Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01174/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 15 August 2019	**On 8 November 2019**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O P
(ANONYMITY DIRECTION MADE)

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves child welfare issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

Representation:
For the appellant: Mr T. Lindsay, Senior Home Office Presenting Officer
For the respondent: In person

DECISION AND REASONS

1. For the sake of continuity, I will refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

2. The case has a long history. The factual background is not in dispute.

Military service (2003-2005)

3. The appellant (OP) entered the UK on 13 December 2002 with entry clearance as a visitor. The appellant's leave was extended to allow time for him to apply to join the British Army. On 23 July 2003 his passport was endorsed to show that he was exempt from immigration control under section 8(4) of the Immigration 1971 during his service with the armed forces. An army certificate shows that he joined the Royal Logistic Corps on 17 July 2003 and was discharged on 25 January 2005. Anyone who joins the British armed forces does so on the understanding that they may be required to do active service. In the context of Gurkha cases, the Armed Forces Covenant was quote by Blake J in *R (on the application of Limbu & Ors) v SSHD* [2008] EWHC 2261 (Admin) [72]:

> "Soldiers will be called upon to make personal sacrifices – including the ultimate sacrifice – in the service of the Nation. In putting the needs of the Nation and the Army before their own, they forego some of the rights enjoyed by those outside the Armed Forces. In return, British Soldiers must be able to always expect fair treatment, to be valued and respected as individuals, and that they (and their families) will be sustained and rewarded by commensurate terms and conditions of service".

4. The current wording of the Armed Forces Covenant, drawn from publicly available sources is:

> "The first duty of Government is the defence of the realm. Our Armed Forces fulfil that responsibility on behalf of the Government, sacrificing some civilian freedoms, facing danger and, sometimes, suffering serious injury or death as a result of their duty. Families also play a vital role in supporting the operational effectiveness of our Armed Forces. In return, the whole nation has a moral obligation to the members of the Naval Service, the Army and the Royal Air Force, together with their families. They deserve our respect and support, and fair treatment.
>
> Those who serve in the Armed Forces, whether Regular or Reserve, those who have served in the past, and their families, should face no disadvantage compared to other citizens in the provision of public and commercial services. Special consideration is appropriate in some cases, especially for those who have given most such as the injured and the bereaved.
>
> This obligation involves the whole of society: it includes voluntary and charitable bodies, private organisations, and the actions of individuals in supporting the Armed Forces. Recognising those who have performed military duty unites the country and demonstrates the value of their contribution. This has no greater expression than in upholding this Covenant."

5. The appellant remained in the UK without leave after discharge, but it seems that it was on the misunderstanding that he still had permission to be in the UK. On 26 July 2007 the appellant applied for naturalisation as a British citizen. The application was refused. On 11 February 2008 he applied for Indefinite Leave to Remain (ILR), but the application was refused because he failed to provide his army discharge papers. The application was resubmitted but refused on 02 December 2009. The appellant was granted 28 days' leave to remain but made no further application. On 04 February 2010 he was served with an IS.151A notice as an overstayer.

First-tier Tribunal decision (2010)

6. On 15 February 2010 the appellant applied for leave to remain on human rights grounds. The application was refused. First-tier Tribunal Judge Carroll allowed the appeal in a decision promulgated on 06 December 2010. The judge was satisfied that the appellant had a "strong family life" in the UK with his partner and children. She found that he was a committed parent who had established "strong social, cultural and familial links" to the United Kingdom. She found the facts of the case to be "compelling". She concluded that the appellant's removal would amount to a disproportionate interference with his right to family life under Article 8 of the European Convention. The appellant was subsequently granted five years' Discretionary Leave to Remain (DLR).

