Respondent Secretary of State dated 7th November 2016 to deport him to Jamaica. The Appellant has had three cautions and convictions between 2nd August 2003 and 26th November 2008. His criminality, it was suggested, meant that his removal from the UK was conductive to the public good under Section 3(5)(a) of the Immigration Act 1971.

The Appellant's Claim

3. The essence of the Appellant's claim is that he is the father of two minor children. These are "J", "Q" and "L". In relation to these children, "Q" currently lives with his mother in Jamaica. As for "J" and "L", they are both British citizens. For "J" the Appellant has indirect contact, pursuant to a Family Court decision, as "J" lived with his mother. The remaining child, "L", also lived with his own mother, at a distance of some two hours away, and the Appellant claimed that he saw him at weekends. The Appellant maintained that he was seeking to continue having such contact, but his mother disputed this, in her communication with Social Services. Indeed, it is a feature of this case that the Home Office had been in contact with Social Services with respect to "J" and "Q" and had been informed that these children were currently on a Child Protection Plan under the category of neglect, and the Appellant had not been named on the children's birth certificates. These matters were referred to expressly by Judge Monson when giving his decision (paragraph 40).

4. The Appellant's human rights claim was also based upon his relationship with a [MJ], whom he had met, some two months before the hearing before Judge Monson, in September 2017. In relation to this aspect of the claim, Judge Monson observed that, with respect to his relationships with his alleged partners, "[MJ] was not here today to support him as she had a 6 month old baby by another father" and that a previous partner, "[M] was not here to support him, as she had to go to work. He was not in a relationship with L's mother. She had a partner with whom she and "L" lived, together with another son and two daughters" (paragraph 69).

5. The Appellant's human rights claim was also based upon his private life, given that he had arrived in the UK in October 2002 on a visit visa, and subsequently been granted indefinite leave to remain the following year in 2003. This arose as a result of his marriage to a Jamaican national who was present and settled in the UK. Thereafter, his attempt to apply for naturalisation in 2007 was frustrated by the fact that he had a string of offences which led the Secretary of State to regard him as a person of bad character, and in consequence his request for naturalisation was refused. These offences ranged from possession of cannabis, to an assault on his daughter, to theft of clothing, and to driving without insurance.

The Judge's Determination

6. In a comprehensive and carefully compiled determination, Judge Monson, after setting out the background, concluded that the Appellant's appeal against deportation fell to be dismissed. The Appellant had three convictions for five offences and three cautions for a further three offences. The oral evidence received at the hearing from PC Lindsay Barnes confirmed no less than 36 police encounters with the Appellant (see paragraphs 3 to 4). The Metropolitan Police had also provided a witness statement detailing the Appellant's "previous non-conviction encounters", which included seven alleged offences against a person between 2006 and 2014 – namely, one sexual offence in 2013; one offence against property in 2014; two thefts and kindred offences between 2006 and 2014; one drugs offence in 2014; and two miscellaneous offences between 2010 and 2014 (see paragraph 52). The Metropolitan Police also included details of "not guilty charges" (paragraph 53).

7. In his determination, Judge Monson ruled that the Secretary of State was not precluded from relying on "non-conviction" evidence for the purposes of a deportation decision, so long as the allegations were proved against the Appellant, and in this the Judge was guided by **Bah (EO (Turkey) – liability to deport) [2012] UKUT 00196 (IAC).** Moreover, consideration was also given by him to **Farquharson (Removal – proof of conduct) [2013] UKUT 00146**, which established that if the material is such that it is open to more than one interpretation, an adverse interpretation should only be drawn, if on a balance of probabilities, there is no other reasonable explanation on the material before the Tribunal (see paragraph 74 of the determination).

The Findings of the Judge

8. In coming to his conclusions, the judge apprised himself of the situation before him, as set out in the refusal letter. This was that the Appellant's human rights claims had been rejected in the face of the deportation order on grounds that the convictions and cautions between 2003 and 2008. These were coupled with the Appellant's "character, conduct and associations" as revealed by the information provided by the Metropolitan Police, in relation to his previous "non-conviction" encounters between 2006 and 2014. Cumulatively, these suggested that it was beyond doubt that the Appellant had been involved in serious criminality in the UK (see paragraph 75). PC Barnes, who gave oral evidence, summarised the information in the CRIS Reports about each of the previous non-conviction encounters (paragraph 76).

9. For his part, Mr Haywood had a detailed analysis of the underlying CRIS material prepared, and he endeavoured before the Tribunal to draw out the exculpatory elements within many of the encounters. He submitted that the Appellant was probably innocent in many of the cases and the information by the complainant was unreliable (paragraph 77). To this, the Judge pointed out what was established in **Farquharson**, namely, that the

Secretary of State has to substantiate the conduct relied upon (paragraph 78) if reliance is to be placed on 'non-conviction' evidence. The judge then moved on to a consideration of the two offences of actual bodily harm (ABH) which he considered in this respect to have been proved against the Appellant.

10. First, there was ON36, which arose from an incident on 1st June 2017, and concerned a complaint against the Appellant for assaulting his ex-partner 'Florence'. The allegation was that he had punched her in the face causing her to cut her lip and had damaged her mobile phone. The Appellant had a pre-prepared statement. In this he said that Florence's allegations were false and malicious. When questioned he had answered, "no comment." Although Florence had later signed a withdrawal statement, the police had then provided the CPS with a "body worn camera evidence" and this is said to have clearly portrayed the victim's injuries and distress (paragraph 79). The judge concluded on this basis that "it is likely that Florence was telling the truth when she complained to the police that she had been assaulted by the Appellant at her place of work." This meant that the allegation of ABH was borne out (see paragraph 80).

11. Second, there was ON20, which concerned an incident two years later on 16th May 2009, when the Appellant and his then partner, who was referred to as 'DN', were together at his flat. "DN" made allegations of rape and false imprisonment against the Appellant, and when the police had arrived at the Appellant's flat, he had delayed in opening the door to the police. When asked for an explanation by them he had said he had locked the door with 'DN' inside the flat because of a recent burglary. The judge did not find this explanation to be credible. However, the judge, did not find the Appellant to have committed the offences of rape and false imprisonment. He did, on the other hand, find the Appellant to have been guilty of ABH. He based this finding having rejected the suggestion that this was an accident with the explanation that, "I consider that his account of accidentally headbutting her is incredible, given the surrounding circumstances. So I find that the offence of ABH is made out, which is the offence for which he was originally arrested" (paragraph 81).

