Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00002/2013

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Determination Promulgated**
On 19 August and 21 October 2013	**On 25 November 2013**
Prepared 19 August and 22 October 2013	

Before

UPPER TRIBUNAL JUDGE MCGEACHY
UPPER TRIBUNAL JUDGE KEBEDE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DWIGHT ANTHONY WALSH

Respondent

Representation:

For the Appellant: (On 19 August 2013) Mr A Khan, Counsel, instructed by Kings Court Chambers
(On 21 October 2013)Mr H Davies, Counsel, instructed by Kings Court Chambers
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

On 19 August 2013 , sitting alone, I heard the appeal of the Secretary of State against a decision of the First-tier Tribunal to allow the appeal of Dwight Anthony Walsh against a decision to deport. I found a material error of law therein and therefore set aside that decision. As my decision that there was an error of law in the determination of the First-tier Tribunal was lengthy, I start this determination with that decision in paragraphs 1 through 32 of the determination. In paragraphs 3 through 12 of my decision I set out the appellant's history in Britain, details of his relationships and his children, and the details of his convictions which led to the decision to deport. At paragraph 7 I set out the sentencing remarks of Her Honour Judge Mowat, who had sentenced the appellant on 22 December 2011 to three years' imprisonment on a charge of unlawful wounding.

At the end of my decision I set out directions that the appellant's representatives would serve an indexed and paginated bundle of all documents on which they wished to rely and also stated that the respondent should serve a copy of any OASys report or presentence report on the Tribunal and on the appellant's representatives. I also stated that the respondent should serve the evidence of the concerns expressed by Social Services about the involvement of the appellant with his children as asserted in ground 5 of the grounds of appeal.

Error of law decision

1. The Secretary of State appeals, with permission, against a decision of the First-tier Tribunal (Judge of the First-tier Tribunal Aujla and Mr A P Richardson J P (non-legal member)) who in a determination promulgated on 28 June 2013 allowed the appeal of Mr Dwight Anthony Walsh against a decision of the Secretary of State to make a deportation order against him under the provisions of Section 32(4) of the UK Borders Act 2007. The appeal was allowed on human rights grounds.

2. Although the Secretary of State is the appellant in the appeal before me I will, for ease of reference, refer to her as the respondent as she was the respondent before the First-tier Tribunal. Similarly, although Mr Dwight Anthony Walsh is the respondent in the appeal before me I will, for ease of reference, refer to him as the appellant as he was the appellant before the First-tier Tribunal.

3. The appellant is a citizen of Jamaica born on 23 February 1971. He came to Britain in 2002 and in October that year made an application for leave to remain as the spouse of a British citizen. He was granted indefinite leave to remain in that capacity in March 2004. The appellant and his then wife, Mrs Kelly Louise Walsh, have three children, Kyeisha Jennifer Walsh born on 23 September 2003, Troy Anthony Passion Walsh born on 3

January 2005 and Latisha Natasha Leona Walsh born on 10 February 2007. The children live with their mother.

4. In 2007 the appellant started a relationship with Ms Jane Brooker who is a British citizen. They have cohabited for three years. Ms Brooker has four children, the eldest three of which have left home. The evidence before the Tribunal was that the appellant had a close relationship with Ms Brooker's children and, moreover, that he saw his own children regularly before he was imprisoned.

5. In July 2011 the appellant was convicted at Reading Crown Court of common assault on Mrs Kelly Walsh, his ex-wife and given a conditional discharge for twelve months.

6. On 22 December 2011 he was convicted at Reading Crown Court of unlawful wounding and sentenced to three years' imprisonment.

7. On sentencing the appellant, Her Honour Judge Mowat stated:-

> "The jury have convicted you of wounding, the lesser of the two offences open to them to convict you upon, so I bear that in mind. You did not have the intent to do really serious bodily harm; you did, however, quite deliberately, slash a man across the head with knife. The injury in my opinion can properly be described as one amounting to greater harm. It is, within the context of woundings, a bad wound. It took thirteen stitches to put it all together again, just about the man's hairline, and we have seen from the photographs some of the residue of blood splattered around the house. Witnesses said there was blood everywhere. Your culpability is high because it was a completely deliberate, unprovoked attack upon an absolutely innocent and unsuspecting man because he had in your view disrespected you.
>
> So I have absolutely no doubt in placing this offence in the category 1, and category 1 according to the current guidelines for sentencers, and the starting point sentence after a trial for someone without previous convictions was three years. In my view that is the appropriate sentence in this case, three years' imprisonment. As things stand, as the current regulations are, you spend half of that time in custody and you will be released on licence subject to recall if you reoffend or breach the terms of your licence."

