Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09125/2016

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision promulgated**
on 3 April 2018	**on 21 May 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

RRB
(anonymity order in force)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Fraczyk instructed by Dixons Solicitors
For the Respondent: Mr Mills – Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a citizen of Jamaica born on 26 November 1983, is the subject of an order made pursuant to UK Borders Act 2007 for his deportation from the United Kingdom as a result of his criminality.
2. On 13 August 2016 protection and human rights claims made by the appellant were refused as was an outstanding application for leave to remain against which the appellant appealed on 22 August 2016.

3. That appeal came before the First-tier Tribunal which, in a decision dated 1 December 2016, dismissed the protection appeal but allowed the human rights appeal.
4. The Secretary of State sought permission to appeal which was granted by another judge of the First-tier Tribunal. At a hearing at Stoke on 21 April 2017 the Upper Tribunal considered the Secretary of States application and on 24 April 2017 concluded that the original Judge had erred in law in a manner material to the decision to allow the human rights appeal.
5. Directions were given for a further hearing to take place to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.
6. One of the issues it was hoped the appellant could resolve was the obtaining of further evidence from a Social Worker at Wadsworth Council in London, which initially proved problematic, resulting in a number of case management review hearings and their adjournment prior to such evidence being obtained by the appellant's solicitors and the matter being listed for a resumed hearing on 3 April 2018.

The background

7. Mr Franczyk handed in a skeleton argument on the day of the hearing in addition to which the Tribunal referred the parties to the decision of the Court of Appeal in *VC (Sri Lanka) v Secretary of State for the Home Department [2017] EWCA Civ 1967*. Time was given to enable Mr Mills to read the skeleton argument and for both parties to consider the decision of the Court of Appeal.
8. It was agreed the relevant test, in light of there being no cross-appeal to the dismissal of the protection claim, and this being a human rights only appeal, was whether the appellant could establish very compelling circumstances that outweighed the public interest in his deportation i.e. whether the appellants removal from the UK would result in unduly harsh consequences such as not to be proportionate.
9. The advocates accepted that the matter could proceed by way of submissions only.
10. The appellant arrived in the United Kingdom on 3 August 2000 lawfully as a visitor. He returned to Jamaica on 2 September 2000 making a further application on 26 September 2002 for another visit Visa which was issued, valid until 26 March 2003. The appellant claims to have arrived in the United Kingdom on 17th or 18 November 2002 but then overstayed.
11. The appellant applied for leave to remain as a student on 11 September 2003 which was rejected as invalid as an incorrect form had been used. On 25 February 2008 the appellant applied for a Certificate of Approval for marriage which was returned as invalid on 9 March 2008. A subsequent application made on 26 March 2008 was granted on 15 May 2008.
12. On 17 February 2010 the appellant was convicted at the South Derbyshire Magistrates Court of possessing a controlled drug – Class A – Cocaine for which he was sentenced to a Community Order on 24 February 2010.

