Upper Tribunal
(Immigration and Asylum Chamber)

Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Sent**
On 23 October and 13 November 2012	....

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE
UPPER TRIBUNAL JUDGE O'CONNOR

Between

OLUFISAYO OLATUBOSHUN OGUNDIMU

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Hooper, instructed by Lawrence Lupin Solicitors
For the Respondent: Mr S Allan, Senior Home Office Presenting Officer

1. *The expectation is that it will be an exceptional case in which permission to appeal to the Upper Tribunal should be granted where the lodging of the application for permission is more than 28 days out of time. Where, in such a case, a judge is minded to grant permission, the preferable course is to provide an opportunity to the respondent to make representations. This might be achieved by listing the permission application for oral hearing.*

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2. *The introduction of the new Immigration Rules (HC 194) does not affect the circumstance that when considering Article 8 of the Human Rights Convention "for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in [this] country very serious reasons are required to justify expulsion." The principles derived from Maslov v Austria [2008] ECHR 546 are still be applied.*

3. *Paragraph 399(a) of the Immigration Rules conflicts with the Secretary of State's duties under Article 3 of the UN Convention on the Rights of the Child 1989 and section 55 of the Borders, Citizenship and Immigration Act 2009. Little weight should be attached to this Rule when consideration is being given to the assessment of proportionality under Article 8 of the Human Rights Convention.*

4. *The natural and ordinary meaning of the word 'ties' in paragraph 399A of the Immigration Rules imports a concept involving something more than merely remote or abstract links to the country of proposed deportation or removal. It involves there being a connection to life in that country. Consideration of whether a person has 'no ties' to such a country must involve a rounded assessment of all of the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances.*

DETERMINATION AND REASONS

Introduction

1. The appellant is a citizen of Nigeria born on 29 September 1984. He lawfully entered the United Kingdom on 7 July 1991, aged six, in order to join his father, who has been settled and mainly resident here since 1961. He was granted indefinite leave to remain on the 29 June 1999. He had thus been resident in the United Kingdom for 21 years at the time of the hearing before us and for about three quarters of his life.

2. The appellant has had a troubled youth with a difficult education history, including significant periods spent in special needs schools. He first appeared before a juvenile court on criminal matters in August 1999, when he was handed a 12 month conditional discharge for obtaining property by deception. He had six further appearances before the juvenile court, being handed a variety of sentences including Supervision Orders, Community Rehabilitation Orders and an Action Plan Order. Between March 2003 and April 2009 he appeared on a further 12 occasions before the criminal courts as an adult, mainly for driving and drug possession offences. These were generally dealt with by way of fines and community penalties.

3. However, on the 18 December 2008 the appellant was sentenced at the Croydon Crown Court following a plea of guilty to a charge of possessing a Class C controlled drug with intent to supply – namely cannabis. This offence was committed on the 21 October 2008 along with another offence of

possessing a Class A controlled drug. The appellant was committed for sentencing to the Crown Court for supplying cannabis, where a sentence of imprisonment for eight months was passed, and forfeiture was ordered of drugs, cash and three mobile phones. On the 24 April 2009 he was dealt with by the Croydon Magistrates for possession of the Class A drugs and given a conditional discharge. This offence was committed at the same time as the matter dealt with at the Crown Court; it is not apparent why the two matters were not dealt with at the same time. It is clear from the information we have seen that, at that time, the appellant had a cocaine addiction that he was supporting by selling cannabis.

4. On the 8 April 2010 the Secretary of State made a decision to deport the appellant as a persistent offender. He appealed this decision to the First-tier Tribunal. In doing so he relied on the fact of his long residence and that he is the father of, and maintains a relationship with a British citizen child born on the 24 August 2004, JT.

5. On the 24 June 2010 the appeal was heard by a Panel comprising of FtT Judge Warren Grant and Mr AF Sheward (non-legal member). The appellant did not attend the hearing and no other witnesses gave oral evidence on his behalf. The appeal was dismissed in a determination promulgated on the 29 June 2010. The appellant drafted and lodged his own grounds of appeal against this decision, but permission to appeal was refused by the First-tier Tribunal on the 4 August 2010. It was not renewed to Upper Tribunal within the required time limit. A deportation order was signed against the appellant on the 13 July 2011.

6. The appellant was detained by the immigration authorities on the 12 September 2011. He subsequently obtained legal representation and on the 19 September and 31 October 2011 representations were made on his behalf in reliance on his family and private life in this country, requesting that the deportation order be revoked. On the 18 January 2012 the Secretary of State made a decision refusing to revoke the deportation order, and certified the appellant's application under section 94 of the Nationality, Immigration and Asylum Act 2002, thus depriving him of a further in country right of appeal to the First-tier Tribunal.