8. A decision that Section 32(5) of the UK Borders Act 2007 applied was thereafter served on the appellant. In the reasons for the decision the Article 8 rights of the appellant were considered, initially with reference to paragraphs 398 and paragraph 399 of the Immigration Rules.

9. Details of the appellant's children in Britain were noted, it being pointed out that Mrs Walsh had cared for the children since birth and while the appellant was in prison, and that the appellant's relationship with her was not subsisting.

10. The decision stated that there were no exceptional facts raised which warranted departure from the decision to deport the appellant, reference being made in the to the judgements of the Court of Appeal in **SS (India) [2012] EWCA Civ 388**, **N (Kenya) [2004] EWCA Civ 1094** and **DS (India) [2009] EWCA Civ 544**. Reference was also made to the determination of the Tribunal in **Omotunde [2011] UKUT 247 (IAC)** and **Sanade (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC)**. With regard to the disruption of family life reference was made to the judgment in **AD Lee [2011] EWCA Civ 348**. It was accepted that the children could not be expected to relocate to Jamaica but it was considered that the appellant could maintain contact with them through modern methods of communication.

11. The deportation order against the appellant was made on 16 November 2012.

12. The Tribunal noted the appellant's evidence at the hearing that his relationship with his ex-wife had broken down in 2005 and his claim that his removal would affect both his own children and those of Ms Brooker.

13. With regard to the offence the appellant told the Tribunal that he was acting in self defence and that he would not use a knife and he could not explain how the wound to the victim happened. He claimed that he had been attacked but the jury had not believed him. With regard to his conviction of common assault he said that he had not assaulted his partner but had pleaded guilty because he was advised to do so by his solicitor. He said that he could not remember what two cautions he had received for criminal damage. He claimed that the incident of wounding had happened at a party but he had not been there and did not know where the offence occurred.

14. In paragraphs 26 onwards of the determination the Tribunal set out their findings of fact. They accepted the appellant had been in a relationship with Ms Brooker for some considerable time. They referred to the provisions relating to the rights of the appellant under Article 8 as set out in the Immigration Rules and found that the appellant could not benefit from those provisions. However, they went on to consider the rights of the appellant under the ECHR. They found that he had established family life with his three children as well as Ms Brooker and took into account that he had lived and worked in Britain since he had first arrived in 2002. They found that there would be an interference with his private and family life if he were removed, but accepted that that would be in accordance with the law. They, however, did not consider that the removal of the appellant would be proportionate. They noted the two convictions against the appellant. They noted that the appellant had denied the offence in evidence before them despite, in his witness statement stating that he had "committed a serious violent crime". They went on, in paragraph 40, to state:-

> "Had the appellant denied the offence in his witness statement as well, that clearly would have indicated to us that the appellant was not remorseful. Having clearly admitted the offence in his witness statement and indicated his remorse, he denied the same in his oral evidence. That was puzzling for us to hear. It may be the appellant is confused or he felt that he could advance his claim by denying the offence in evidence. Be that as it may, we are prepared to give the appellant the benefit of the doubt about his assertions in oral evidence and accept that his assertions were not demonstrative of lack of remorse."

15. Having then referred to the judgment of the Court of Appeal in **N (Kenya)** they stated that it was clear that the appellant had committed a very serious offence, that he had engaged in an unprovoked attack on an innocent person and that a knife had been used. In paragraph 44 they stated that all the details of the offence "would indicate that the public interest demanded that the appellant be deported from the United Kingdom in the interests of maintaining law and order and prevention of crime."

16. They went on to state in paragraph 45 that:-

> "On the other hand, we note the sentencing judge acknowledged that the appellant had not committed the offence intentionally, although it was an unprovoked attack on someone who the appellant considered had disrespected him. The appellant was given three years' custodial sentence which he has served. There is nothing to suggest that the prison service had any complaints against him whilst he was serving his sentence. The appellant was assessed as at low risk of reoffending and medium risk of serious harm to members of the public and those known to him. Whilst we accept that it was a serious offence of violence, it was however not a premeditated behaviour. It was committed on the spur of the moment because, as the judge noted, the appellant perceived that the victim had disrespected him. Leaving aside the common assault conviction which we have not considered to be a serious matter in view of the sentence that the appellant was given, the appellant had in effect committed one serious offence during his eight years' residence in the United Kingdom from 2002 until August 2010 when the offence was committed. We accept that he was remorseful about the matter."