13. On 14 December 2010 the appellant was convicted at Derby Crown Court of 3 counts of supplying a controlled drug – Class A – Crack Cocaine, and on 19 January 2011 convicted at the Derby Crown Court for possession with intent to supply a controlled drug – Class A – Crack Cocaine.
14. The appellant applied for leave to remain as the spouse of a British citizen on 9 February 2011.
15. On 7 March 2011 the appellant was sentenced to 18 months imprisonment in respect of his conviction of 19 January 2011 and on 13 May 2011 he was sentenced to 12 months consecutive to the sentence of 7 March 2011, 12 months concurrent and 12 months concurrent in relation to convictions of 14 December 2010. The appellant did not appeal against either conviction or sentence.
16. A liability for deportation letter was issued on 25 August 2011 to which responses were received on 26 September 2011 and 4 October 2011 including asylum and human rights claims.
17. The appellant was recalled to prison on 27 August 2012 following his arrest although no further charges were brought and he was released from custody on 21 September 2012.
18. In a Statement of Additional Grounds dated 22 November 2012 the appellant raised asylum and human rights grounds and a further liability for deportation letter was issued on 20 December 2012.
19. On 16 April 2014 the appellant was convicted at South Derbyshire Magistrates Court of possession of a controlled drug – Class B – Cannabis/Cannabis Resin, using a vehicle whilst uninsured and driving otherwise than in accordance with a license, for which he was fined £50, fined £110, and received no separate penalty respectively. On 14 October 2014 the appellant was convicted at Derbyshire Magistrates Court of driving otherwise than in accordance with a license and using a vehicle while uninsured for which he received no separate penalty and was fined £110 respectively.
20. A deportation order was signed on 12 June 2015 and the reasons for deportation letter was issued on 16 June 2015 which also refused the outstanding applications for asylum and leave to remain. The refusal of the application for asylum was certified as clearly unfounded and the refusal of the Human Rights claim certified under section 94B of the 2002 Act.
21. As a result of further representations received on 2 July 2015, a further reason for deportation letter was issued on 8 July 2015 when the protection claim was again refused. A Pre-Action Protocol letter was issued by the appellant on 26 August 2015 which led to an application for permission to apply for judicial review on 16 September 2015. Permission to proceed with the judicial review claim was granted on 10 December 2015, as a result of which the respondent agreed to reconsider the case upon the judicial review claim being withdrawn, resulting in a consent order signed on 26 March 2016 in relation to that matter.
22. A decision to deport letter was then issued on 15 June 2016 to which a response was received on 13 July 2016 and on 13 August 2016 the protection and human rights claims were refused. The outstanding application for leave to remain was also refused.

23. It is the appellant's case that his deportation to Jamaica will breach his family and private life protected rights. The appellant's wife DB is a British citizen. They married on 8 August 2008 having cohabited prior to that date and at all times, other than when the appellant was in prison, state they have been living as a family unit.
24. The appellant's private life claim is based upon the length of time he has been in the United Kingdom; although since 26 March 2003 he has remained unlawfully as an over stayer.
25. The appellant claims to also have family life with his five children from three separate mothers. Details are recorded by the First-tier Tribunal at [23] of that decision as follows (subject to the requirement of the anonymity direction made above):

    - MD-M, a British citizen, born in the United Kingdom on 23 February 2012, 14 years of age. MD-M is the appellant's stepson and the natural child of his wife from a former relationship. MD-M lives with the appellant, his wife and their 2 natural children.
    - SB, born in the United Kingdom on 19 January 2005, 11 years of age. She is in the care of Wadsworth Borough Council and is the natural child of the appellant from a former relationship. The appellant has regular if infrequent face-to-face contact with his daughter which has been organised by Social Services.
    - TB, British citizen, born in the United Kingdom on 30 September 2007, aged 9 years. He is the natural son of the appellant and his wife and he lives in Derby with his parents.
    - SEB, British citizen, born in the United Kingdom on 2 November 2010, aged 6. She lives with her natural parents in Derby, namely the appellant and his wife.
    - TSB, a British citizen, born in the United Kingdom on 23 May 2014, aged 2 years. TSB is the natural child of the appellant and SJ with whom the appellant had a brief affair. TSB lives with his mother at an address in Derby and the appellant has regular and frequent contact with him.

26. The ages provided for the children relate to the date of the hearing before the First-tier Tribunal, 7 November 2016, making the children 18 months older at the date of this hearing before the Upper Tribunal.

Submissions

27. On behalf of the appellant, Mr Fraczyk submitted the respondent's decision is unlawful as it contravenes paragraph 399(a) of the Rules, is unduly harsh, and otherwise disproportionate under article 8 on the basis it would be unduly harsh to expect the British citizen children to relocate to Jamaica and it would be unduly harsh to expect the children to remain in the UK without the appellant.
28. In relation to the appellant being removed with the children remaining in the United Kingdom; Mr Fraczyk submitted the best interests of the children will

normally require the care of both parents. In the context of this case SB's biological mother is not in a position to care for her as a result of which the child is in the care of the local authority.