7. Removal directions were set and the appellant was due to be removed to Nigeria on the 23 February 2012. However, having had yet further representations rejected by the Secretary of State, the appellant brought an application for judicial review on the day he was due to be removed. As a consequence, the Secretary of State deferred the directions made for his removal.

8. At this stage his present legal team realised that he had not exhausted his appellate remedies from the adverse decision of the First-tier Tribunal and so, on the 5 March 2012, he made an out of time application to the Upper Tribunal for permission to appeal against the decision of the First-tier

Tribunal of 29 June 2010. This application was granted by an Upper Tribunal Judge on the 14 March 2012.

The grant of permission to appeal

9. When granting permission to appeal the judge stated as follows [the names having been anonymised by us]:

> "3. I have the benefit of very full grounds drawn by experienced counsel. They are all arguable but I am particularly concerned by the ground complaining that the Tribunal gave no reason for attaching no weight to the evidence in the form of (sic) letter to the Secretary of State (the subsequent witness statement was not signed) from one [Ms CT] who introduced herself as the mother of the appellant's son and said that the appellant "has been apart (sic) his life, he sees him regularly and is also responsible for his school and wealthfair (sic)". Clearly if [Ms CT's] evidence was, or should have been, accepted then it is at least arguable that the determination was deficient.
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> 4. The application is very late. It should have been received no later than 26 August 2010 but it was received on 5 March 2012. A main reason for the application being late is that the appellant acted on advice suggesting a different remedy.
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> 5. My powers in these circumstances are wide. I remind myself that there is at the core of this claim an arguable assertion that the best interests of the child have not been considered properly and I extend time"

10. Before we became seized of the appeal there had been a hearing before another Upper Tribunal Judge during which the Secretary of State expressed concern at the grant of permission to appeal having been made so long after the expiry of time to renew the application.

11. We understand those concerns but it is common ground between the parties that:-

    i. There is no power to revoke a grant of permission to appeal if the judge had power to grant it.
    ii. The signing of the deportation order did not deprive the judge of the power to grant permission to appeal; section 104(5) of the Nationality, Immigration and Asylum Act 2002 stating that only appeals brought against decisions of the types referred to in sections 82(2) (a), (c), (d), (e) or (f) are to be treated as finally determined upon the making of a deportation order. The appellant appealed to the First-tier Tribunal against a decision of a type referred to in section 82(2)(j) of the 2002 Act.
    iii. The only remedy available to the Secretary of State to challenge an inappropriate exercise of discretion to extend time and/or grant of permission to appeal is by way of judicial review. That course had been considered in this case and a decision was made not to challenge it.

12. Nevertheless, we consider it appropriate to make some observations about the grant of permission to appeal out of time. The appellant was required, by rule 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008 [“2008 Rules”], to make his application for permission to appeal to the Upper Tribunal no later than seven working days after the date on which the First-tier Tribunal’s refusal of permission was sent to him. He was required, therefore, to have filed his application by the 26 August 2010. Under rule 21(6) an applicant who is out of time must include a request for an extension of time and the reason why the application was not provided in time.

13. The Upper Tribunal has jurisdiction to extend the time for the filing of an application for permission to appeal pursuant to its case management powers set out in rule 5 (3)(a) of the 2008 Rules. Whilst the judge granting permission was correct to state that he had ‘wide powers’ when considering whether to extend time, those powers must be exercised having regard to the ‘overriding objective’ (rule 2(3)).

14. Rule 2(1) of the 2008 Rules provides that the overriding objective of the Rules is to enable the Upper Tribunal to deal with cases ‘fairly and justly’. That requirement is not limited in its effect to the giving of due consideration to the position of each of the parties to a particular appeal, it allows interests of a wider scope to be considered. This must include the public interest in there being finality to litigation, which is a significant interest of both parties to litigation in immigration appeals where the time limits are stricter than in other chambers of the Upper Tribunal.

15. The Secretary of State bears the difficult administrative and financial burden of maintaining effective immigration control. One reason for the strict time limits is so that the UKBA can be clear when a claimant’s appeal rights are exhausted and thereafter proceed to take the necessary enforcement action.

16. Factors relevant to the exercise of discretion to extend time under rule 5(3)(a) of the 2008 Rules will include, but are not limited to: (i) the length of any delay, (ii) the reasons for the delay, (iii) the merits of the appeal and (iv) the degree of prejudice to the respondent if the application is granted. The merits of the appeal cannot be decisive (see the reasons given in Boktor and Wanis [2011] UKUT 00442).

17. Here the grounds in support of the application for permission to appeal out of time explained that the appellant had been misadvised by his previous representatives who advised him that he should proceed by way of fresh representations rather than pursue a right of appeal and that consequently a clear error of law in the FtT’s decision had been overlooked.