Criminal conviction (2012)

7. On 13 November 2012 the appellant was convicted of robbery and was sentenced to four years' imprisonment. The sentencing judge made the following comments about the appellant's role during a street robbery involving violence with a weapon, for which his co-defendant was sentenced to a period of five years' imprisonment:

> "This is serious group offending at night with a weapon involved. Not only was that weapon used but the complainant was kicked and punched I accept though he did not suffer great physical injury as a result of that but as I have outlined it is quite clear to me that he was deeply psychologically affected by the actions of those who robbed him on that particular night, and that is what makes robbery such a serious crime.
> …..
> I do take the view on the evidence that I have heard that you, Mr [B], were the instigator in relation to this. I take that view because it was you who used the weapon, it was you who used the most violence and it was you who walked up to the top of the street. I am going to differentiate between you in terms of sentence. It does appear to me that I can treat you, Mr [OP], as somebody with no relevant previous convictions and so in the circumstances, taking into account all matters of mitigation that have been raised before me, I can deal with you on the basis that the appropriate sentence is one of 4 years in custody which is the starting point within category 2; and coming to that decision I have taken into account the matters that … have been raised before me in mitigation, but I can give you no credit for a guilty plea in respect of this matter, nor do I accept what you say about remorse in relation to this matter. You fought a trial, you had the witnesses come to court and they gave evidence against you. So in your case there will be a sentence of 4 years."

8. An OASys assessment completed on 21 June 2013, while the appellant was in custody, noted that the appellant denied involvement in the crime but had insight into the emotional trauma that victims of such offences suffer. He said that he had written to the victim and would be willing to apologise personally if given the opportunity. He was reportedly concerned about how his partner would manage while he was in prison. The appellant expressed his intention to distance himself from criminally minded peers and said that he would concentrate on his parental responsibilities upon release. He was reported to be upset and stressed because it was his first time in custody. The report stated that he had shown a good level of victim empathy and appeared thoughtful and considerate towards others. The assessor found that he did not display anti-authoritarian views or behaviour and was respectful and polite during the interview. At the time he was assessed to pose a 'medium' risk of serious harm to the public but 'low' risk of serious harm in other categories. This means that he had the potential to cause serious harm but was unlikely to do so unless there is a change in circumstances, for example, failure to take medication, loss of accommodation, relationship breakdown or drug or alcohol misuse. The predictor scores of the likelihood of reoffending were all assessed to be 'low' risk.

9. The appellant's prison records described him as a "hard working and very polite individual" and reported generally positive behaviour leading to him being granted enhanced status.

10. A letter from the National Probation Service (NPS) dated 30 October 2014, following the appellant's release from prison, stated that he was subject to licence conditions. He had been attending supervision sessions on a weekly basis and was required to complete the Structured Supervision Programme. His Probation Officer confirmed that he was engaged in the sessions and was making progress. She anticipated that he would complete the licence period successfully. The appellant has not been convicted of any further offences since his release from prison.

Deportation decision (2014)

11. The appellant was served with a notice of liability to automatic deportation on 18 January 2013. He responded to the notice with further representations on 11 March 2013. On 03 June 2014 a decision was made that section 32(5) of the UK Borders Act 2007 ("UKBA 2007") applied. The Secretary of State gave reasons why she did not consider the human rights exception in section 33 of the Act applied. A deportation order was signed on 09 June 2014.

12. The Secretary of State accepted that the appellant had a family life with his partner, who is a British citizen. It was accepted that he had children who were British citizens. They would not be required to leave the United Kingdom. The best interests of the children were served by them remaining in the United Kingdom with their mothers. No findings were made as to what the effect of separation would be on the children.

The Secretary of State concluded that there were no exceptional circumstances that would outweigh the strong public interest in deportation.

Procedural history of the appeal

13. The decision was made before the changes made to Part 5 of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") by the Immigration Act 2014 ("IA 2014"). The appeal is an 'old style' appeal against the decision that section 32(5) UKBA 2007 applied (section 82(3A) NIAA 2002). The appellant appealed on the ground that his removal in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998 ("HRA 1998").