29. It is submitted that the impact on the children, particularly SB, when considered together with the nature of the offending and the impact of the appellants removal, demonstrates the undue harshness of the respondent's decision. It is submitted that at no time did the appellant receive a prison sentence in excess of 4 years meaning that where factual matters give rise to very compelling circumstances the appellant is entitled to succeed.
30. It was also submitted the most recent criminal conviction is relatively dated, being 14 October 2014, which in conjunction with other submissions made, lends some credence to the undue harshness point and circumstances in which the appellant poses a minimal future risk to public safety.
31. It was also submitted there will be obvious disruption to family life between the appellant and his other family members including his current partner and their children. It was submitted the eldest child is now over 10 ½ years of age.
32. In relation to SB specifically, it was submitted that the appellant enjoys contact with the child at the discretion of the Local Authority which he has exercised, providing regular contact and emotional care for the child. It is submitted the necessary threshold is met but outside the rules in any event.
33. It was submitted that although there is a strong interest in the appellants deportation on the facts, that is breached as evidenced by the letter from Wandsworth Council which it was submitted is of real significance as it deals with the core issue and the question of alternative arrangements.
34. It was submitted on the appellant's behalf that in this case such arrangements are not feasible due to the damage to the child which could impact upon her psychological development.
35. It was submitted there are special/very compelling circumstances and that separation would be a critical factor as there is a vulnerable/fragile young person and serious risk of harm to SB if removal was to take place.
36. On behalf the Secretary of State, Mr Mills submitted in relation to the family that it was accepted there will be an impact upon family members in the United Kingdom. Mr Mills referred to the need to consider the best interests of the children but it was not made out that these will be breached, without more, such as to make the decision disproportionate.
37. Mr Mills submitted that SB was "out of the equation" and only the other children will be directly impacted by the appellant's removal and that the appellant had failed to establish that the best interests of the children or the impact of his removal outweighs the strong public interest in his deportation.
38. It was submitted there is no intention by the Local Authority to return SB to the appellant's care. It was submitted neither paragraph 399A nor section 117B(v) exceptions are available as the decision is not unduly harsh. Mr Mills submitted the appellant seeks to rely on exceptional circumstances but that a higher test has to be met. It was submitted that it had not been shown, on the basis of the Social Workers letter, that the impact upon SB is such that that threshold is crossed.

39. Mr Mills submitted the letter from the Social Worker provides, for the first time, concrete information regarding SB and that further trauma may be caused if a stable relationship ends although it is submitted there will always be a degree of trauma on separation, in any event. Mr Mills submitted that if this was to happen social services would adjust and supplement the package of support meaning that SB will always receive help.
40. Mr Mills submitted the Social Worker is conscious of the impact and will take appropriate steps to ensure the child is properly cared for and that it had not been made out that any impact upon the child was sufficient to outweigh the strong public interest.
41. Both advocates made detailed submissions in relation to the decision of the Court of Appeal in *VC (Sri Lanka)* which will be discussed further below.

The letter from Social Services

42. The letter from a Social Worker employed by Wadsworth Council has been referred to by both advocates and sets out the current situation in relation to the child SB. For ease of reference that letter is set out verbatim, subject to the requirement of the anonymity order, in the following terms:

> Dear Sir/Madam
>
> Re: Mr RRB DOB: 26.11.1983
>
> I am the newly allocated Social Worker for Mr B's daughter SB DOB: 19.01.2005 who was made subject to a Care Order granted to the London Borough of Wandsworth on 14 March 2013. The order was granted due to S having experienced significant trauma during her early years with her birth mother, this included witnessing Domestic Violence, substance misuse by the mother, antisocial behaviour, emotional neglect and inconsistent parenting.
>
> This letter has been requested by Mr B through his Solicitors in support of his application for the deportation and human rights appeal proceedings.
>
> S remains in a therapeutic residential unit and presents with ongoing emotional difficulties. These difficulties are usually displayed in a form of anger; she struggles to regulate her emotions, lashes out and sometimes becomes physically aggressive towards staff. S often presents as anxious and unable to concentrate. S currently has contact with her father Mr B once a month but there are no plans for S to be cared for by her father. S and Mr B have a positive relationship as he is the only consistent family member in her life. If S's and Mr B contact were to stop due to him being removed from the country it is in my professional opinion that this would have a detrimental impact upon S's emotional well-being. Although S is in the care of the local authority she also has the right to family life, as her mother cannot meet her needs and is inconsistent she requires Mr B's input in order to maintain a relationship with her family. S and Mr B are reported to have positive contacts when S is in a good state of mind.
>
> S has been observed to be fond of her father, she values the relationship she has with him and looks forward to seeing him prior to contact. S is currently receiving individual therapy through a specialist service and is seen regularly. There is a robust package of support to meet her emotional needs and address her traumatic