18. In YD (Turkey) [2006] EWCA Civ 52 the Court of Appeal was considering both an application for a stay of removal and an application for an extension of time for lodging an appeal to the Court of Appeal against a decision of the

Asylum and Immigration Tribunal, the applicant having failed to apply to the AIT for permission to appeal in time. Brooke LJ (with the agreement of Moore-Bick and Wilson LJJ), summarised his conclusions on the issue of whether to grant an extension of time as follows [paragraph 41]:

> "(3) Every day that passes from the time when the AIT is without jurisdiction is likely to weaken the chance of this court being willing to grant an extension of time, and it would be rare for the court to grant an extension of time for two months or more: it will have to be satisfied that a significant injustice has probably occurred;
>
> (4) The court will only grant such an extension if in all the circumstances (including the considerations set out in CPR 3.9) it is just to do so. The appellant will have to present a strong case that he is likely to achieve ultimate success on his appeal against the original immigration decision for such an exceptional course to be justified."

19. We see no reason why this general principle ought not also to be of equal application when consideration is being given to applications for an extension of time to apply for permission to appeal to the Upper Tribunal.

20. There must always be a reason shown why time limits have not been complied with and the longer the period of non-compliance the more powerful those reasons should be. Whilst each case must be determined on its own facts, given the strict time limits in immigration appeals generally and the reason behind those time limits, the expectation is that it will be an exceptional case where permission to be appeal should be granted where there has been a significant delay in filing an application; by significant delay we would certainly include any period more than 28 days out of time.

21. Where a judge is minded to grant permission to appeal in such cases he or she should specifically consider whether removal action has been initiated and whether there are other reasons why the grant of permission would prejudice the public interest in effective administration of immigration control. As permission is normally granted on the papers without a hearing and without an opportunity for the respondent to raise objections, we also consider that the preferable course is that the respondent is given an opportunity to make representations on the grant of permission in cases where the delay exceeds 28 days. Perhaps the easiest way to achieve that is to list the permission application for oral hearing on seven days clear notice. In such cases the claimant may need to substantiate any reason why the claim is made late, by way of evidence.

22. We observe that in this case the appellant was already challenging his removal and the rejection of the representations as a fresh claim and we recognise, for reasons given below, that there was a strong claim that the FtT decision contained a serious error of law. There was substance in the contention that the previous representatives had failed to advise the appellant of that error of law as a basis of seeking permission to appeal.

Revised Decision letter

23. On the 16 August 2012, following the grant of permission but before the error of law hearing, the Secretary of State, in light of HC 194 [the amendments made to the Immigration Rules that took effect on 9 July 2012], provided a further letter setting out her reasons for concluding that the appellant's deportation should be maintained and why, applying these new Rules, in her view it would not lead to a breach of Article 8 ECHR.

24. The Secretary of State noted that the appellant had been convicted of 30 offences of which three remained unspent. She concluded that paragraph 398(c) was of application to the appellant because his deportation would be conducive to the public good as a consequence of him being a persistent offender. The Secretary of State then gave consideration to the application of paragraphs 399(a), 399(b) and 399A of the Immigrations Rules.

25. In relation to paragraph 399(a) the Secretary of State concluded that:-

i. The appellant is not in a genuine and subsisting relationship with JT (his son);
ii. JT is a British citizen living in the United Kingdom;
iii. It is unreasonable to expect JT to leave the United Kingdom.;
iv. There is another family member who is able to care for JT in the United Kingdom, that being his mother, CT.

26. As to paragraph 399(b), it was concluded that:-

i. The appellant is not in a genuine and subsisting relationship with JD (his claimed partner);
ii. JD is a British citizen living in the United Kingdom;
iii. The appellant has been living in the United Kingdom with valid leave continuously for at least 15 years immediately preceding the immigration decision;
iv. There are no insurmountable obstacles to the appellant's family life with JD continuing outside the United Kingdom.

27. In relation to paragraph 399A the Secretary of State concluded that:-

i. The appellant has lived for 20 years continuously in the United Kingdom immediately preceding the date of the immigration decision;
ii. The appellant has not demonstrated that he has 'no ties' to Nigeria.

28. The Secretary of State finally concluded that there were no exceptional circumstances in the appellant's case so as to warrant a departure from the above stated position and that, as a consequence, his removal would not lead to a breach of Article 8 ECHR.

Error of Law

29. On the 23 October 2012 we heard argument on the issue of whether the First-tier Tribunal's decision involved the making of an error of law such that it ought to be set aside. At the end of the submissions Ms Kiss, representing the Secretary of State, accepted that the First-tier Tribunal had erred in law at paragraph 18 of its determination. We agreed that this was so and now give our reasons for coming to this conclusion.