14. First-tier Tribunal Judge Gibbs and Ms Singer ("the FtT panel") allowed the appeal in a decision promulgated on 01 December 2014. The FtT panel was satisfied that the appellant was in a long-term relationship with his partner and that she was "more than usually reliant on the appellant for support, both emotionally and financially" [27]. The FtT panel was also satisfied that he continued to have a "genuine, subsisting and loving relationship with his daughters" [26]. The respondent had accepted that it was in the best interests of the children to remain in the UK with their mothers. The FtT panel found that it was in the best interests of the children to be brought up by both parents in the UK [30]. The FtT panel gave weight to the fact that the children were British citizens. The respondent did not suggest that the children should leave the UK. The FtT panel considered the stringent test of 'very compelling circumstances' by then set out in section 117C(6) NIAA 2002 [34]. They concluded that the individual circumstances of this case outweighed the public interest in deportation [40].

15. In a decision promulgated on 27 February 2015, Upper Tribunal Judge Martin found that there was no error of law in the First-tier Tribunal decision. The panel directed itself to the correct legal framework and came to conclusions that were open to them on the evidence.

16. The Secretary of State was refused permission to appeal to the Court of Appeal on the papers, but permission was granted following a renewed application to appeal made at an oral hearing on 04 November 2015. The Court of Appeal did not hand down a judgment until 06 March 2018: see *SSHD v OP (Jamaica)* [2018] EWCA Civ 316. The court concluded that the FtT panel failed to take a structured approach to the assessment in line with the decision in *NA (Pakistan) v SSHD* [2016] EWCA Civ 662 whereby a tribunal should consider whether any of the circumstances in the exceptions apply before considering whether those factors, either taken alone or in conjunction with other factors, amount to 'very compelling circumstances' to outweigh the public interest in deportation in cases involving sentences of at least four years' imprisonment [16-19]. Although the Senior President observed that the facts that might be relevant to the exceptions to deportation did not appear to be "especially compelling", the comment was made without detailed analysis of the evidence and appeared to be made in order to illustrate why the FtT panel needed to

give more detailed reasons to justify its conclusion. The Court of Appeal was not expressing a concluded view on the substantive case.

17. In light of the Court of Appeal decision the Upper Tribunal subsequently set aside the decision of the FtT panel and remitted the case for a fresh hearing before the First-tier Tribunal.

First-tier Tribunal decision (2018)

18. First-tier Tribunal Judge Adio ("the judge") allowed the appeal in a decision promulgated on 24 January 2019. He identified applicable legal test at the date of the decision ('exceptional circumstances'). He also outlined the correct statutory scheme applicable at the date of the hearing, which was whether there were 'very compelling circumstances' to outweigh the public interest in deportation [33-34].

19. The judge reminded himself of the seriousness of the offence with reference to the sentencing judge's remarks and emphasised that there was a strong public interest in deportation. He took into account the OASys assessment and the fact that the appellant had been assessed as low risk of reoffending. He noted that the risk of reoffending was only one aspect of the public interest considerations. The judge accepted that the appellant was aware of the consequences of his actions on the victim, took rehabilitation courses in prison and was remorseful [35-36]. The judge went on to consider the deterrent effect as one aspect of the public interest in deportation [37]. He reminded himself that the 'very compelling circumstances' test identified a "very high threshold" that required circumstances that have a "powerful, irresistible and convincing effect" [37].

20. Having directed himself to the significant weight that must be given to the public interest in deportation the judge went on to consider the facts of the case [38]. He concluded that there were a number of factors which cumulatively amounted to 'very compelling circumstances' that outweighed the public interest in deportation. He found that it was in the best interests of the children to be brought up by both parents in the UK [38]. He noted that the appellant had a long period of residence since 2002 although he recognised that it was precarious [39-40]. He has three children in the UK who are British citizens and are "heavily dependent" upon him [40]. He found that the evidence showed that the appellant's partner would struggle to visit him in Jamaica with the children. On the two occasions she has been, she was sponsored by relatives. Her father's health was deteriorating, he was less able to provide financial support. The judge accepted that the reality of the situation is that their relationship may not survive the separation caused by deportation [41].

21. The judge considered the evidence that he had heard and found that the appellant's partner "would not be able to cope" without the appellant and would struggle to look after the children [42]. She has a back problem and relies on the appellant to help with the children, to administer medication and to support her in their daily routine [43].