12. The judge's determination of the facts exhibits a nuanced and careful approach to the allegations made against the Appellant. He rejected some of the most serious charges levied at the Appellant by the complainants (such as rape and false imprisonment at paragraph 82). However, he proceeded to find both the allegations contained in ON 36 and ON 20 to be proven against the Appellant:

> "Although there are reasonable grounds to suspect that the Appellant has been in a series of abusive relationships, and that his convictions for assault in a domestic context are just the tip of the iceberg, I am unable to find that the Respondent has brought forward sufficiently cogent evidence to prove that the Appellant was guilty of any of the offences alleged against him by various female complainants over the years save to the ABH offences alleged in ON20 and ON36" (paragraph 83).

13. The judge did not find the existence of the Appellant's children in the UK to be such as could assist him in remaining in this country. This was because of the finding of the Family Court. This referred to the Appellant's misuse of controlled drugs. This led the judge to conclude that the Appellant's children would be put at risk (paragraph 85) on account of the Appellant being in contact with criminal drug dealers and associates. Given what had been said in **Bah** by the Upper Tribunal, (see paragraphs 88 to 89) the judge came to the firm conclusion that "viewed as a whole, the conduct, character and associations of the Appellant reached such a level of seriousness as to justify a decision to deport" (paragraph 89).

14. The judge justified his findings in the following way. First, that the Secretary of State in accordance with the strictures of **BAH**, had been able to show that the Appellant had been violent towards woman. Second, that she had been able to show that he was a habitual abuser of controlled drugs bringing himself into contact with criminal drug dealers and associates. Third, the Appellant himself had not been able to show that he was a reformed character who was unlikely to reoffence again in the future. Fourth, on the contrary, he had sought to minimise his proven offending, by effectively protesting his innocence and putting all the blame on others. Fifth, there was no evidence that the Appellant had stopped abusing controlled drugs.

15. On the question of whether the Appellant was a "persistent offender" however, the judge found in favour of the Appellant because the decision in **Chege [2016] UKUT 00187** confirmed that the Respondent Secretary of State can only rely upon convictions and cautions if the intent is to prove that the Appellant is a persistent offender within the meaning of the Rules or the statute. In this case, however, "the Respondent has fallen far short of proving that the Appellant is a persistent offender" (paragraph 95). This is because after a series of offences which were committed between 2003 and 2009, "there was a long hiatus before the next proven offence in 2014 (for which the police did not bother to prosecute the Appellant), and then a significant gap before the encounters in June 2017, which are featured in ON35 and ON36" (paragraph 96).

16. That aside, however the Appellant's human rights claim failed, on the basis of Judge Monson's findings, because the Appellant could not demonstrate that he had family life as a partner of [MJ]. The judge concluded that "there is no satisfactory evidence to demonstrate that she has the status of a partner, as opposed to being merely the Appellant's latest girlfriend" (paragraph 98). The Appellant failed to show he enjoyed family life as a parent, because "Q" was already living with his mother in Jamaica, and the child's best interests would be promoted if the Appellant returned to Jamaica himself, so that the child could have access to both parents. "J" and "L" were both British nationals, born of different mothers, but only with respect to "J" was the Appellant permitted to have indirect contact, so that if the Appellant was removed to Jamaica, he could maintain this indirect contact from there. Indeed, the fact that the Family Court had only granted the Appellant indirect contact confirmed that "J's"

best interests were not to have direct contact with the Appellant (paragraph 99).

17. As for "L", the judge did not accept that there was a genuine and subsisting parental relationship with him because "the Appellant had not brought forward any independent evidence to show that he has been having contact with L on a weekly basis". In fact, a startling feature of this part of the claim is that Appellant himself "has volunteered that L's mother is now objecting to him having continuing contact with L, following intervention by Social Services" and "L" lives in a family unit comprising his mother, stepfather and stepsiblings (paragraph 100). Therefore, even though that the Appellant was the "biological father" of "L," the judge was not persuaded that his removal would significantly impact upon the welfare and wellbeing of "L."

18. On the contrary, "the evidence falls very far short of showing that it would be unduly harsh for the children to remain in the UK without their biological father" (paragraph 100). The judge was emboldened in this conclusion by the fact that,

> "Given his record, and the outcome of previous Family Court proceedings, there does not appear to be a realistic prospect of the Appellant being granted direct contact with his children in the UK as a result of a further application to the Family Court" (paragraph 100).

19. As for the Appellant's private life, the judge concluded that "the Appellant has not been lawfully resident in the UK for most of his life" and that, "it has also not shown that he is socially and culturally integrated in the UK". That said, the judge did give express regard to "the credit side" of the Appellant, observing that "there is documentary evidence pointing towards the Appellant beginning to improve his prospects to studying at university and obtaining some qualifications, and there is also some limited evidence of the Appellant participating in gainful economic activity in the past" (paragraph 101).

20. On the other hand, the Appellant had only operated within a Jamaican diaspora in the UK "and there is little evidence of the Appellant establishing positive integrated links in the UK". In fact, "he has made himself known to the police on numerous occasions, and his habitual abuse of controlled drugs brings him into contact with criminal drug dealers and associates", (paragraph 102). The judge concluded that there would not be very significant obstacles to the Appellant's reintegration into life and society in Jamaica "where he grew up and where he has lived for most of his life" (paragraph 103).

21. Finally, that left the issue of "freestanding Article 8 proportionality assessment" and the judge gave detailed consideration to this aspect of the claim as well. He concluded that, given the Appellant failed to meet the requirements of the deportation Rules "by a considerable margin", then "in normal circumstances, he would need to provide evidence of a very strong Article 8 claim over and above the circumstances described in

the exceptions to deportation in order for the public interest in this deportation to be outweighed" (paragraph 104). There is no suggestion that this direction given by the judge to himself is not correct. In fact, the judge held that "the Appellant can potentially succeed in a freestanding proportionality assessment, although his Article 8 claim is much weaker than the exceptions given in the deportation Rules" (paragraph 105).

22. Turning to the Appellant's claim on this basis, therefore, the judge held that questions 1 and 2 of the **Razgar** test would be answered in the Appellant's favour, but that questions 3 to 4 of the **Razgar** test went in favour of the Respondent. On the issue of proportionality, which was question 5, the Appellant's ability to speak English was in his favour. Although the Appellant was not financially independent, he had the capacity to obtain gainful employment. Although the Appellant enjoyed indefinite leave to remain, until the deportation order was served on him, " his status was nevertheless at all material times a precarious one" (paragraph 106). The Appellant, according to the judge, had not established a private life "of a special and compelling character such that the normative guidance contained in Section 117B should not apply to him", which was to the effect that little weight would be attached to a private life that was built up during the time when a person's status here was precarious. In conclusion, the judge held that although the public interest in the Appellant's deportation was less than if the Appellant was a foreign criminal within the meaning of the statute, "it is still significant" and that the decision to deport on conducive grounds "strikes a fair balance between, on the one hand, the Appellant's rights and interests and those of his children in the UK, and, on the other hand, the wider interests of society" (paragraph 107).