30. There was no dispute before the First-tier Tribunal as to the date that the appellant first arrived in the United Kingdom, or that he had remained continuously living here since 1991. When considering the application of Article 8 ECHR the First-tier Tribunal concluded as follows:

> "[18] On the basis of the evidence before us we have found negligible evidence of private and family life. The appellant's sister attended at the case management review hearing and stated that their father was in Nigeria and would not return before the date for the full hearing but no family member attended the hearing to give evidence on behalf of the appellant. We find that he clearly lives with his parents but that he is an adult and that his relationship with his parents and his siblings does not go beyond normal emotional ties beyond adults. The fact that his father is in Nigeria shows that he visits that country and there is nothing to stop any of the appellant's close family members from visiting Nigeria or even going to live there is they wish. The consequences of the removal of the appellant will not be sufficiently grave so as to engage the Convention. Even if the Convention were to be engaged his removal would be in accordance with the law; and would have the legitimate aim of protecting the public against those who commit crimes. There is nothing in the appellant's personal history in the form of compassionate circumstances which would outweigh the duty imposed upon the Secretary of State to prevent crime and to protect the public. In this context we refer to paragraph 35 of Samaroo and another v SSHD [2001] EWCA Civ 1139 and to paragraph 65 of N (Kenya) v SSHD [2004] EWCA Civ 1094. The judgmental issue is whether in a democratic society it would be necessary and proportionate to the legitimate aim and if we have to go on to make a finding in respect of proportionality we find that removal is proportionate."

31. Insofar as the First-tier Tribunal concluded that Article 8 was not even engaged and that there would be no interference requiring justification, we have no doubt that it made a serious error of law. In AG (Eritrea) [2007] EWCA Civ 801, and in particular paragraphs 26-28, the phrase "consequences of such gravity" in the Razgar question (2) were found to posit no particularly high threshold.

32. Had the tribunal correctly directed itself it would have been clear, even on the limited facts before it, that the only conclusion open to it, given that the appellant had lived here since the age of six and for nearly 20 years, was that Article 8(1) was engaged. This was a case where the tribunal of its own motion, irrespective of anything the appellant advanced or failed to advance in his home made grounds of appeal, ought to have considered and

applied the decision of the Grand Chamber of the European Court of Human Rights in the case Maslov v Austria [2008] ECHR 546.

33. In Maslov the applicant had resided in Austria for 18 years since the age of six and had appeared before the juvenile courts on multiple counts of aggravated gang burglary and attempted aggravated gang burglary, forming a gang, extortion, assault and unauthorised use of a vehicle, committed between November 1998 and June 1999. He was sentenced to 18 months' imprisonment, 13 of which were suspended on probation. He was subsequently sentenced to 15 months imprisonment on eighteen counts of aggravated burglary and attempted aggravated burglary. When fixing the sentence the court observed that the applicant, although still living with his parents, had completely escaped their educational influence, had repeatedly been absent from home and had dropped out of school. The applicant had also failed to comply with the order to undergo drug therapy. On 3 January 2001 the Vienna Federal Police Authority imposed a ten year exclusion order on the applicant. Having regard to the applicant's convictions, it found that it was contrary to the public interest to allow him to stay in Austria any longer. The applicant appealed, submitting amongst other things that the exclusion order violated his rights under Article 8 of the Human Rights Convention as he had come to Austria at the age of six, his entire family lived in Austria and he had no relatives in Bulgaria. Following a succession of unsuccessful appeals to the Austrian courts he was deported to Sofia in December 2003. He subsequently applied to the ECtHR. The Grand Chamber held that there had been a violation of Article 8.

34. In coming to its conclusion the Court considered whether the interference with the applicant's private and family life could be justified under Article 8(2). It set out, in paragraph 57, criteria relevant to that exercise where an offence is committed by an applicant. The Court then elaborated on those criteria in passages that should be very familiar to all judges making these decisions. We emphasis the following two paragraphs:

> "74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see *Üner,* § 55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, their childhood in the host country, were brought up there and received their education there (see *Üner*, § 58 *in fine*).
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> 75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

35. It was thus in June 2010 trite law that in cases of the present kind, where there has been long residence since childhood, the private life claim will succeed unless there are "very serious reasons...to justify expulsion". That remains the case: see for example MW (Democratic Republic of Congo) v

SSHD [2011] EWCA Civ 1240 Sullivan LJ at paragraph 75 and the reported decision of the Upper Tribunal in Masih (deportation – public interest – basic principles) Pakistan [2012] UKUT 00046 (IAC).

36. The First-tier Tribunal in the instant appeal singularly failed to direct itself in accordance with Maslov; failed to recognise the strength of the private life claim by reason of long residence alone; failed to identify the need for very serious reasons to justify the expulsion and, accordingly, failed to determine the human rights appeal lawfully. As a consequence of these serious flaws, the decision cannot stand. For these reasons we set aside the determination of the First-tier Tribunal and indicated that we would remake the decision ourselves on 13 November 2012.