childhood. If Mr B is to be deported S's current therapeutic package would be adjusted in order to cover the loss of her father, however it is felt that this would cause further trauma to S's already troubled and painful childhood experiences.

Mr B engages well with the residential unit where S is placed and is receptive to advice when given to effect positive interaction between him and S and her half siblings that he brings to contact from time to time. Mr B informed the residential unit of his deportation hearing and they are too are of the view that if contact were to stop this would have a significant impact upon S's progress and psychological development.

It is of significant concern that if contact were to stop due to Mr B's removal, such negative impact upon S could possibly lead to her rebelling, getting involved in criminal activity or even substance misuse. This could be the result of her feeling rejected and the impact of loss on a young person with emotional difficulties such as S.

I am therefore writing to the request the court to consider the relationship Mr B has with his daughter when making its final decision.

Please feel free to advise if the local authority could be of any further assistance to this matter.

Yours faithfully

Etc.

Discussion

43. It is not suggested there is any reason why S should lose contact with her half siblings as they are to remain in the United Kingdom irrespective of what happens to the appellant. The letter also refers to the loss of contact between Mr B and S, but if the appellant were removed from the United Kingdom contact could still continue albeit in a different form. There is no evidence that S, like many young people, is not fully au fait with the digital world be it on a mobile/smart phone or other device such as a computer and facilities such as Skype or FaceTime which allows people to interact on a regular face-to-face, albeit they are physically separated, basis. It is accepted when making this decision that it is the face-to-face contact in each other's physical presence that occurs once a month that will change if the appellant is removed from the United Kingdom.
44. It is clear S remains in a very supportive environment trying to do its best to enable this young person to come to terms with everything that has occurred to her in the past. S was born on 19 January 2005 and is therefore 13 years of age, a difficult period for many as they navigate the changes from childhood to adolescence to adulthood through puberty and maturity.
45. Between the error of law finding and the resumed hearing, the Court of Appeal had handed down its decision in *VC (Sri Lanka) [2017] EWCA Civ 1967*, a decision that deserves careful consideration written as it is by Lord Justice McFarlane a leading expert during his time at the bar and now within the judiciary in relation to children - law and practice.
46. At [1] the Court of Appeal identify the scope of the hearing before them when they state: "*The central focus of the present appeal relates to the evaluation of the right*

to family life under Article 8 of the European Convention on Human Rights of a foreign criminal deportee whose two children were at the relevant time subject to full care orders and orders authorising the local authority to place them for adoption".

47. In this appeal S is the subject of a Care Order and although the letter from Wadsworth Council makes no reference to whether they have sought an order authorising the local authority to place S for adoption, it is a clear intention of the authority not to return S to the care of the appellant in this case. There is no suggestion that S will be returned to her mother's care either in the letter. It may be a case in which S is a child who may have to remain within the care system due to issues that may make it difficult for her to be adopted. It is arguably safe for the purpose of these proceedings to undertake the evaluation of the right to family life under article 8 ECHR on the basis that S will remain in the care of the local authority who have a statutory obligation to provide for her care and welfare.