The judge considered evidence which indicated that the appellant did his best to support his family when he was in prison. The judge concluded that the appellant's family had an "unusually high dependency" upon him. His removal would be particularly detrimental for the children [44]. The judge went on to find that communication by modern methods would be insufficient to maintain family life given the high level of dependency that they had upon him. The appellant and his family members were found to be credible witnesses [45].

22. The judge considered the appellant's service in the army as a "compassionate factor" [46]. He reminded himself of the weight to be placed on the public interest in such a case but conclude that the combination of circumstances was such that they amounted to 'very compelling circumstances' that outweighed the public interest in deportation [47].

Grounds of appeal to the Upper Tribunal

23. The Secretary of State's grounds of appeal make general submissions with lengthy references to various cases concerning deportation but are not clearly particularised. At the hearing, Mr Lindsay distilled the grounds into two main points.

    (i) The judge erred in failing to stake a structured approach to the assessment by considering whether any of the exceptions to deportation were engaged as part of the overall assessment of whether there were 'very compelling circumstances' to outweigh the public interest in deportation: see *NA (Pakistan)*. The judge made the same error that the Court of Appeal highlighted in the decision of the previous FtT panel: see *OP (Jamaica)*.

    (ii) The judge failed to give adequate reasons to explain his findings with reference to the evidence or made unclear findings.

Decision and reasons

Error of law

24. The factual background to the case was not in dispute. The judge heard evidence from the appellant and his family members. His findings relating to the credibility of the witnesses are not challenged. There can be no doubt that the judge directed himself properly to the relevant legal framework. He gave significant weight to the public interest in deportation and made clear that he was aware of the very high threshold.

25. The judge was required to conduct an evaluative assessment of the evidence in order to ascertain where a fair balance should be struck in circumstances where significant weight must be placed on the public interest in deportation in cases involving a sentence of at least four year's imprisonment. The Secretary of State takes issue with

the way in which the judge evaluated the evidence weighing in favour of the appellant and argues that he did so without giving adequate reasons to explain why the circumstances of the family were such that it would be 'unduly harsh' on the children to be separated from their father over and above the usual negative effects of deportation or to adequately explain how or why the overall circumstances were such that they amounted to 'very compelling circumstances' to outweigh the public interest in deportation.

26. In my assessment this was, in general, a clear and well written decision that outlined the correct legal framework and addressed the relevant factual circumstances. However, I find that there is some force in the Secretary of State's argument that the findings made from [40] onwards tended to state the judge's finding on the issues without the level of explanation that might be required to support his conclusion that deportation would be 'unduly harsh' on his children or to explain why the separation of the family as a result of deportation would enter into the realm of 'very compelling circumstances'.

27. In *NA (Pakistan) v SSHD* [2016] WLR(D) 662 the Court of Appeal noted that the inevitable consequence of deportation is for children to be separated from a parent even though it is contrary to their best interests. The Supreme Court in *KO (Nigeria)* made clear that something more than the usual harsh effect of deportation on a child is needed to reach the elevated threshold of 'unduly harsh' to meet the requirement of section 117C(5) NIAA 2002.

28. It was open to the judge to find, in line with previous tribunals before him, that the appellant had a strong family life with his partner and children in the UK. It may have been open to him to find that his family members have an "unusually high dependency" on him, but in order to do so he needed to explain why the nature of the relationship between the appellant and his family members went beyond the usual supportive relationships that one might expect between partners or between a parent and his children. The judge's failure to explain how or why the familial relationships went beyond the usual negative effects of deportation amounts to an error of law. Given that the two points made by the Secretary of State are intertwined it is not necessary to deal with the second point separately.

29. The First-tier Tribunal decision involved the making of an error on a point of law. The judge's findings relating to the credibility of the witnesses and the factual circumstances are preserved. In remaking, the Upper Tribunal only needs to conduct the evaluative assessment again.

Remaking

Best interests of the children

30. In assessing the best interests of the children, I have considered the broad principles outlined in *ZH (Tanzania) v SSHD* [2011] UKSC4, *Zoumbas v SSHD* [2013] UKSC 74

and *EV (Philippines) and others v SSHD* [2014] EWCA Civ 874. The best interests of children are a primary consideration although they are not the only consideration. They can be outweighed by the cumulative effect of other public interest considerations.