23. The appeal was dismissed.

Grounds of Application

24. The grounds of application state that the judge embarked upon a flawed analysis of whether the case for deportation had been established. He had held that the Appellant was guilty of ABH but the Appellant had not been cross-examined about the incident. The evidence of the injuries had not been produced by the Secretary of State. The photographs, according to the CRIS Report, "do not show a particular clear injury". Moreover, the Appellant's ex-partner had been arrested by the police in November 2017 for assaulting him. The victim herself had withdrawn her statement. The Appellant's ex-partner had said that she had been assaulted and not allowed to leave the flat for over three hours, but had then herself left the flat, and then curiously returned back to it as well. The police scene examiner confirmed that the key was inside the lock, such that the Appellant would not have been locked from outside, and when the police sought to retain the telephone of the alleged victim in order to investigate the cause and to recover the voicemails, offering to contact her mobile phone company on her behalf, the Appellant had instead asked for the return of the phone, so that no further enquiries could be made. As for the

alleged drug use, the Appellant only had a history of personal drug use, and any suggestion that he was dealing with drug dealers and their associates was unfounded. He had been a long-term lawful resident in this country. He had admitted to drug use (cannabis and crack cocaine) at a particular low point in his life. He was not using drugs now and this was his oral evidence, such that the judge's finding that there was no evidence that he had stopped using controlled drugs was unwarranted.

25. Second, in relation to the Appellant's Article 8 claim, although the judge had found that the Appellant was not a persistent offender, and that the Appellant did not need to provide evidence of a very strong Article 8 claim over and above the circumstances described in the exceptions to deportation, he was wrong to have then gone on to say that there had to be "independent evidence" that he saw his son "L" every weekend (at paragraph 100). The Appellant's own evidence, if accepted, would have been enough to establish that credible evidence existed which required no corroboration. As to the Appellant's relationship with [MJ], the Appellant's partner was now pregnant with their child. The judge also erred in concluding that the Appellant's status was at all material times a precarious one, because he had been in the UK with leave in 2002, requiring indefinite leave to remain in 2003, and only in 2014 was he served with a deportation decision. The judge's analysis of how the "freestanding balance" failed to be struck is not reasonably in detail on the facts.

26. On 30th January 2018, permission to appeal was granted by Judge Baker in the First-tier Tribunal.

27. A Rule 24 response was entered by the Respondent Secretary of State on 15th June 2018. A response to the Secretary of State's Rule 24 notice, together with a skeleton argument, was thereafter entered by Mr Haywood on 17th June 2018.

Submissions

28. At the hearing before us on 19th June 2018, Mr Haywood, appearing on behalf of the Appellant, took us carefully through his grounds of application. The defendant, he submitted, was not a foreign criminal, so as to be subject to paragraphs 398A and 399 of the Immigration Rules. The judge had not been satisfied that the Appellant had been guilty of rape and false imprisonment. He was not satisfied that the Appellant was a persistent offender under the Rules. He had only been satisfied that the Appellant had been guilty of ABH. The Appellant had taken drugs for his personal use more than eighteen months ago, but there had been no evidence to show that he had been in contact with drug dealers and their associates. His status had not been "precarious" throughout his time here because he had acquired ILR from 2003 onwards, having entered lawfully, and it was only in 2014 that a deportation decision had deprived him of that status.

29. It was, he submitted, against this background that the relevant case law had to be applied. **Bah** made it quite clear that, although the Secretary of State was not precluded from relying on "non-conviction" evidence, nevertheless the onus was on the Secretary of State to prove these allegations, on the basis of evidence, the reliability of which had to be carefully assessed, in compliance with the minimum standards of fairness (see **BAH** at paragraph 55). **Farquharson [2013] UKUT 00146** made it clear that, "if the material renders itself capable of more than one interpretation we should only draw one adverse to the Appellant if on the balance of probabilities there is no other reasonable explanation on the material before us" (see paragraph 27 of **Farquharson**). This was a case where the complainant, who alleged ABH, on the basis that she had her face slapped and her mobile phone broken, had been unwilling to proceed.

30. In fact, the CRIS evidence showed that her witness statement had contained assertions which put the prosecution in some difficulty, that it proved impracticable for the prosecution to proceed any further. For example, the "Details of investigation" as set down by PC K A Butler, for 16th May 2009 (at 6.55 hours) discloses how, after the victim claimed to have been punched in her face by the Appellant, she ran across the road and telephoned her mother. She asked her mother to call her and leave her an answer phone message, telling her that she needed her phone immediately. Her mother then did this. This was at a time when the Appellant had left the flat momentarily. When the Appellant returned back to the flat the victim followed him back into it. Mr Haywood pointed out that the notes of K A Butler make it clear that the victim recognised that "she admits that this is strange having just been raped and punched however said that she had just got it in her head that she had to find a legitimate reason to leave and go home".

31. Mr Haywood submitted that this was "curious behaviour" and a different interpretation of the facts may have been open to make here for the prosecution. The document by K A Butler appears at page 828 of the main bundle.

32. In the same way, the account by PC L M Coghlan (at page 840 of the bundle) explains in the "Details of Investigation" (on 16th May 2009 at 22.28 hours) that when the police arrived and banged on the door, the Appellant took some time to open the door, after the victim had been hit and kicked about thirty times. The police finally broke the door down and the Appellant was arrested. The victim "was asked if I had been raped and I said nothing because the word rape sounds awful to me. I was scared". She goes on to say that, "had I been able to leave his house after he had sex with me, then I probably would not have reported the rape to police. I feel that it all has to come out now". Mr Haywood submitted that this account too was ambiguous and open to more than one interpretation.

33. Such ambiguities, submitted Mr Haywood, have to be read in the context of the Appellant's own account of the events. This is related to by PC J M Mills in his "Details of Investigation" (on 17th May 2009 at 16.41 hours)

who records that the Appellant "denied assaulting in any way; he did not punch or kick her. The only time he touched her was when his head accidentally struck her on the face. He denied deliberately locking her in his flat and refusing to let her leave. At no point did she ask to leave" (page 246). PC J M Mills also goes on to record that the Appellant said that "he did not punch her in the nose in the bathroom" (page 248). The victim had not been locked inside the flat. The police evidence, such as from DSM Tyler (on 29th July 2009 at 15.39 hours) states in the "details of investigation" that the "scene examiner" had provided a statement relating to his examination of the scene "in which he records seeing a key inserted in the lock of the door on the inside" (see pages 265 to 266).