17. They then stated that the appellant had a strong relationship with the children, that he had been in continuous contact with them and provided for them, and stated that the welfare of the children was an important matter and that the appellant was an integral part of the process of bringing up the three children together with his ex-wife. They stated that he had a genuine subsisting relationship with the children and with Ms Brooker who was still standing by him. It would not be reasonable, they considered, for her to be expected to go with him to Jamaica.

18. In paragraph 47 they stated that they had carried out a balancing exercise between the public interest in removing the appellant in the interests of maintaining law of order and preventing crime, and the appellant's and his family's compassionate circumstances. They stated they were satisfied

the appellant's case had exceptional features to enable them to consider the matter on Article 8 grounds outside the Rules, and went on to allow the appeal on human rights grounds.

19. The Secretary of State appealed. The grounds of appeal first asserted, at some length, that the Tribunal were wrong to apply a two-stage test in effect stating that the determination of the Tribunal in **MF (Nigeria) [2012] UKUT 00393 (IAC)** was incorrect.

20. The second ground of appeal stated that the Tribunal had failed to give "reasons or adequate reasons" for their findings, stating that they failed to give their own assessment of the appellant's risk of harm and reoffending. It was also claimed that the Tribunal, having noted the appellant's lack of remorse at the hearing, had found that he be given the benefit of the doubt as he had expressed remorse in the witness statement. Moreover, he had failed to show remorse for the assault on his partner (I consider that this is a reference to the assault on Mrs Walsh). The grounds went on to say that it was submitted that it was "almost perverse" to suggest that the appellant's offence was acceptable because he has perceived someone to have disrespected him. The grounds pointed out that the appellant's escalating offences had been ignored and it was submitted that he remained a serious risk of harm to the public and those he knew.

21. It was also argued that the findings regarding the best interests of the appellant's children were inadequate given that the appellant's ex-partner had had to cope while he was in prison.

22. The fifth ground stated that:

> "It is submitted that the appellant has failed to provide adequate reasons as to why it is in his children's best interests for him to remain here to have direct contact with them given that social services have expressed concerned about his involvement with them due to the impact on them of the assault on his partner."

23. Before the hearing the respondent submitted further written submissions which emphasised that the Tribunal had failed to follow the principles set down in **Masih (Pakistan) [2012] UKUT 00046 (IAC)** or to give explanation for the weight attached to the public interest in deportation of those who met the criteria set out in legislation.

24. They referred to the judgment of the Court of Appeal in **SS (Nigeria) [2013] EWCA Civ 550** which referred to the weight which should be given to primary legislation such as that in the UK Borders Act 2007.

25. At the hearing of the appeal on error of law before me Mr Melvin relied on the grounds of appeal, spending some time referring to the terms of the new Rules. He emphasised that the appellant was not living with his own children and asserted that the Tribunal had not properly set out the future risk posed by the appellant.

26. In reply Mr Khan stated that the Tribunal's approach to the Rules was correct – they were entitled to follow a two-stage approach and he argued that they had produced a detailed and rational decision. He referred to a letter written by Mrs Walsh in July 2012 where she referred to the role which the appellant fulfilled in the lives of his children and his closeness to them. He emphasised that the Tribunal had accepted that the appellant had committed a serious offence and had this in mind when they were considering the proportionality of the deportation of the appellant. The appellant had accepted, he argued, that he had committed a horrific crime, but Mr Khan emphasised that the appellant had done so on the spur of the moment.

27. He stated that the appellant's ex-wife now had another partner and was about to give birth to their child. He argued that the conclusions of the Tribunal were fully open to them on the evidence and asked me to find that there was no error of law in the determination.

28. I considered the determination, the submissions and the documentary evidence before me. I found that there are material errors of law in the determination of the Tribunal. Although I considered that they did properly consider the issue of the rights of the appellant in two stages: firstly under the Rules and secondly under the Convention I considered that they erred in their evaluation of the relevant factors which should have been taken into account when assessing the proportionality of removal.