31. It is accepted that the appellant has three children who are British citizens. The appellant's oldest daughter (A) was born on 09 November 2005. She is 13 years old at the date of the hearing. Save for a period of two years when her father was serving a prison sentence, during which time she continued to have regular contact with him, she has benefited from a genuine and subsisting parental relationship with her father throughout her life. There is evidence to show that A suffers from asthma. The judge accepted that the appellant plays an important role in making sure that she is administered the necessary medication to control her condition.

32. The appellant's second daughter (B) was born on 18 May 2009. She is 10 years old at the date of the hearing. The judge accepted that the appellant has a close bond with his second daughter because he helped to deliver her and has spent a lot of time providing care for the child. His partner told Judge Adio that she found it particularly difficult without the appellant when he was in prison. Judge Adio recorded that he was told that the child was in a special school, but the extent of any vulnerabilities or disabilities that she may have is unclear from the evidence. I am satisfied that the appellant has a close relationship with both children. He lives with them and provides day to day care and support that one might expect of a loving and supportive father.

33. The evidence relating to the appellant's contact with his son (C) born of another relationship is less clear. In his statement he says that he hoped to build on his relationship with his son. Although it seems likely that he may have contact with his son because the child's mother has previously provided evidence in support of the appellant's appeal, the extent of is contact with his son and the strength of the parental bond is unclear.

34. Consistent with the findings of all the previous tribunals, I am satisfied that it is in the best interests of the children to be brought up by both parents in the UK. The best interests of the children are a primary consideration which must be given significant weight. The Secretary of State accepts that the children would not be required to leave the UK. Their interests point strongly towards maintaining the stable and caring relationship that they have with the appellant.

Article 8(1) – private and family life

35. The appellant is a 34-year-old Jamaican man who has lived in the UK for 16 years. It is likely that he has developed a private life in the UK during that time. In 2010, the First-tier Tribunal was satisfied that the appellant had developed strong social, cultural and familial links the UK. In that time, he has also developed a strong family life with his partner and two children. The strength of his family life with the third

child is unclear. The children are British citizens with whom he has a genuine and subsisting parental relationship. I am satisfied that his removal in consequence of the decision would affect his right to private and family life in a sufficiently grave way as to engage the operation of Article 8(1) of the European Convention.

Article 8(2) – proportionality

36. Article 8 of the European Convention protects the right to private and family life. However, it is not an absolute right and can be interfered with by the state in certain circumstances. It is trite law that the state has a right to control immigration and that rules governing the entry and residence of people into the country are "in accordance with the law" for the purpose of Article 8. Any interference with the right to private or family life must be for a legitimate reason and should be reasonable and proportionate.

37. Part 5A NIAA 2002 applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to private or family life and as a result is unlawful under the HRA 1998. In considering the 'public interest question' a court or tribunal must also have regard to the issues outlined in section 117C in cases concerning the deportation of foreign criminals. The 'public interest question' means the question of whether interference with a person's right to respect for their private or family life is justified under Article 8(2) of the European Convention of Human Rights.

38. In this case the appellant was sentenced to a period of four years' imprisonment. In those circumstances great weight must be given to the public interest in deportation. Section 117C(6) states that the public interest requires deportation unless there are 'very compelling circumstances'. The test has repeatedly been described as an extremely demanding one involving a high threshold: see *NA (Pakistan), KO (Nigeria) v SSHD* [2018] UKSC 53 and *RA (s.117C: "unduly harsh"; offence; seriousness) Iraq* [2019] UKUT 123.

39. I have already set out the serious nature of the offence and the judge's sentencing remarks. Although the sentencing judge did not find that the appellant played the lead role in the assault, he was held to be equally culpable and was sentenced accordingly. The nature of the assault was deeply unpleasant and frightening for the victim. A street robbery at night with violence and the use of a weapon is a particularly serious offence which was reflected in the length of the sentence imposed on the appellant. I give significant weight to the public interest in deportation given the nature of the offence and the length of the sentence.