34. In fact, submitted Mr. Haywood, nothing more amply demonstrates the ambiguities in the evidence then the decision not to prosecute. This is related to by PC J M Mills in the "details of investigation" (on 22nd September 2009 at 8.25 hours) who records that

> "Yesterday afternoon I attended the case conference with the prosecution Counsel and CPS prosecutor. It was decided that the CPS would discontinue this matter and there would be no trial, due to the victim being unwilling to substantiate the allegation and the comments made in her withdrawal statement" (page 869).

35. Thereafter, on 29th September 2009 PC J M Mills explains that "this morning I attended court 10 at Snaresbrook Crown Court for a mention in this matter before a judge. The prosecution Counsel offered no evidence and the case was closed" (page 869). That left, submitted Mr Haywood, the question of the Appellant's drug dealing. However, there was no allegation at all of the Appellant's actually dealing with drugs. There was no evidence to this effect. Therefore, the "public interest" balance had to fall away because it had been wrongly undertaken. This was a person who had entered the UK with leave and subsequently acquired ILR. During this time his presence in the UK was not "precarious" (with Mr Haywood referring to paragraph 8(c) of his skeleton argument). In fact, the Appellant had a family life in the UK. He had resided with his children. He had a wife. He had produced credible evidence that required no cooperation of his contact with his children.

36. For his part, Mr Jarvis submitted that it was true that the Appellant was not a "persistent offender." However, on the basis of the Tribunal decision in **Chege [2016] UKUT 00187**, which has determined that this was a question of mixed fact and law, and fell to be decided by the Tribunal at the date of the hearing, the judge was right to have concluded in the manner that he did in other respects. In this, he drew our attention to the Secretary of State's Rule 24 response.

37. First, Mr Jarvis submitted that to criticise the judge's determination in this case was to effectively hold him to a higher standard of proof, which was not supported by the developing legal jurisprudence on judicial decision making. The Court of Appeal in **AM v Secretary of State for the Home Department [2012] EWCA Civ 1634** had referred to Lord Hoffmann's

dicta in **Piglowska v Piglowska [1999] 1WLR 1360**. This was to the effect (at page 1372) that:

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as were given by the District Judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well-known …. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself".

38. The Court of Appeal in **AM** continued (at paragraph 54) to state that Baroness Hale in **AH (Sudan) v SSHD [2007] UKHL 49**, had also said (at paragraph 30) that:

> "…. This is an expert Tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert Tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the Tribunal will have got it right …. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. The Appellate Court should not rush to find such misdirections simply because they might have reached a different conclusion or the facts will express themselves differently".

39. Mr Jarvis went on to make good his point by stating that the judge in this case gave proper regard to the legal approach established in **BAH [2017] UKUT 00330** and in **Farquharson [2013] UKUT 00146** and applied the guidance given in those cases at paragraph 89 of the determination. There could be no criticism that the judge had misdirected himself.

40. Second, insofar as there was a challenge to the judge's findings, with respect to the claim that the Appellant had punched Florence in the face causing her to cut her lip and damage her mobile phone (ON36), the findings were lawful and were made in the context of the correct legal framework. Insofar as there is a criticism that the Appellant was not cross-examined about the incident, this was irrelevant, given that the discrepancy in the evidence was one which had already been identified in the CRIS material, and was part of the Secretary of State's case against the Appellant. It did not prevent the Appellant himself from addressing the issue in his evidence-in-chief. The fact was that the Secretary of State's conclusion in this respect remained unaffected for two reasons. First, in order to meet the relevant burden of proof, what the Secretary of State had to do was to provide all of the evidence relevant to the allegation, which had been amassed by the police, and which included photographs of the injury, as well as the nature of the injury that was explicitly described in the CRIS material). Second, insofar as the Appellant

himself alleges that in November 2017 Florence assaulted the Appellant himself, this was not relevant to the particular issue at hand, namely, that on 1st June 2017 the allegation was that it was the Appellant who had assaulted the victim. Nothing that the Appellant had himself said in evidence prevented the judge from taking a view on the matter that he did.

41. Third, insofar as the allegations of rape and false imprisonment were concerned (ON20) on 16th March 2007, against someone referred to as "DN", the criticism levied overlooks the fact that the judge did find the Appellant not to have committed offences of rape and false imprisonment, but did find the Appellant to have been guilty of ABH. The judge was entitled to conclude that, "I consider that his account of accidentally headbutting her is incredible, given the surrounding circumstances. So I find that the offence of ABH is made out, which is the offence for which she was originally arrested" (paragraph 81). The suggestion that there was no cross-examination was again untenable for two reasons. First, the Appellant himself had the opportunity to rebut the allegation as described in the police evidence itself and any "failure" to cross-examine the Appellant did not identify any unfairness that was actually caused to the Appellant. It was still entirely proper for the judge to have come to the conclusion that he did. The finding was open to him. There was no inconsistency with **Bah** or any other authority. Second, whereas it was true that the withdrawal statement had not been produced, the absence of the withdrawal statement did not mean that the judge could not make the findings that he did, these being based upon the weight of the police evidence. In fact, submitted Mr Jarvis, what this was case was about, was a lack of detailed evidence by way of a rebuttal from the Appellant. Nowhere is this more clear than in the Appellant's witness statement of 19th June 2018 (at pages 6 to 7) where he deals with no less than five specific allegations against him in just over one page, by way of little more than simply a rebuttal.

42. Mr Jarvis then took us to the weight of the evidence amassed by the police. He took us to the internal reference to the CRIS Report (at page 28), where the victim's daughter called the police. PC Richardson records, on 2nd June 2017, that the victim had swollen lips and a swollen right cheek. She was unwilling to provide any explicit statement but she did state that the Appellant had assaulted her (at page 29). The children explained that this had happened on "countless" occasions before. The victim did state that the damage to her phone was caused by the Appellant and, "it has been captured on DMV". The children claimed that the victim had been assaulted by the Appellant (page 30). PC Richardson on 2nd June 2017 records that, "after viewing the body worn footage it appears that you cannot hear VIW1's answer to the questions asked as they are too quiet. Most of her answers however have been repeated by the attending officers" (page 33). There was, submitted Mr Jarvis, no ambiguity in relation to the answers because they had been confirmed by the officers.