Admission of the appellant's spent convictions

37. One of the appellant's grounds of appeal before the Upper Tribunal was that the determination of the First-tier Tribunal contained a further error of law in that it had relied on convictions of the appellant that were spent and should have been excluded from consideration.

38. Section 7(3) of the Rehabilitation of Offenders Act 1974 provides as follows:

> "If at any stage in any proceedings before a judicial authority in Great Britain … the authority is satisfied, in the light of any considerations which appear to it to be relevant (including any evidence which has been or may thereafter be put before it), that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions or to circumstances ancillary thereto, that authority may admit or, as the case may be, require the evidence in question notwithstanding the provisions of subsection (1) of section 4 above, and may determine any issue to which the evidence relates in disregard, so far as necessary, of those provisions"

39. It is for the Secretary of State to satisfy us that justice could not be done without admitting the appellant's spent convictions (AA (Spent convictions) Pakistan [2008] UKAIT 00027). We concluded that she has done so on the facts of this case.

40. In a case of this sort, where the Secretary of State relies on a persistent course of conduct rather than a single serious offence to justify deportation, it is of importance to look at the appellant's offending behaviour as a whole. It is the Secretary of State's case that the appellant's offending behaviour escalated and would continue to do so. It would be artificial in such circumstances to consider only the most very recent convictions. We therefore directed that we would admit the whole of the appellant's criminal record when we re-made the decision, in order to obtain a complete picture. The weight to be attached to spent convictions is a very different matter,

but their relevance is the information they throw on the strength of the public interest in deporting the appellant for his most recent offending.

41. We also observe that where persistent criminal conduct is relied on, it is important for the judge to have the full Criminal Record Office print out rather than just a summary of the dates of convictions. The full list assists discovery of when the offending occurred, whether it was in breach of a Community Order, whether the appellant was on bail at the time of the offending, and other data about the sequence of the offending. We pointed out at the hearing that any suggestion that the Data Protection Act restricted disclosure of such information to a court is misconceived.

Other Case Management issues

42. At the error of law hearing it appeared that other information about the appellant's personal and family life and the strength of his connection with his child might be needed, including material in the possession of local social services. We were aware that the appellant relied on a very full report of an independent social worker who had made a home visit to see the appellant with JT.

43. In order to assist in the case management of this appeal we directed there be a consolidated bundle of evidence produced by the appellant no later than 5pm on 5 November 2012. We also directed that both parties inform the Tribunal in writing by 10 am on 6 November 2012:-

i. Which witness they required to attend for cross examination and
ii. Whether any further directions for the production of documents was sought.

We made provision for a 'For Mention' hearing on the 6 November, in order to ensure that the re-making hearing the following week would proceed without difficulty. We expressed the hope that Ms Kiss would retain the conduct of the case on behalf of the Secretary of State given the care she had clearly taken to prepare for it hitherto.

44. By way of the facsimile received by the Tribunal at 10.45am on the 5 November the appellant's solicitors made an application for an extension of time in relation to the direction that they produce a consolidated bundle. They did not indicate that they wished to cross-examine any of the witness' relied upon by the Secretary of State.

45. In response to the directions, the Secretary of State served a witness statement of a Ms Laura Best. The Secretary of State failed, however, to inform the Tribunal in writing which witnesses, of those included in the material before us on the 23 October 2012, she required to attend for cross-examination. At the For Mention hearing Mr Bramble indicated that he had only very recently taken over the file as Ms Kiss was unavailable for reasons which we fully understand. He provided no explanation as to why the

Secretary of State had not complied with the directions of the Tribunal and agreed that the appellant ought to be given a short extension of time in which to file and serve a consolidated bundle of evidence. He indicated that as far as he was aware the Secretary of State did not require the attendance of the appellant's witnesses at the hearing, although by way of caveat he noted that the up-to-date statements of the witnesses had yet to be filed.

46. A consolidated bundle, absent witness statements, was received by the Tribunal on the morning of the 8 November, in compliance with the amended timetable. Shortly thereafter, on the same day, the Tribunal received a further bundle containing (i) witness statements prepared for an earlier hearing before the Upper Tribunal, and (ii) updated witness statements for all but one the appellant's witnesses. There was no updated statement from CT, who is the mother of JT. We were made aware that there was some tension between her and the appellant's current partner JD.

The hearing on 13 November

47. At the outset of the hearing Mr Allan, who now appeared for the Secretary of State, indicated that although the Secretary of State had received the consolidated bundle, she had not received the additional bundle containing the witness statements. Ms Hooper confirmed that she had been instructed that such statements had been served on the Secretary of State by facsimile, for the attention of Ms Kiss.