48. The core of the judgment is in the following terms:

> *Discussion*
>
> *42. For the reasons put forward by Mr Cornwell, it was, in my view, not possible for the circumstances of this case to come within the requirements of paragraph 399(a) of the Rules. On the basis of the Court of Appeal's analysis of the family history, [VC] had played only a minimal role in the care of his children and, even when living at the family home, he had on a regular basis rendered himself unable to act as a parent as a result of heavy drinking and abusive behaviour. By the time of the Secretary of State's decision to deport him, any vestiges of a 'parental relationship' with the children had long fallen away and had reduced to their genetic relationship coupled with the most limited level of direct contact which was intended to cease altogether on adoption. Mr Cornwell is correct to stress the words 'genuine', 'subsisting' and 'parental' within paragraph 399(a). Each of those words denotes a separate and essential element in the quality of relationship that is required to establish a 'very compelling justification' [per Elias LJ in AJ (Zimbabwe)] that might mark the parent/child relationship in the instant case as being out of the ordinary.*
>
> *43. Although, as I have explained, [VC's] case falls, as it were, at the first hurdle in that it was not possible on the facts as they were at the time of the decision to hold that he had a 'genuine and subsisting parental relationship', I am also persuaded that the Appellant is correct in submitting that for paragraph 399(a) to apply the 'parent' must have a 'subsisting' role in personally providing at least some element of direct parental care to the child. The phrase in paragraph 399(a)(ii)(b) which requires that 'there is no other family member who is able to care for the child in the UK' strongly indicates that the focus of the exception established in paragraph 399(a) is upon the loss, by deportation, of a parent who is providing, or is able to provide, 'care for the child'. This provision is to be construed on the basis that it applies to a category of exceptional cases where the weight of public policy in favour of the default position of deportation of a foreign criminal will not apply. To hold otherwise, and to accept Ms Jegarajah's submission that her client comes within the exception simply because he has some limited, non-caring, contact with his child would enable very many foreign criminals to be included in this exception.*
>
> *44. The applicable Home Office guidance is in no manner determinative of the issue in this case, but, on hearing Ms Jegarajah's submission in relation to the*

guidance, and contrary no doubt to her intention, I was struck by the degree to which, on the facts of this case, each of the factors listed told very largely against her client having 'an active and ongoing' parental relationship rather than for it.

45. It is also, in my view, clear that paragraph 399(a) must relate to the care to be given by the foreign criminal or any other member of the child's family, as opposed to any other carer. The focus of the paragraph is upon the loss to the child of care as a result of the foreign criminal parent's deportation. Where, as here, neither the foreign criminal nor any other family member is providing care to the child, the paragraph can have no relevance. In terms of the provision of care, the deportation will have no impact on the child's circumstances. Whilst the meaning of paragraph 399(a)(ii)(b) is in any event plain, that meaning would be further clarified if the phrase 'other than the foreign criminal' were added so that it read:

> *'there is no other family member other than the foreign criminal who is able to care for the child in the UK.'*

46. There will no doubt be cases that are nearer to the line, and which will require careful evaluation, but the facts of the present case, where the Court of Appeal has ruled that it is not in the interests of his children's welfare for [VC] to be considered as a carer for them at any stage during their childhood and that they should, if possible, be adopted, very plainly establish that [VC] was not, and had no prospect of, providing care for his children.

47. Although, if My Lords agree, my decision on the primary ground disposes of the appeal entirely, I also consider that the Appellant's second and third grounds of appeal have been made good. A lack of re-offending behaviour will, in cases that would otherwise qualify for deportation as a foreign criminal under the rules, carry little weight (see the cases cited at paragraph 37 above) and, in any event, the FTT was in error in conducting an analysis which simply used its conclusion on this one factor as a trump card, without conducting any balance against other aspects of the public interest.

48. With respect to the third ground of appeal, again I accept the Appellant's submissions in full. It was impermissible for the FTT to seek to identify factors related to Article 8 which were, on its view, outside the Rules. In any event, further time pursuing a relationship which falls short of engaging with paragraph 399(a) will not transform its quality to one that becomes a genuine and subsisting parental relationship, and, as the UT held, any impact on the ability in later life of the 'child' to trace her father was, on any view, outside the range of relevant considerations under Article 8."