43. Furthermore, the victim's daughter had taken photographs of the injuries. All that the Appellant had to say in relation to this detailed evidence was that, "I denied the allegations made against me" (see page 39). The OIC update by PC Talat on 22nd June 2017 was to the effect that, "I am now in possession of photos which show VIW1's injuries. The photos do not show a particularly clear injury. There are two photos." Yet, there was no doubt that there were injuries. The existence of the injuries was clear. In fact, the Appellant was given a proper opportunity to rebut the injuries. He did not call them into question. When he was asked (page 40) on 3rd June 2017 by DC Brodie, "did [victim] have any injuries when you saw her?" he answered, "no comment". When he was asked "did you see her mobile phone?". He answered, "no comment". When he was asked "did you see her drop her mobile phone". He answered, "no comment". When he was asked "was there anyone else there when you went to her workplace?" He answered, "no comment". Indeed, where it was expressly put to him "can you account for how [victim] got a cut to her lip?" he answered, "no comment" (see page 41).

44. The strength of the evidence, submitted Mr Jarvis, in relation to the offence of ABH, (ON20), was also considerable. A graphic account is given of the sexual assault in PC Coghlan's account on 16th May 2009. Yet, the judge, for reasons that were open to him, rejects that rape had been proven. Mr Haywood had submitted that it was "curious behaviour" for the victim to have left the flat and then to have returned to it, but it is clear that a full explanation is given for this behaviour by the victim, as detailed by PC Coghlan (at page 838). The victim herself states "she admits this is strange". However, she wanted her mother to call her to give a legitimate reason for leaving. Nevertheless, when PC Coghlan took the victim to Whitechapel Haven, where she was examined by a doctor, the summary of the findings were that there were bruises to face, neck, arms, legs, and thighs, as well as abrasions to the right hand, right forearm, back and buttocks. All of these were in the form of "extragenital findings". There were also, however, abrasions to the posterior fourchette, which were described as "genital/perianal findings" (see page 833).

45. The complainant subsequently made a statement withdrawing the complaint, as PC J M Mills explains (at page 869),

> "Yesterday afternoon I attended the case conference and prosecution Counsel and CPS prosecutor. It was decided that the CPS will discontinue this matter and there would be no trial, due to the victim being unwilling to substantiate the allegation and the comments made in her withdrawal statement".

However, the background to this is set out by J M Mills on 3rd June 2009 when the victim was offered, by the police themselves, the opportunity to contact her mobile network provider, O2, on her behalf, as well as suggesting that she purchase a pay as you go phone for temporary measures. What is said, however, is that "unfortunately, she was adamant that she has the original phone returned to her. She has concerns that without a phone she would not be in a position to ring the police in the

event she encounters a suspect." This, added Mr Jarvis, amply demonstrated the predicament in which the victim claimed to find herself. She asked for her phone back only because she needed protection from the police as she was so fearful of the suspect.

46. Finally, Mr Jarvis submitted that the judge did not err in law in stating that the Appellant's claim of being in contact with his children was unsupported by even the mother of the children, if the established case law was clear. In **TK (Burundi) [2009] EWCA Civ 40** the Court of Appeal made it quite clear, "how important it is in cases of this kind for independent supporting evidence to be provided where it would ordinarily be available; and where there is no credible explanation for the failure to produce that supporting evidence", because this "can be a very strong pointer that the account being given is not credible" (paragraph 20).

47. It was also made clear that "independent supporting evidence which is available from persons subject to this jurisdiction be provided wherever possible and the need for an Immigration Judge to adopt a cautious approach to the evidence of an Appellant where independent supporting evidence, as it was in this case, is readily available within this jurisdiction, but not provided" (paragraph 21). Mr Jarvis submitted that in this case this supporting evidence from the child's mother was readily available but it was not provided. It was not provided without any justification being put forward.

48. The judge was entitled, accordingly, to conclude that there was no general and subsisting parental relationship with "L." In fact, the determination goes further. The judge observes that "the Appellant has volunteered that L's mother is now objecting to him having continuing contact with L" (paragraph 100).

49. In his reply, Mr Haywood submitted that the fundamental issue here was one of fairness, and the judge had failed to apply the strictures in **Farquharson**, given that more than one interpretation was open on the evidence before the Tribunal, and other reasonable explanations were available.

50. First, with respect to ON36, and the allegation that the Appellant had slapped the victim, cut her lip, and damaged her phone, given that in November 2017 Florence had herself assaulted the Appellant, as claimed by him, he would say that this was simply a malicious allegation against him.

51. Second, with respect to ON20, and the allegation of ABH, it ought not to be forgotten that the victim had also alleged rape and false imprisonment, and yet she had returned back to the very premises where she alleged she had been violated. Furthermore, the judge, in deciding where the balance of considerations fell, in relation to the Article 8 claim, had fundamentally erred in law by concluding that the Appellant's status had been precarious. He had been here on the basis of indefinite leave to remain.

52. At the end of the hearing, we decided *de bene esse* that we should have sight of the withdrawal statement and that this should be disclosed to us before we make our decision. Mr Jarvis took instructions from the police. He returned to say that disclosure would take place within 21 days of this hearing. In the event, the former complainant was unwilling for her statement to be adduced in the current proceedings.

53. At the reconvened hearing on 24th September 2018, Mr Haywood reminded the Tribunal of the Appellant's family situation. The Appellant had three sons. These were "J" (aged 10 years); "Q" (aged 10 years); and "L" (aged 4 years). He also had a grown-up daughter and had a granddaughter. "Q," he explained, was living in Jamaica and his other two sons live in this country. He had indirect contact with "J" and saw "L" every weekend. He sees his adult daughter and the granddaughter. The Appellant wants to maintain regular contact with all of his children. He is now in a new relationship and his partner is expecting their child. Moreover, he has worked throughout his time in the UK, setting up a catering business in 2012. He is currently studying international business at Anglia Ruskin University, a course which he will complete when his degree is awarded in 2020.

54. A significant feature of this appeal is that the decision to deport the Appellant arose as a result of "Operation Nexus", which was based on "non-conviction" evidence from the Metropolitan Police. The Secretary of State's decision letter explains that the evidence of the Metropolitan Police is relied upon together with the claimed justification that the Appellant has been involved in "serious criminality" in the UK, on the basis of "non-conviction encounters". It was true that the Appellant had a number of convictions. However, these were between August 2003 and November 2008, which meant that they occurred nine years ago, and they had resulted in cautions, fines, community directives, or a period of disqualification from driving. None of the offences met the normal twelve months' threshold to trigger automatic deportation. In fact, the convictions did not lead to the imposition of custodial sentences. As a result, the Appellant has never served a term of imprisonment in the UK or in Jamaica.