29. Although in paragraph 47 they stated that they had carried out the balancing exercise between the public interest in removing the appellant against maintaining law and order and preventing crime on the one hand, and the appellant and his family's compassionate circumstances on the other, and did refer to the judgments of the Court of Appeal in **N (Kenya)** and that in **OH (Serbia)** in paragraphs 41 and 43 of the determination, they did not set out why they had ignored the fact that the UK Borders Act 2007 makes it clear that when a foreign criminal is sentenced to a period of imprisonment for at least twelve months the Secretary of State must make a deportation order in respect of that foreign criminal. As Laws LJ states in **SS (Nigeria) v SSHD [2013] EWCA Civ 550** that:-

> "53. … An Act of Parliament is anyway to be specially respected; but all the more so when it declares policy of this kind. In this case, the policy is general and overarching. It is circumscribed only by five carefully drawn exceptions, of which the first is violation of a person's Convention/Refugee Convention rights. … Clearly, Parliament in the 2007 Act has attached very great weight to the policy as a well justified imperative for the protection of the public and to reflect the public's proper condemnation of serious wrongdoers. Sedley LJ was with respect right to state that 'in the case of a 'foreign criminal. the Act places in the proportionality scales a markedly greater weight than in other cases.

> 54. I would draw particular attention to the provision contained in s.33(7): 'section 32(4) applies despite the application of Exception 1...', that is to say, a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on Article 8. I said at paragraph 46 that while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed."

30. The judgment in **SS (Nigeria)** was issued on 22 May 2013 – that is before the hearing of this appeal. Nowhere in the determination do the Tribunal acknowledge the weight to be placed on the decision to deport under Section 32 of the 2007 Act. That is, I consider, a clear error of law.

31. Moreover, the fact that the Tribunal accepted that the appellant was remorseful about his offence is hardly a mitigating factor, when particularly, as in this case, the appellant acted, as they say, "on the spur of the moment" because the appellant perceived that the victim had disrespected him. It appears moreover that the appellant's assault on his wife was also unpremeditated. It is difficult to reconcile the conclusion that the appellant was remorseful with the fact that the appellant appeared to claim that he had acted in self defence or was not present at the party where the offence took place. There is no indication, I considered, that the appellant would not commit such similar crimes in the future. There is no indication that he has taken steps to ensure self-control. Moreover, the comment of the Tribunal that the sentencing Judge had acknowledged that the appellant had not committed the offence intentionally did not reflect what the Judge said in her sentencing remarks. I further find that the Tribunal have not given any adequate reason for concluding that it is in the best interests of the children for the appellant to continue having contact with them given that he had assaulted their mother. The lack of adequate reasons for the findings made by the Tribunal is a clear error of law. I therefore set aside the determination of the First-tier Tribunal.

32. I gave directions that the respondent copies of any OASys report or any pre-sentence report as well as the evidence that social services had expressed concerns abut the involvement of the appellant with his children as asserted in ground 5 of the grounds of appeal.

Determination

33. At the hearing on 21 October I sat with Upper Tribunal Judge Kebede. Mr Melvin informed us that there was no evidence from social services and that there had been no pre-sentence report. The onus had been on the prison to prepare an OASys report but they had not done so.

34. Mr Davies stated that there was an error in paragraph 5 of my decision when I had said that the appellant had been convicted in July 2011 of common assault on his ex-wife. He stated that that was incorrect. The conviction had been for common assault on the appellant's partner, Ms Jane Brooker. It appears that the fault was mine, as I had noted the letter from the duty social work assistant at Reading Borough Council dated 29 June 2012 which stated:

> "December 12 2011
>
> Kelly Walsh disclosure
>
> Ex-partner had come around to help out with the children, and while he was here he tried to grab some of her stuff. She had become angry and exploded and hit him. He had retaliated and hit her across the face. She had called the police who had him arrested. At some point he had come around to the house again in the last week (the children let him in through the back door whilst mum was upstairs) and managed to hit her again."

35. It is, of course, correct that the conviction of common assault was in July 2011, not in December that year. The assaults referred to in the letter from Reading Borough Council took place very shortly before the appellant was imprisoned. It was therefore not the assault on Mrs Walsh that had resulted in the conviction.

36. At the hearing before us the appellant gave evidence. He stated that he was a changed person and that he recognised that he had let himself, his children and his partner down.