48. As a consequence we delayed the start of the proceedings to give Mr Allan the opportunity to consider these statements. We note, however, that many of the statements contained within this bundle had previously been filed and served by the appellant for the purposes of use at an earlier hearing before the Upper Tribunal. As detailed above, there were, additionally, short supplementary statements from all but one of the witnesses relied upon by the appellant.

49. Upon the resumption of the hearing Mr Allan indicated that he wished to cross-examine the appellant and all of his witnesses. We directed Mr Allan's attention to the directions of the 23 October, and the failure of the Secretary of State to comply with those directions by informing the Tribunal in writing which witnesses would be required for cross-examination. Mr Allan responded by stating that he had important points to put to the witnesses and that the Secretary of State had not had opportunity, prior to the day of the hearing, to consider the additional witness statements and consequently to know whether there was a need for the witnesses to be cross examined.

50. We rejected Mr Allan's request. The Secretary of State was provided with detailed witness statements from the appellant, and each of his witnesses, several months prior to the hearing of this appeal. In such circumstances, it is clear that the Secretary of State was in a position, at least a week before the hearing, to be able to properly identify which of those witnesses she wished to cross-examine. The Upper Tribunal had by this stage had three

hearings following the grant of permission; the need for expedition and efficient use of court time was obvious. Where either party fails to co-operate with the Tribunal or respond to directions they must expect to bear the consequences of their own failure to properly prepare for the hearing.

51. CT was not present at the hearing, nor was there any need for her to be. If we were to accede to Mr Allan's request to allow her to be cross-examined, it would have necessitated a further adjournment of the appeal. Mr Allan could not rely on the fact that the Secretary of State had not seen all of her evidence until the morning of the hearing.

52. However, given that the other witnesses were present at the hearing and that some of what was said in their statements was new, we indicated that we would allow cross-examination of the appellant, his father and JD, despite the Secretary of State's failure to comply with the directions.

The further evidence

The evidence of the appellant

53. In evidence the appellant adopted the contents of his witness statements as being true and accurate. He was then tendered for cross-examination. In cross-examination he confirmed that he had returned to Nigeria on only one occasion since his arrival in the United Kingdom, for two weeks with his sister and father. He had travelled there in order attend the wedding of a friend of his father's and stayed in a hotel whilst there. He thought that his father had travelled to Nigeria on three occasions in total. He was unaware of any relatives he may have there.

54. The appellant's attention was then drawn to his offending history. He accepted he had made 'big mistakes' in the past and that he had twice been sentenced to terms of imprisonment, although on the first occasion this sentence had been varied on appeal. He thought that he had been 18 or 19 years old when he was last sentenced to a term of imprisonment. He then confirmed that he had been born in 1984 and that he must have been 21 or 22 years old at the time of his imprisonment in 2008. The appellant was then asked when he thought his attitude to offending had changed. He stated that at the time of his son's birth he had gone to college and taken help from probation officers in order to try and 'get off' the drugs. He accepted that he had 'slipped up' a few times since the birth of his son, but asserted that he had stayed out of trouble entirely since 2008 'save for a little bit of trouble a few weeks ago'. He accepted that he had recently been cautioned for possessing cannabis, but stated that he did not use cannabis often.

55. The appellant was then asked a series of questions about his relationship with CT. He stated that his son had been born prematurely at 33 weeks on 24 August 2004, and that he had been in a relationship with CT for approximately one and a half years prior to the birth. He had lived with CT

and her parents prior to the birth and subsequently he, his son and CT had moved into their own accommodation. He had moved out of this family home when his son was aged three or four. He agreed that this would have been in 2008. He had then been in a relationship with someone else, which lasted approximately one year, before he had started his relationship with JD in 2005 or 2006.

56. At this time it was pointed out to the appellant that there were internal inconsistencies in his evidence about the timing of his relationships. The appellant responded by stating that he had 'got a few bits mixed up', and that he knew he had been with JD for seven years because her daughter, TS, was two or three years old when his relationship to JD had begun; she is now nine years old. He further asserted that he thought JT to have been two years old when he [the appellant] had left that family home he had shared with him and CT. He is now required, by the immigration service, to live and sleep at the address he shares with JD and TS. He does not go round to CT's house to see his son. Either his father or brother regularly picks up JT. He [the appellant] sees his son at his father's or brother's house. His father or brother then drops his son back with CT. They also occasionally pick up JT's half-sister. These arrangements have been in place for approximately a year. The only time he has been to CT's house since his release from immigration detention was the occasion on which Ms Christine Brown, an independent social worker, came to the house. He does not go to CT's house because Ms JD does not like him doing so. There is animosity between JD and CT.