55. A "non-conviction deportation", if it can be put that way, is therefore, in the Appellant's case, different from the "automatic deportation" provisions in Section 32 of the UK Borders Act 2007. Here the threshold requirement (in relation to conviction for a designated offence, with the imposition of a custodial sentence of twelve months' custody) would be met. That being so, the deportation of that individual would be deemed to be conducive to the public good. The Secretary of State must in those circumstances make a deportation order.

56. In other cases, however, whether an individual should be treated as being liable to deportation, and deported, is a matter of "discretionary judgment". This is clear from **Bah (EO (Turkey) – liability to deport) [2012] UKUT 00196**. There is a power to review the Secretary of State's

decision to decide that deportation is conducive to the public good and to deport (see **Bah** at paragraph 30). If there is an appeal, the Tribunal has to decide for itself whether on the facts as found, deportation is conducive to the public good, and that in reaching its decision, the Tribunal is not bound by the Secretary of State's view of the seriousness of the offences in question (see paragraph 30 of **Bah**).

57. Where any assertion of fact by the Secretary of State, which is material to the assessment of whether deportation is conducive to the public good becomes in dispute, it must be established by the Secretary of State, on the balance of probabilities, that this indeed is the case. **Bah** also indicates that the Secretary of State is not precluded from relying on "non-conviction" evidence. However, any allegation must be proved by the Secretary of State. This is clear from **Bah** where it was held that,

> "Any specific acts that have already occurred in the past must be proven by the Secretary of State, and proven to the civil standard of a balance of probability. The civil standard is flexible according to the nature of the allegations … and a Tribunal judge should be astute to ensure that proof of a proposition is not degraded into speculation of the possibility of its accuracy" (paragraph 63).

58. It is also clear from **Bah** that,

> "The only criteria for admissibility or otherwise is whether the evidence is relevant and has been made available to both parties. The question is whether an individual's deportation is conducive to the public good. The Tribunal is entitled to have regard to such evidence before it as is relevant to that question, giving such weight as it considers appropriate bearing in mind the quality of the evidence and the difficulty in challenging it when it is hearsay evidence or from anonymous sources. We do not accept that the admission of such evidence would deny an Appellant a fair hearing" (paragraph 55).

59. These principles were clarified further in the case of **Farquharson (removal – proof of conduct) [2013] UKUT 00146**, where the Tribunal gave further guidance and stated that,

> "We are astute to the need to avoid speculation. If the material renders itself capable of more than one interpretation we should only draw one adverse to the Appellant if on the balance of probabilities there is no other reasonable explanation on the material before us" (see paragraph 27).

60. On this basis, the submissions that were made by Mr Haywood were fourfold. First, that the Secretary of State had failed to prove by sufficiently cogent evidence that the Appellant was guilty of any of the offences alleged by him save for the two ABH offences, which are labelled in the evidence as ON20 and ON26 (see determination at paragraph 83). Second, the Appellant's misuse of drugs, it was said, had brought him into contact with criminal dealers, thereby placing his partners and family at risk (see determination at paragraph 85), but there had been no allegation that he had ever dealt in controlled drugs because he had only used them

for his own purposes. Third, the Secretary of State had shown, when viewed as a whole, that the Appellant's conduct, character and associations reached such a level of seriousness as to justify a decision to deport, according to the judge. It was held that the Appellant had been shown to have a propensity to reoffend, and he had been violent to women, and was a habitual user of controlled drugs, and there was no evidence that he had stopped using controlled drugs. This was also unsustainable because it is contrary to the Appellant's own evidence. It was not true that he had sought to minimise his "proven" offending (as was stated at paragraph 89 of the determination). Fourth, and finally, the judge had accepted that the Secretary of State had not shown that the Appellant was a "persistent offender", so that the framework in the Rules (at paragraphs 399 and 399A) did not apply (see paragraph 97 of the determination). Yet, curiously enough, despite this finding, the judge then proceeded to analyse the Appellant's position within the framework of the Rules themselves (at paragraphs 98 to 103) before turning to a "freestanding" assessment of the Appellant's position under Article 8, under which the judge found that the Appellant's deportation was indeed justified (see paragraphs 104 to 107).

61. At the reconvened Hearing, on 24th September 2018, Mr Haywood repeatedly emphasised his basic submission that, given what had been decided in **Bah** and **Farquaharson**, the evidence behind what was contended for by the Secretary of State, must be provided. The evidence in question was therefore relevant. This is because it raised questions as to precisely what the victim's position was, and if that evidence cannot be provided, then the allegation must fall away. If one considered the witness statement of the victim, the allegation in questions was disputed. In fact, a different version of events was suggested by the Appellant himself. Mr Haywood submitted that he had provided an extract from the CRIS Report (see "Police evidence from CRIS Report") which was sufficient to raise doubts. He accordingly submitted that if one looks at the contents of each of the items there, it is quite clear that the allegation of ABH against the Appellant is unsustainable.

62. At this stage Mr Justice Lane put it to Mr Haywood that, given that Judge Monson below, was clearly aware that the witness statement of the complainant had been withdrawn, whether he was obliged thereafter, as a matter of law, to find that ON20 had not been proved. Or, was it the case, asked Mr Justice Lane, whether the judge had simply failed to give sufficient weight to the fact of the withdrawal of that witness statement? Mr Haywood replied that the latter was clearly the case. The judge had to demonstrate what weight he had given the withdrawal of the statement, together with the commentary that went with it.

63. Mr Haywood moreover submitted that in his Grounds of Appeal, before the First-tier Tribunal, dated 17th January 2018, he had made it clear that "ON20 concerned an allegation of ABH, false imprisonment and rape" (paragraphs 81 to 82) arising from an incident on 16th May 2009, when the Appellant and his ex-partner were at his flat. The judge found that the

allegation of ABH was made out, but the allegations of rape and false imprisonment were not. However, he argued that Judge Monson (at paragraph 81) had been wrong to reject the Appellant's account of the victim having sustained injuries on account of an accidental headbutting by him when he had fallen over. This was particularly the case given that first, the witness statement by the victim had been withdrawn; and second, given that the Appellant had not been cross-examined on his own version of how the injury was sustained by the victim.