37. Mr Davies put to him that it had been stated that he went to his ex-wife's home and had assaulted her. He first said that he had not assaulted her and then said that he was with Ms Brooker and she had needed somebody to pick up his children from school. She (his ex-wife) had started an argument but she had not turned up at court. She said that that had not led to a conviction and that the judge had found that his ex-wife was not telling the truth.

38. He was then asked about the conditional discharge in 2011. He stated that Ms Brooker had been beaten up by someone and returned home when he was in bed. They had been arguing and the police had been called by her daughter. The appellant had opened the door and the police had spoken to Ms Brooker and she said that she and two girls had got into a fight. The police had not listened to her and had taken him away. That incident had not involved Mrs Walsh.

39. With regard to the charge for wounding he first said that he was not guilty and there had been only one offence. He was then asked what his position was today and he said that he was sorry, he was hardworking and he was sorry that his reputation had been spoiled, he had lot his job and

his children. He was asked if he accepted that he had a problem with self-control and he said that he had learned by his mistakes. To show that he was trying to get self-control he had attended various courses – he had been to a maths class, and classes in first aid and painting and decorating: he said that he worked in a kitchen at Maidstone prison.

40. He had only had one adjudication which was when he was being taken back from the kitchen and he had not wanted to go into his cell for a few minutes so that it could be aired. The officer had said that he was refusing to get into his cell. Since his sentence finished on 22 June 2013 he had been in detention. He had been asked if he had undertaken any courses in self-control and he said that in Maidstone he had tried to learn about controlling his feelings and how to treat people.

41. He stated that his relationship with Ms Walsh was now neutral and, having given the names and dates of birth of his children, he said that he loved them so much and they had come with Ms Brooker to see him in prison the day before the hearing and that he was worried about Keisha who had now become very large and had been in tears. She had said that she did not want him to get into trouble. He said that he would never let them down again. If he were deported he did not know how he would be able to keep in contact with them and did not think that they could cope without him.

42. He stated that Ms Brooker was always there for him and would come to see him in the detention centre and they loved each other very much. He wished to have a chance to show that he had learned from his mistakes.

43. There was no cross-examination.

44. Ms Brooker then gave evidence, stating that she had been together with the appellant for seven years and they had lived together for three and a half years. She has four children aged 18, 21, 23 and 25, and three grandchildren. Her youngest grandchild has Down's syndrome. She is very close to her children and if the appellant were deported she would not be able to go with him, particularly because of the support she needed to give to the grandchild with Down's syndrome. She described her relationship with the appellant as being very strong and stated that his relationship with her children was also strong. He had had an important role in their lives and had been the one to discipline them.

45. She said that she would be destroyed if the appellant were removed.

46. With regard to the conviction for assault she had said she had been in conflict with someone and had gone home. The appellant had been in bed and wanted to know what had happened and the police had been called by her daughter. The police had not accepted anything that the appellant had said and it had gone on from there.

47. With regard to the offence which had led to the decision to deport, she stated that this had happened after the appellant's father had died and the appellant had self-destructed at that stage, but that he was a good man.

48. There was no cross-examination from Mr Melvin.

49. In summing up Mr Melvin relied on the reasons for refusal letter and written submissions, stressing the ratio of the decisions in **SS (Nigeria)** and in **MF (Nigeria) v SSHD [2013] EWCA Civ 1192**. He stated that the appellant's crime was such that the public interest in his deportation outweighed any other factors, including that of the best interests of the children. In any event he pointed to the fact that there were no letters from either doctors or from the children's schools regarding the role the appellant might play in their lives.

50. In his written submissions he had referred to relevant case law and stated that there was nothing exceptional to the appellant's case. With regard to the children, the skeleton argument stated that there was little evidence that the appellant's son Troy was suffering from autism or ADHD and there was no medical evidence that he was receiving medication. Latisha had no particular problems and although it was alleged that Keisha missed her father and that she was putting on weight and suffered bullying from school there was no letter from a GP or medical person to confirm any of her problems.

51. In his summing up Mr Davies asked us to allow the appeal. He stated that the appellant had accepted that he had some problems with self-control, but that he was now in a better position to deal with those problems. He referred to the support from Ms Brooker and referred to what he called the appellant's "complex family situation". He pointed out that Ms Walsh now had a baby by another partner and was a single parent with four children.