40. The courts have repeatedly emphasised that great weight should be given to the public interest in deportation. However, that is not to say that the weight to be given to the public interest in deportation is uniform or monolithic. The more serious the offending behaviour; the greater the weight is placed on the public interest in

deportation. The less serious the offending behaviour; the more readily an individual's compelling or compassionate circumstances might outweigh the public interest in deportation. In other words, the assessment under section 117C(6) of the NIAA 2002 and paragraph 398 of the immigration rules more closely resembles the overall balancing exercise undertaken by the Strasbourg court when assessing whether the interference with a person's private or family life is justified and proportionate under Article 8(2) of the European Convention. After all, that is the stated intention of the statutory scheme. This was expressly recognised by the Court of Appeal in *NA (Pakistan)*:

> "38. Against that background, one may ask what is the role of the Strasbourg jurisprudence? In particular, how does one take into account important decisions such as *Uner v Netherlands* (2007) 45 EHRR 14 and *Maslov v Austria*? Mr Southey QC, who represents KJ and WM, rightly submits that the Strasbourg authorities have an important role to play. Mr Tam rightly accepted that this is correct. The answer is that the Secretary of State and the tribunals and courts will have regard to the Strasbourg jurisprudence when applying the tests set out in our domestic legislation. For example, a tribunal may be considering whether it would be "unduly harsh" for a child to remain in England without the deportee; or it may be considering whether certain circumstances are sufficiently "compelling" to outweigh the high public interest in deportation of foreign criminals. Anyone applying these tests (as required by our own rules and legislation) should heed the guidance contained in the Strasbourg authorities. As we have stated above, the scheme of Part 5A of the 2002 Act and paras. 398-399A of the 2014 rules is to ensure compliance with the requirements of Article 8 through a structured approach, which is intended to ensure that proper weight is given to the public interest in deportation whilst also having regard to other relevant factors as identified in the Strasbourg and domestic caselaw. The new regime is not intended to produce violations of Article 8."

41. Having placed very significant weight on the public interest following the appellant's conviction I turn to consider whether there are 'very compelling circumstances' that might outweigh the public interest in deportation. Whether there are 'very compelling circumstances' will depend on the circumstances of each case.

42. At the date when the appellant committed the offence, he had leave to remain based on his family life with his partner and children. Of course, he was foolish to jeopardise the immigration status that he was granted following the appeal in 2010 and the stability that it provided for his family. Nevertheless, at the date when the Secretary of State made the decision to deport the appellant, he had been remaining in the UK with lawful leave albeit his status was still precarious.

43. It is not disputed that the appellant speaks English. The evidence shows that he has worked hard in the past and is able to earn a living so that he can be financially independent. He worked for the British Army and then in various other jobs before committing the offence. The prison records report that he was a hard-working prisoner. When he has been in work, it appears that he is the main bread winner for the family. When he was in prison, his partner had to give up work to care for the children and became reliant on other relatives for support. The judge was satisfied that his partner's father, who previously provided some financial assistance, is now

less able to provide her with financial support because of his failing health. The fact that the appellant can speak English and is likely to be able to support himself financially are neutral factors.

44. The appellant has lived in the UK for 16 years. During that time, he has established close links to the UK. He remained lawfully from 2002-2005. In the period after he was discharged from the army it seems that the appellant may not have fully understood his immigration status and was under the misapprehension that he had leave to remain when he did not. By the time he was refused naturalisation as a British citizen in 2007 and applied for ILR in 2008 he should have been aware that he was remaining without leave. When he was issued with an IS.151A in February 2010 he must have understood that he was an overstayer. However, he acted promptly to make an application to regularise his status soon after and was subsequently granted five years' leave to remain on human rights grounds. The grant of leave to remain was quite short lived because the making of the deportation order had the effect of curtailing any existing leave to remain. I place some, but little, weight on the private life ties that the appellant has established during his lengthy period of residence in the UK.