64. Against this background, Mr Haywood submitted that it must not be forgotten that the victim had behaved strangely, by her own admission, following the incident. She had been able to leave the flat of her own volition, and then remarkably, to return back to it, when she could have easily fled and either gone to her mother's house, or to have reported the matter to the police. It was also extremely strange for the Appellant to refuse to surrender up her mobile phone, to enable the police authorities to check on the calls that had been made, notwithstanding the assurance given by the police which expressly addressed her concerns. The burden was on the Secretary of State to prove the allegation. She had failed to do so.

65. For his part, Mr Jarvis submitted that a judge deciding a case such as this is often faced with the management of large amounts of evidential materials. Not everything can be expressly referred to. Even so, nothing in **Bah [2012] UKUT 00196** or in **Farquaharson [2013] UKUT 00146**, actually imposed a burden upon the Secretary of State to produce *all* the evidence, that could possibly be produced. In fact, all that was needed was for the Appellant to "understand the gist" because "the Tribunal is not conducting a re-trial" as was made clear in **Farquaharson** by Mr Justice Blake. Of course, the more evidence the Secretary of State can provide, the better it will be all around, but there is nothing in the cases of **Bah** and **Farquaharson** to suggest that the Secretary of State has to produce all the evidence that exists. Judge Monson below was entitled to consider the CRIS Reports.

66. The police were, after all, obstructed in entering the premises where the victim was being assaulted and this is clear from Judge Monson's decision, where he properly explains how, there had been a delay in the Appellant opening the door to the police, where the allegation of offence ON20, which alleged rape and false imprisonment committed on 16th May 2009, was raised against the Appellant. When Mr Staunton had asked the Appellant why he had delayed in opening the door, he had said that he was getting dressed, and the judge observed "this is not a credible explanation in view of the fact that the Appellant was only wearing a vest when the police eventually forced their way in." Furthermore, the Appellant's explanation that the flat had recently been burgled, so that he needed to lock the door, leaving his victim inside, was also rejected by the judge because "the police could find no record of the report of a burglary" (paragraph 21).

67. It is true that the victim then withdrew her witness statement, leading the CPS to "discontinue this matter and there would be no trial, due to the victim being unwilling to substantiate the allegation" (see J N Mills at page 869), but this did not mean that the offence of ON20 was not proved, as far as this jurisdiction was concerned, when the matter was before Judge Monson. After all, the victim was then taken to Dr Haven in Whitechapel, whose "extragenital findings" included, bruises to face, neck, arms, legs and thighs, as well as abrasions to right hand, right forearm, back and buttocks". His "genital/perianal findings" included an abrasion to the posterior fourchette. Accordingly, the Secretary of State's case is laid out extremely clearly in the CRIS Report, from which these references are drawn. The Appellant's explanation about what he had said happened is also adequately well explained and recorded there. For that reason, it cannot be said that it is unfair to the Appellant to base a decision on matters that have already been disclosed in this way. There is no legal error in the decision by Judge Monson.

68. As for the issue of the Appellant not having been cross-examined, this was an extremely heavy evidence-based appeal, and just because the Presenting Officer did not ask any questions did not undermine the lawfulness of the decision. The fact remained that even though the withdrawal statement had not been produced (in circumstances where as was now clear there were a variety of multiple reasons for why it was withdrawn) the judge's detailed analysis with respect to ON20 at paragraph 81 of the determination, took all of this into account, and properly explained why the offence of ABH was made out by the Secretary of State "which is the offence for which he was originally arrested" (paragraph 81), as Judge Monson carefully pointed out.

69. Mr Haywood's skeleton argument had argued that both sides must have sight of the evidence even in circumstances where a witness feared reprisals. This was based on authority in the decision by Mr Justice Blake in **R (oao ILPA) v Tribunal Procedure Committee [2016] 1 WLR 3519** (at paragraph 83). However, that was an observation made in the context of Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604), that had come into force on 20th October 2014. Under this Rule 13(2) the Tribunal could give a direction prohibiting the disclosure of a document or information to a person (including the Appellant) if satisfied that such disclosure would be likely to cause that person or some other person serious harm "and the Tribunal is satisfied having regard to the interests of justice that it is proportionate to give such a direction".

70. In that case, ILPA, a professional body of immigration lawyers established in 1984, had challenged the legality of Rule 13 and contended

    (i) it is *ultra vires* as it is beyond the scope of the rule making power in that it interferes with common law principles of fairness without statutory authority; and

(ii) in the context of issues decided in immigration appeals, the creation of a judicial discretion to decide a case on material unknown to the Appellant is so unfair that no rational rule making body could have promulgated it.

71. However, Mr Jarvis submitted that the challenge was thrown out because "the Rules do not mandate such a course, even if the judge is satisfied that disclosure would be likely to cause a person serious harm (physical or mental)" in that "the judge must act judicially, in accordance with the overriding objective to achieve fairness and the common law principles" so that "such a direction can only be given if the judge considers it to be proportionate" (per Justice Blake at paragraph 70).

72. Indeed, the High Court in that case had gone on to say that Rule 13 did not "give rise to a systemic or inherent lack of fairness." This was because it would not be used to make a closed substantive decision in the manner contended for by ILPA, and that only in "'a rare and unusual case, where the competing considerations would have been examined on their individual facts' could Rule 13 be used in the manner contended for by ILPA" (paragraph 84).

73. Finally, as for the recent Tribunal decision in **Andell (foreign criminal – para 398) [2018] UKUT 198**, that decision is not correct. The Appellant here is not a foreign criminal. In treating him in a manner that he was, Mr Jarvis submitted that "**Andell** had changed the legal landscape" by making paragraph 398 of HC 395 applicable, without recognising that it had to be read subject to paragraph A398, making it inapplicable to a person who was not a "foreign criminal" because he had not been subject to a custodial sentence of at least twelve months. A foreign criminal was set out in a statutory definition at Section 117D(2) of the NIAA 2002. It was not set out in the Immigration Rules at paragraph 398 of HC 395. In fact, the very confusion that paragraph 398 potentially stood to throw up, was designed to be abated by paragraph A398, by introducing a clarity to the distinction between foreign criminals facing deportation and other non-British nationals facing deportation.

74. In reply, Mr Haywood submitted that one thing that both sides could clearly agree upon was that the Appellant was not a "foreign criminal" under the statutory definition of the 2002 Act because he had not been convicted, and it was wholly improper to seek to treat him as one purely on the grounds of him being "suspected" of being one. Second, what stood as an issue between the Appellant and the Secretary of State, however, was that of the degree of clarity and specificity required in the evidence which would go to confirming that the Appellant had indeed been guilty of offence ON20. **Farquaharson** made it quite clear that the evidence had to be provided. It was not enough here to say that "a sufficient gist of it" had been disclosed if the evidence itself was ambiguous. That then raised the problem that if the account itself was unproven, it was quite a leap to then say that it was implausible for the Appellant to claim that the injuries were not caused by him.