52. He referred to the judgment of the House of Lords in **Beoku-Betts** [2008] UKHL 39 and emphasised the need to take into account the interests of other members of the family, and in particular the appellant's children. He emphasised that the appellant had stated that he had a good relationship with the children of Ms Brooker and indeed they had seen him in detention. He stated that every child required a father and a mother, and by deporting the appellant his influence on his children's upbringing would be excluded.

53. He referred to a consideration of the appellant's rights under Article 8 outside the Immigration Rules and argued that the removal of the appellant would damage the interests of the children, and that this was an exceptional circumstance that required that the appellant's appeal be allowed. He asked therefore that we allow the appeal.

Discussion

54. In considering the appeal we have taken into account the evidence before us as well as that in the appellant's bundles of documents which were before the First-tier Tribunal. In the appellant's initial statement he stated that he had been in a serious relationship with Ms Brooker for the past six years (that is, since 2007) and that they had lived together with her four children. He stated that he had seen his children on a "weekly to fortnightly basis" and they had come and stayed with him and Ms Brooker. In that statement he stated he was completely remorseful for what he had done, and said that he had never before committed such a crime and promised that he would never do anything such as that again. He claimed that he had always worked in Britain. The bundle of documents shows that the appellant had worked during 2007 for J P Moran Company Limited on a subcontract basis. There is some indication that he has worked from time to time with George Wimpy and Taylor Woodrow.

55. In the second bundle there are wage slips for Ms Brooker and her statement in which she stated her marriage had broken up after twenty years and she emphasised that she loved the appellant. She stated that the appellant had worked since they met and she referred to his love for his own children. There are also letters from Ms Brooker's brother and her son Keiren Brooker and other friends of Ms Brooker. In a small bundle of documents lodged for the hearing, there are other letters of support. In the core bundle is a statement from Ms Walsh dated 14 July 2012 stating that they had not been together for four and a half months *(sic)* and that the appellant had not lived with them prior to his imprisonment as he had been living with his girlfriend. She stated that the appellant had a close relationship with his children. In particular the letter referred to the difficulties Keisha was having worrying about her father. The letter however stated that all the children were doing well at school, and they had a lot of support from the school to help if any problems arose. She stated that she did not know what the impact of deportation would have on the appellant's younger children but it would be difficult for her to deal with all three children by herself. In the further bundle lodged before the hearing there is a further letter from Mrs Walsh dated 9 August 2013 in which she writes about the difficulties that the children are having and states that Keisha meets with a woman called "Flic" at school for, I presume, therapy to deal with the troubles in her life and states that Troy suffers from ADHD and is autistic and that she is trying to get him into a special school. In the bundle there are letters from Ms North of Reading Borough Council, Dr Kate Martin of Bath and North East Somerset NHS and Berkshire Healthcare NHS all referring to Troy's problems. Mrs Walsh refers to her current partner who also has children and doesn't live with her. She also refers to her own mother's illness.

56. In considering this appeal we turn to the position of the appellant under the Rules, noting the terms of the judgement of the Court of Appeal in **MF (Nigeria) [2013] EWCA 1192**. We first, therefore, consider the new Rules, paragraphs 398, 399 and 399A of HC 395. The appellant has been

convicted of an offence for which he has been sentenced to a period of imprisonment of less than four years but at least twelve months (398(b)).

57. The appellant does have a parental relationship with a child under the age of 18. Indeed, his children are British. It would certainly not be reasonable to expect them to leave Britain, but the reality is there is another family member who is able to care for the children: Mrs Walsh has been looking after the children throughout their lives and indeed the appellant has not lived with them for some years.

58. The appellant does have a genuine and subsisting relationship with a partner (Ms Brooker), a British citizen who is settled here, but he has not had valid leave continuously for at least fifteen years. Given Ms Brooker's statement and given the gloss that has been put on the term "insurmountable" by the Court, we conclude that there are insurmountable factors that would mean that she could not leave Britain to live with the appellant in Jamaica. However, the terms of paragraph 399(b)(i) and (ii) are, of course, in the alternative. Therefore the appellant's relationship with Ms Brooker does not lead to the appellant's claim succeeding under the Rules.