57. The appellant continued by stating that that JD is now pregnant with his child. He had initially lived with JD after his release from criminal detention, but he had left JD a couple of months after the hearing before the First-tier Tribunal [approximately August 2010], and returned to live with CT. He had then left CT and returned to live with JD in October 2011.

58. In response to questions from the tribunal the appellant accepted that he had been selling cannabis in 2008 to fund his cocaine habit. He further stated that he had been put on a supervision requirement in 2008 and that he had 'not touched' cocaine since that time. He accepted that when he was arrested in October 2008 he was still addicted to cocaine. He also accepted that his recent caution for possession of cannabis contradicted the assertion made in his witness statement of July 2012 that he was clear of drugs and would remain so. He indicated that he had taken cannabis on a couple of other occasions in the past year because he had felt down and could not sleep.

The evidence of JD

59. JD adopted the contents of her witness statements and was tendered for cross-examination. She stated that she and the appellant had been in a relationship for seven years and he had first moved in with her approximately five or six years ago. She and the appellant had split up for

about a year, and had subsequently ‘got back together last September or October [2011]’.

60. The witness continued her evidence by stating that she and CT are cousins, and that they do not now talk to each other as a result of the appellant’s transfer of affections. She knows JT. Her daughter’s [TS’s] father picks her up at the weekends. This relationship is informal and not regulated by the courts. She is not aware of the appellant having any family members in Nigeria. She is aware that the appellant had recently been arrested for smoking cannabis. The witness then asserted that the appellant is not currently using cocaine. Whilst she could not identify any physical differences in the appellant, his behaviour was markedly different from the time he had used cocaine, notably that he now does not go out socially at all.

The evidence of Mr Ogundimu senior

61. The appellant’s father adopted the contents of his witness statements and was tendered for cross-examination. In cross–examination he confirmed that he had attended the wedding in Nigeria of his late sister’s daughter**.** Since the appellant’s arrival in the United Kingdom he [the appellant] had only visited Nigeria on one occasion. He told us that his niece (whose marriage he had attended in Nigeria), lives in Massachusetts, USA and that she had returned to Nigeria in order to marry there.

62. It was noted by Mr Allan that the witness had stated that he had also returned to his family village in Nigeria. The witness responded by stating that by ‘family village’ he had meant the village where his family were from. The witness further stated that his brothers and sisters had all now passed away, and that he had only an elderly 95 year old aunt living in the family village**.** He agreed that that there were other distant family members living in Nigeria, although he was not asked who these were**.** He confirmed that he had been living in the United Kingdom for 52 years and that he had not kept in contact with people in Nigeria. The witness further confirmed that the appellant now lives with JD.

63. In response to questions from the tribunal, the witness stated that his parents and their siblings had all passed away, save for the 95 year old aunt referred to earlier.

The respondent’s case

64. In his submissions Mr Allan relied on the reasoning set out in the Secretary of State’s letter of the 16 August 2012. He submitted that, as a consequence of the provisions of paragraph A362 of the Immigration Rules, the Tribunal were required to determine the appeal brought on Article 8 grounds on the basis of the rules which are now in force, this being despite the decision under challenge having been made over two and a half years ago.

65. He maintained that the Secretary of State had been correct to conclude that he was a persistent offender and that, consequently, paragraph 398(c) is of application. Reliance was also placed on the fact that the appellant had recently been cautioned for possession of cannabis, and it was asserted that the appellant's evidence that he no longer had a cocaine habit could not be relied upon. It was submitted, in the alternative, that even if the appellant does not currently have a cocaine habit, his previous cannabis drug habit had progressed to a cocaine habit and there was no reason to think that this would not happen again.

66. The tribunal invited Mr Allan to address it on the question of proportionality, in particular in relation to the application of Maslov. In response Mr Allan asserted that the Immigration Rules ought now to be treated as the executive's statement of where the proportionality balance lies in any given individual case and that, as a consequence, there need not be a separate consideration of the Maslov criteria because those criteria had been absorbed within the considerations in paragraph 398. Upon the tribunal attempting to seek justification for this submission, Mr Allan indicated that he would need to take specific instructions. In written submissions from the Secretary of State of the 27 November 2012 it was stated that "The Respondent has carefully considered the broad principles set out in Maslov and other Strasbourg and domestic case law in formulating the new rules."

67. In relation to paragraph 399(a) Mr Allan asserted that given that CT is JT's primary carer she would be able to care for JT and that consequently the appellant could not meet the requirements of paragraph 399(a)(ii)(b). At this stage Ms Hooper indicated that it was accepted that CT was able to care for JT.