45. Both Judge Adio and Judge Carroll were satisfied that the appellant has strong family life ties in the UK with his partner and children. He entered into a relationship with his partner in 2004 at a time when he was exempt from immigration control as a member of the armed forces. I take into account the fact that his partner was only around 16 years old when they began their relationship. She had a baby not long after. As a result, she says that she was unable to obtain many qualifications and has been largely dependent upon the appellant to support the family. Although the appellant told Judge Adio that his partner had learning disabilities I can see no evidence in the extensive bundles he prepared to support this statement. Nevertheless, the evidence has been consistent throughout the various hearings before the tribunal that the appellant's partner struggled in financial and practical terms to maintain the household and to look after the children while the appellant was in prison. To what extent the challenges she faced resulted from possible learning difficulties rather than her limited education is somewhat unclear.

46. In terms of her health, I was not referred to any evidence that might suggest that the appellant's partner suffers from any serious health problems. The judge accepted that she suffered an injury to her back and continues to experience pain that can make it difficult for her to care for the children. The medical records contained in the appellant's bundle support this claim. His partner's profile suggests that she is more reliant on him for practical support than might be the case in other relationships. The appellant supported her in the early years of their relationship when she spent a period of time in the care of the local authority. I am satisfied that the appellant is in a genuine, subsisting and long-standing relationship and give weight to the strong ties that he has established with his partner.

47. The tribunal has consistently found that it is in the best interest of the appellant's children to be brought up by both parents in the UK. The interests of the children are a primary consideration, but they can be outweighed by the significant weight that must be given to the public interest in deportation.

48. Although the Secretary of State did not address the 'unduly harsh' test in the decision letter, it is plain from the decision that she did not consider it proportionate to expect the appellant's partner or children to relocate from the UK to the country to which the appellant will be deported despite the fact that his partner has connections with Jamaica. Weight must be given to the long-standing connections that she and the children have to the UK and the fact that the children are entitled to the benefits of British citizenship. For these reasons, I am satisfied that it would be unduly harsh to expect the appellant's partner and children to live in the country to which he would be deported.

49. I consider whether it would nevertheless be 'unduly harsh' to expect the appellant's partner and children to remain in the UK without him. Both Judge Adio and Judge Carroll recognised the significant role that the appellant plays in his family life with his partner and children. His partner is largely dependent upon him for support. Colloquially, he could be described as the oil that keeps the family engine running. When he was in prison his partner struggled both financially and in practical terms to look after the children. However, she does have some family support in the UK. At the time when the appellant was in prison her father was able to provide limited financial support. Judge Adio accepted that he was no longer able to provide the same level of support because of his failing health.

50. Although the appellant's partner has visited Jamaica on two occasions both visits were reliant on financial support from other family members. It is unlikely that she would be able to earn enough to visit the appellant on a regular basis. The evidence supports Judge Adio's conclusion that the deportation of the appellant might effectively bring an end to the relationship. At the very least, it would affect their ability to continue their family life in a serious and grave way. Although all members of the family would be affected by their separation from the appellant it is said that B may be particularly affected because of the close nature of their relationship. His partner's evidence to Judge Adio suggested that she found it particularly difficult to be separated from her father while he was in prison and that her education was affected. It was said that she is in a special school, but I have not been referred to any evidence that might indicate that she suffers from any serious disabilities or to show what the long-term effect of separation from her father might be.

51. I find that there are certain aspects of the evidence which show that the effect of deportation on the appellant's partner and children might have a harsh effect over and above the usual negative effects of deportation. These are long-standing family relationships entrenched over many years. The appellant's partner does appear to be particularly reliant on the appellant for financial and practical support and is likely to struggle to bring up the children on her own. It is not in the best interests of the

children to face long-term separation from a loving and supportive father. Although there is some suggestion that the appellant's partner, and perhaps his younger daughter, might have some learning difficulties the evidence in relation to any particular vulnerabilities that they have is lacking. I have to bear in mind that the test of 'unduly harsh' reflects something more than the usual harsh effects of deportation on a family. In this case I conclude that the evidence shows that it would not just be harsh, but very harsh on the family to remain in the UK without the appellant. However, there is insufficient evidence of any other compelling or compassionate circumstances that might elevate the effect of deportation to the stringent threshold of 'unduly harsh'.