59. Paragraph 399A of course does not apply to the appellant. The reality therefore is that the appellant cannot meet the requirements of the Rules to avoid deportation unless "exceptional circumstances" exist. We note the terms of paragraph 398(c) where it states that:-

> "… the Secretary of State in assessing that claim (the deportation of a person from the UK is conducive to the public good) would consider whether paragraph 399 or 399A applies and, if it does not, will only be in exceptional circumstances that the public interest in deportation would be outweighed by other factors."

We also note the guidance in paragraph 13 of **MF (Nigeria)** which quoted from the Explanatory Memorandum to the new rules.

60. We have therefore considered whether or not there are such "exceptional factors". In considering whether there are such factors, we note the terms of the discussion in **MF (Nigeria)** in paragraphs 35 onwards and consider that the guidance therein mean that a consideration of the exceptional factors in this case is an exercise akin to a consideration of the proportionality of removal under the Convention.

61. It is therefore relevant to set out our findings of fact in this case.

62. The appellant has lived in Britain since 2003 with leave. It appears that for most of that time he has been in work. He married and had three children, now aged 10, 8 and 6. His relationship with their mother broke down. The interests of the children is a primary concern but in assessing those interests we have to take into account the fact that the appellant has never been the primary carer of those children and has been in a

relationship with his current partner, Ms Brooker now for some years, effectively, it appears since around the time that his third child was born. There are assertions by the appellant, Ms Brooker and in Mrs Walsh's letters of July 2012 and 9 August 2013 that indicate that the appellant continued to be involved with his children, but of course that involvement had virtually ceased once he was in prison. In the correspondence from Reading Borough Council, North East Somerset NHS and Berkshire Healthcare Trust there is nothing directly linking his difficulties or those of Keisha to the fact that their father might be deported. There is no indication that the appellant plays or has played for many years a central part in their lives. Mrs Walsh has never given evidence in court in support of the appellant.

63. It is also relevant that the children did see him assault their mother on two occasions. Although the appellant has appeared to deny that that was the case, we place weight on the letter from Reading Council regarding the incident in December 2011. Given the appellant's conduct in the index offence and indeed his conviction for assault on Ms Brooker, we have concluded that, although no conviction arose from that incident, it is the case that he did lash out at Ms Walsh. We note the terms of the judgment of Sedley LJ in **AD Lee** where he emphasised that the reality is that criminality can lead to the breakup of a family. We cannot conclude that the removal of the appellant would be such an interference with the rights of the appellant's children, which we acknowledge is a primary concern in the consideration of the rights of the appellant and the children under Article 8 of the ECHR, that his removal would be disproportionate nor that in deporting the appellant the respondent would be in breach of her duties under Section 55 of the Borders Act 2007.

63. Turning to the appellant's relationship with Ms Brooker, we accept that it is a close relationship and indeed that she would be devastated if he were deported. However, though she referred to his involvement with her children, the reality is that three of them have left home and one at least has his own children. The child remaining at home is aged 18.

64. We now turn to the index offence and refer again to the sentencing remarks of her honour Judge Mowat and to the NOMS report. That referred to the appellant posing a medium risk of serious harm to the public and to known adults including partners. He was described as a violent offender, and his offender reconviction scale indicated that the probability of his being reconvicted within one year was 23%, two years at 38% although the banding category is low.

65. Although the appellant states that he has changed his ways and that he is undertaking a number of courses in prison, none of these relate to anger management or the ability to empathise with the victims of crime or indeed to indicate that he would be able to stop himself lashing out at other individuals if he felt "disrespected" or that they would in other ways not comply with his wishes.

66. We note the weight that must be placed on the decision of the Secretary of State when deciding that it is appropriate that a criminal should be deported. We follow the guidance of the Court of Appeal in **SS (Nigeria)** which is quoted in paragraph 29 above. We conclude, having weighed up all these factors and indeed taking into account in particular the provisions of the Rules that the Secretary of State was entitled to decide to deport this appellant.

67. While we have placed weight on the distress the decision will cause to Ms Brooker and indeed the effect that the deportation of the appellant might have on his own children, and accepting that their welfare is a primary concern, we consider that the nature of the appellant's crime is such that his removal is proportionate and therefore that it is appropriate to dismiss the appellant's appeal.

68. The decision of the First-tier Tribunal, having been set aside, we dismiss the appellant's appeal against the decision to deport on both immigration and human rights grounds.

Decision.
This appeal is dismissed on both immigration and human rights grounds.

Signed Date: 19 November 2013
Upper Tribunal Judge McGeachy