49. The Court of Appeals finding that 'genuine', 'subsisting' and 'parental' within paragraph 399(a) denotes separate and essential elements in the quality of the relationship that is required to establish "very compelling justification" is a reminder to decision-makers of the danger of not undertaken the required factual analysis in a case of this nature. In the past to many decisions were made on the basis that 'genuine' 'subsisting' and 'parental' together meant one thing without considering the separate facts.

50. The submission by Mr Fracyzk that the decision in *VC* is wrong and cannot be correct as a person in a case with no prospect of having a child returned could not succeed, as it would mean there was no parental relationship, is an argument that has not been made out. The Court of Appeal has emphasised again the importance of fact-finding in relation to the nature of the relationship. The

decision of the Court of Appeal is binding upon this Tribunal and there may be circumstances where an individual who had a genuine, subsisting, and parental relationship with a child before the intervention of local authority and the making of a Care Order may remain involved in the life of the child, with the agreement of the authority, possibly with a view to the child being returned to his or her parents if issues that led to the making of the Care Order can be resolved. It may be necessary to therefore consider whether there are reasonable prospects of a child subject to a Care Order being returned to his or her natural parents in the reasonable future. If not, as a result of the making of an adoption order or, as in this case, a clear statement by the local authority that there is no intention to return a child to his or her parents, an appellant may have to accept an inability to establish the existence of a 'parental relationship' at the date of an appeal hearing.

51. In this case it is not disputed that Mr B is the biological father of S. It is not disputed that S is child of a former relationship. It is not disputed that S lived with and was notionally within the control of her mother from her birth until her removal and subsequent Care Order granted in March 2013.

52. The respondent's decision to deport and refuse the appellants human rights and protection claim, dated the 16 June 2015, did not accept that the appellant had a genuine and subsisting parental relationship with S as there was no evidence of significant and meaningful positive involvement in the child's life with a significant degree of responsibility of the child's welfare.

53. The appellant claims to have such a relationship with S and indeed with all his children. It was not disputed that such a relationship exists with those children with whom he lives.

54. An earlier letter from a firm of solicitors based in Derby, dated 4 January 2012, to the appellant's current wife referring to S noted that S's mother had been getting into difficulties with her ability to care for her daughter leading to the involvement of Social Services in Wadsworth. It is noted that until that involvement there was regular contact with S who would stay for weeks on end during the school holidays, including almost all the summer holidays and that the appellants partner got on well with S's mother. This is an illustration of the nature of the relationship between the appellant (when he was not in prison), his current wife, and S at that time.

55. The Court of Appeal find that for paragraph 399(a) to apply the 'parent' must have a 'subsisting' role in personally providing at least some element of direct parental care to the child. The relevant date when these issues are considered in an appeal of this nature is at the date of hearing. Since March 2013 'parental' care of the child has vested in the local authority, Wandsworth Council. There is no evidence that the appellant exercises any element of direct parental care for S in this appeal.

56. It is also the case in this appeal that in terms of the provision of care, the deportation will have no impact on S's circumstances with the exception of the manner in which any contact between S and the appellant occurs. This is a case in which, on the basis of the available evidence, the appellant is not being considered as a carer for S. The appellant has failed to make out that he has any prospect of providing care for S.

57. The appellant refers to other aspects which it is submitted are relevant to a freestanding article 8 assessment but, as noted by the Court of Appeal above, this is not a permissible approach in relation to S as such matters will not transfer the relationship to one of a genuine and subsisting parental relationship.

58. The appellant therefore fails by reference to paragraph 399(a) as he has not established a genuine and subsisting parental relationship with S. In relation to paragraph 399(a)(ii)(b) "that it would be unduly harsh for the child to remain in the UK without the person who is to be deported" this is part of the additional provisions required in addition to the existence of a genuine and subsisting parental relationship. Had this been a matter that was being considered it would have been necessary to weigh the impact upon S against the public interest in the appellants deportation for committing drug-related offences. Such offending is extremely damaging to the wider interests of society and individuals who become addicted.