52. I have considered whether there are any other features of this case that must be considered when assessing the cumulative effect of the factors on the appellant's side of the balancing exercise. Like Judge Adio, I consider that the appellant's service in the British Army is a factor that can be given some weight. The appellant served in the British Army for nearly two years. Although this was not a lengthy period of service, and nothing in the army certificate lists any other points of note, such as mentions in dispatches or the award of medals, the fact that the appellant joined the army in the knowledge that he could be called for active duty and was prepared to place himself at risk in defence of the UK is a matter that is properly recognised by the Armed Forces Covenant. The appellant's service in the British Army is an unusual feature in this case that should be recognised and given some weight in the overall balancing exercise.

53. In assessing the overall weight to be given to the appellant's circumstances, I take into account the fact that the appellant was previously of good character. Albeit the index offence was a particularly serious one that attracted a sentence of four years' imprisonment, and that is a matter that must be given significant weight, it did not form part of a pattern of offending behaviour. Even at the time when the OASys report was prepared in 2013 there was no suggestion that the appellant had any involvement in gangs or showed pro-criminal attitudes. He must take responsibility for his part in the crime he committed, but there is no evidence to show that he is likely to reoffend. The OASys report assessed him to be low risk of reconviction. He complied with his licence conditions. The risk assessment has been born out in the six years since his release, in which he has not been convicted of any further offences.

54. I bear in mind that the Upper Tribunal in *RA (Iraq)* observed that the fact that a person has not committed further offences is unlikely to have a material bearing on the assessment, but that is not the approach taken by the Strasbourg court, which does take into account the time that has elapsed since the offence and the person's conduct during that period: see *Boultif v Switzerland* (2001) 33 EHRR 50, *Üner v Netherlands* (2007) 45 EHRR 14 and *Maslov v Austria* [2008] ECHR 546. If the appellant had been convicted of further criminal offences the fact would reinforce and give even greater weight to the public interest in deportation. The risk of reoffending is relevant to whether there continues to be a pressing social need to deport a person. The fact that he does not pose a risk of reoffending must conversely have some bearing on the

assessment albeit it is unlikely to be given any determinative weight in the appellant's favour in cases involving a serious criminal offence. The Upper Tribunal in *RA (Iraq)* was right to observe that it is the norm to expect a person not to commit criminal offences.

55. At the hearing, Mr Lindsay accepted that it would be difficult for the Secretary of State to argue that there was "not the evidence there for the appeal to potentially succeed". He did not think that he was able to argue that Judge Adio's overall conclusion was irrational. The focus of the Secretary of State's concerns was the way in which the judge reached the conclusion and whether adequate reasons were given to justify it.

56. I remind myself that the provisions contained in the statutory scheme are intended to be compliant with a proper application of Article 8 of the European Convention. In assessing whether a fair balance has been struck between the undoubted weight that must be placed on the public interest in deportation and the individual circumstances of this case, I conclude that, while none of the factors are sufficient if taken alone, the cumulative effect of the appellant's circumstances are sufficiently compelling to amount to 'very compelling circumstances' that outweigh the public interest in deportation. The factors upon which I base this cumulative assessment are:

    (i) the appellant's length of residence and level of integration in the UK;
    (ii) the strength and long-standing nature of his private and family life ties;
    (iii) the fact that the long-term separation would be very harsh on his partner and children albeit not quite reaching the threshold of 'unduly harsh';
    (iv) the fact that the appellant has served as a member of the British armed forces; and
    (v) to some limited extent, the fact that this was a single albeit serious offence which did not form part of a pattern of offending and the appellant has demonstrated by his behaviour over some years since his release that he is at low risk of reconviction.

57. For these reasons I conclude that removal of the appellant in consequence of the decision would be unlawful under section 6 of the Human Rights Act 1998.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is remade and the appeal is ALLOWED on human rights grounds

Signed  Date 06 November 2019
Upper Tribunal Judge Canavan