Discussion

75. We are satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1)) of TCEA 2007) such that we should set aside the decision. Our reasons are as follows. First, it is not the case that the judge is not cognisant of the applicable legal framework. The decisions in **Bah [2012] UKUT 00196** and in **Farquharson [2013] UKUT 00146**, upon which Mr Haywood addressed the judge at the hearing below were fully addressed by the judge (at paragraphs 85 to 89 of the decision). He took into account the "non-conviction" evidence and found, on the facts, that it was established, on the basis of the Appellant's conduct, character, and associations, that his actions had reached such a level of seriousness as to justify the decision to deport. He particularly identified the fact that the Appellant had:

    (a) been violent towards women,

    (b) been a habitual abuser of controlled drugs, which brought him into contact with criminal drug dealers and associates,

    (c) had not shown that he was a reformed character who was unlikely to reoffend in the future,

    (d) had sought to minimise his proven offending and even protested his innocence seeking to blame his partner in crime, and

    (e) had produced no evidence that he had stopped abusing controlled drugs (paragraph 29).

76. Although the Upper Tribunal in **RLP (BAH revisited – expeditious justice) [2017] UKUT 330** noted the changes to the legal landscape since **Bah**, there is nothing in **RLP** that assists the Appellant's case. On the contrary, the Upper Tribunal in **RLP** pointed out the significance of Part 5A of the Nationality, Immigration and Asylum Act 2002 in determining whether it would be disproportionate to remove an individual. The judge in the present case had full and proper regard to section 117B.

77. In the same way, the strictures in **Farquharson** were applied by the judge, and it is not the case that he erred in drawing a conclusion adverse to the Appellant when, on a balance of probabilities, another reasonable explanation was open to the judge to reach on the material before him. For example, the fact that the Appellant himself complained about being assaulted by Florence in November 2017, is not relevant to the Appellant's own assault some five months earlier on 1st June 2017. There could be no ambiguity in the evidence that the victim's daughter called the police, that the daughter had taken photographs of the injury, that the injury actually existed, and that when the Appellant was asked whether the victim had an injury, he replied "no comment".

78. In any event, the thousand pages of police evidence in the CRIS Report was not something upon which the Appellant could comprehensively be cross-examined upon. The Appellant knew what the allegations were

against him and yet chose to make simple denials with respect to them in just over one page in his witness statement of 19th June 2018, when it was open to him to deal with them specifically. We agreed that what this appeal is about is a lack of evidence by way of a rebuttal from the Appellant which cannot be laid at the door of the Respondent Secretary of State.

79. Therefore, with respect to the ON36 offence, of the Appellant having slapped the face and caused damage to the telephone of Florence, we are satisfied that the judge dealt with this appropriately (at paragraph 79) referring to the Appellant's interview answer of "no comment" to questions specifically on the assault.

80. As for the withdrawal of her statement, there was a perfectly adequate explanation given by the victim, which was that she feared that, were she to come under attack again from the Appellant, she would need to call the police quickly enough, and needed her phone for her protection.

81. With respect to the ON20 offence, the judge was entitled to reject the headbutting of the victim as "incredible" in that "given the surrounding circumstances" the judge was satisfied that the offence of ABH was made out, which was the offence for which the Appellant was originally arrested, but rape and false imprisonment were rejected (paragraph 81 to 82). He was equally entitled to conclude that the Appellant's "convictions for assault in a domestic context are just the tip of the iceberg (paragraph 83), although Mr Jarvis did not press us on this point.

82. Any failure on the part of the Secretary of State to cross-examine the Appellant on this particular matter needs to be seen in the context of the extremely wide-ranging nature of the evidence in this case. Furthermore, the Appellant could have adduced evidence in his witness statement, and given oral testimony in evidence in chief to this effect, which he signally failed to do.

83. In all the circumstances, therefore, the absence of a withdrawal statement does not vitiate the judge's findings. The evidence had to be looked at in the round, across the various incidents. With respect to ON20, the appellant had accepted that he headbutted the former complainant but claimed he did so accidentally. The judge's rejection of this assertion as incredible does not fall to be impugned merely because (for reasons about which one can merely speculate) the woman concerned decided to withdraw the complaint.

84. With respect to the suggestion that the judge had misdirected himself by referring to the Appellant's drug abuse in terms that he was a habitual abuser and brought himself into contact with criminal drug dealers and associates, there was no error of law here either, in terms of his application under Article 8, on the basis of his family life as a parent.

85. This is because the Family Court had previously already decided exactly this (at paragraph 85), namely, that the children would be placed at risk. He had received criminal convictions in Jamaica in 2007 and been convicted in dealing with "ganja" (see paragraph 13). He had not been named on his children's birth certificates and Social Services had been prepared to place the children in short-term foster care (paragraph 40). The judge did not err in concluding that "there does not appear to be a realistic prospect of the Appellant being granted direct contact with his children in the UK as a result of a further application to the Family Court" (paragraph 100).

86. With respect to his family life as a partner, criticism has been made of the judge having referred to the Appellant's immigration status as "highly precarious". It was, however, manifestly highly precarious when he claimed to have met [MJ] in September 2017, because by then the Appellant had for some time been the subject of a decision by the respondent that the Appellant should be deported from the United Kingdom. Furthermore, that deportation decision had not been taken out of the blue. The Appellant had, for some time, been engaged in opprobrious conduct that eventually led to the decision. His status was, thus, precarious, notwithstanding he had indefinite leave to remain.

87. The judge was right to find that "the Appellant has not been lawfully resident in the UK for most of his life" (paragraph 101). That is factually correct, given the Appellant's immigration history.

88. Finally, in terms of the judge's analysis of the Appellant's situation outside the Immigration Rules, he studiously applied the **Razgar** test (paragraphs 104 to 107). The Appellant had not shown himself to be socially and culturally integrated in the UK, although he had provided evidence of studying at university and obtaining some qualifications, but there was limited evidence of the Appellant participating in gainful economic activity in the past, and the business he set up in 2012 failed (paragraph 101). In the circumstances, applying the Section 117B considerations of the 2002 Act, there could only have been one conclusion.

89. The judge's proportionality assessment, beginning at paragraph 104 of his decision, was entirely sound.

Decision

90. There is no material error of law in the original judge's determination. This appeal is, accordingly, dismissed.

91. No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 5th November 2018

TO THE RESPONDENT
FEE AWARD

As we have dismissed the appeal there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Juss 5th November 2018