59. The immediate impact upon S would not have been to lose all contact with the appellant but for the nature of the contact that takes place to change from direct to indirect contact. Verbal communication and real-time interaction could still occur albeit the appellant could not take S out. It is also the case that the local authority already provides a support package for S including individual therapy through a specialist service. The letter referred to above specifically states that if the appellant were to be deported the therapeutic package will be adjusted in order to cover the loss of her father. It is not made out that the impact of such work, both before and during early stages of the appellants removal, would not enable S to understand what had occurred and to be able to adjust to the changing nature of any contact that did take place. The contact once a month is the level of contact the local authority were willing to approve and manage.

60. I do not find it made out on all the facts that the effect of the appellants removal from the United Kingdom upon any of the children would be unduly harsh. Whilst S fails in relation to 399(a) that is based upon the unique circumstances of S being the subject of a care order with no prospect of the appellant having any direct caring role in relation to the child.

61. So far as the other children are concerned, it is accepted that the appellant lives with MD-M, TB, and SEB. In that respect the issues whether it is unduly harsh for children to remain in the United Kingdom with their mother if the appellant is removed as it has not been suggested today that it is reasonable for the appellant's wife or the above children to move to Jamaica with him.

62. I do not find it made out that any hardship is sufficient to outweigh the public interest in relation to the above children or the other child who lives with his mother but with whom the appellant has contact, TSB. It is accepted that there is likely to be emotional distress and upset but it has not been made out that the removal of the appellant may will result in a situation sufficient to outweigh the strong public interest in the appellants deportation. The children will continue to be cared for in their home environments as they have been to date with no evidence of any adverse impact upon them at the time the appellant was in prison. Whilst it is accepted that family routines may have to adjust and that these families too may go through a period of emotional upset and distress, it has not

been made out that any harshness is sufficient to justify a finding that it is unduly harsh on the facts. Similarly I do not find it made out that the effect of the appellants deportation upon his partner will be unduly harsh.

63. At the error of law hearing it is recorded at [17] "as agreed with the advocates, this case depends upon [S]".

64. As part of the public interest assessment the appellants claim relating to lack of offending behaviour and passage of time has been considered but these do not arguably assist. In *Gurung v SSHD [2012] EWCA Civ 62* the Court of Appeal, when overturning a Presidential Upper Tier panel, said that the absence of a risk of reoffending, though plainly important, is not the "ultimate aim" of the deportation regime. We are troubled, too, by the proposition in paragraph 40(iii) (cited above) that the nature and seriousness of the offence do not by themselves justify interference with family and private life without prospective regard to the public interest. Although Mr Bourne does not seek to characterise this as an error of law, he is right, in our view, to suggest that it misplaces the emphasis. The Borders Act by s.32 decides that the nature and seriousness of the offence, as measured by the sentence, do by themselves justify deportation unless an exception recognised by the Act itself applies.

65. Those exceptions read:

> Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (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.

66. The private life the appellant seeks to rely upon has, as with the family life, being formed at a time when the appellant has no lawful leave to remain in the United Kingdom. That warrants little weight been attached to such protected rights.

67. I find in this appeal, notwithstanding the very sad circumstances in which the child S finds herself as a result of the actions of her parents, the appellant has failed to discharge the burden of proof upon him to establish that he is able to benefit from either exception provided by the UK Borders Act to enable him to successfully oppose the order for his deportation from the United Kingdom. There is a very strong deterrent element in deterring those involved in the illegal sale of drugs from doing so again or to deter other foreign nationals in the United Kingdom from believing that if they contribute to the sale of illegal drugs there will be no consequences for them. The United Kingdom has a substantial drug problem caused by those entitled to reside here as a result of being British nationals without any additional element of foreign nationals contributing to the hardship and misery addiction can bring to families and individuals.

Decision

68. **I remake the decision as follows. This appeal is dismissed.**

Anonymity.

69. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Upper Tribunal Judge Hanson

Dated the 13 May 2018