68. As to paragraph 399(b), Mr Allan submitted that the appellant had not demonstrated that he is in a subsisting relationship with JD; there being no evidence that they shared accommodation, or that the appellant had been financially maintaining JD. He also reminded the tribunal that the appellant had been unable to give a consistent timeline as to when the relationship with JD had begun or as to when they had started living together. He asserted that, in any event, the appellant had not established this relationship was genuine. He reminded the tribunal that the appellant had admitted living with CT in 2010 purely to bolster his position with the immigration authorities. It was submitted, in the alternative, that there were no insurmountable obstacles to JD living in Nigeria.

69. In relation to paragraph 399A Mr Allan accepted that the appellant had lived in the United Kingdom for 20 years as required by the rule but asserted that he could not establish that he has no ties to Nigeria, given that he has an aunt, and other unspecified relatives, living there and that he has cultural ties to the country. He asserted that the immigration rule was phrased so as to preclude an applicant who has any ties to the country to

which he is being deported, irrespective of how limited those ties were and whether they could be seen to be effective ties.

70. The tribunal invited Mr Allan to make submissions on the issue of whether the Secretary of State’s decision was in accordance with the law (including the United Kingdom and Strasbourg jurisprudence in relation to Article 8). In response he stated that the immigration rules are the executive’s perception of where the balance lies in Article 8 cases and that if those rules were satisfied then this appellant ought to succeed in his appeal. We postulated whether this would still be the case even if, on a hypothetical scenario, the appellant was a cocaine supplier. Mr Allan stated that it would, as long as the appellant had not previously been convicted of an offence for which he had received a sentence of imprisonment of more than four years. He re-iterated that it was the Secretary of State’s submission that a consideration of the immigration rules was, save for in exceptional cases, determinative for Article 8 purposes.

The appellant’s case

71. In response Ms Hooper submitted that the appellant should not be treated as a persistent offender and that, although he had now admitted using cannabis on a few occasions in the past year, it would not be in the public interest to deport him. She asserted that even if the appellant could be described as a persistent offender, the aim of deporting persistent offenders is to stop a further escalation in their offending. She noted that the escalation in the appellant’s offending had dissipated since 2008.

72. In relation to the issue of whether the appellant is still a cocaine user, she submitted that he had offered to take a drug test in order prove his case in this regard and that, in such circumstances, the evidence that he no longer takes cocaine should be accepted.

73. As to paragraph 399(b) of the Immigration Rules, Ms Hooper asserted that the appellant is in a genuine and subsisting relationship with JD. She reminded the tribunal that Ms JD is now pregnant with the appellant’s child. She further asserted that, although the appellant’s evidence as to the dates of his relationship with JD had not been clear, it was plain when looking at his evidence as a whole that he was ‘hopeless with dates’. She submitted that there were insurmountable obstacles to JD moving to, and living in, Nigeria with the appellant, in particular the fact that she has a British citizen daughter who has regular contact with her father.

74. In relation to paragraph 399A it was asserted that the appellant does not have ‘ties’ to Nigeria of a type precluded by paragraph 399A(a) of the Rules.

75. In conclusion, Ms Hooper submitted that the appellant meets the requirements of paragraphs 399(b) and 399A of HC 395 and that his appeal ought to be allowed.

Further written submissions

76. In the course of the hearing, and in the light of (i) the importance he attached to the new immigration rules as indicating how the Article 8 balance should apply and (ii) whether the rules should be interpreted so as to reflect the criteria established by the European Court in such cases as Maslov and the Supreme Court in such cases as ZH Tanzania [2011] UKSC 4, we asked Mr Allan:

i. Whether the term 'ties' in paragraph 399A of the Immigration Rules ought to be interpreted consistently with the decision of the ECtHR in Maslov?;

ii. Whether paragraph 399(a) of the Immigration Rules excludes cases where another family member is able to care for person D's child [where person D is the subject of deportation action] but where person D provides additional care which the child needs?

77. By way of written submissions dated 27 November 2012 we were informed:-

i. 'No ties (including social, cultural or family)' in paragraph 399A means "[t]aking account of their background as a whole, the person has so little connection with that country as to mean that the consequences for them establishing a private life there would be unjustifiably harsh". We were referred to the UKBA Guidance (set out in Chapter 13 of the Immigration Directorate Instructions) on the concept of "no ties", which indicates that a decision maker "should consider whether the person has sufficient knowledge of or connections to the country of origin to be able to form an adequate private life in that country".

ii. As to Paragraph 399(a)(i)(b), "[a]ssessing whether a parent's involvement is 'needed', whilst appropriate in family law proceedings, would create a new and inappropriate test for determining Article 8 considerations in deportation cases… The person facing deportation can succeed under these rules where they can show no alternative family member is able to [provide adequate] care for the child… the rules…reflect the possibility that…separation [between parent and child] may not be in the child's best interest. "

iii. The wording of paragraph 398 "[r]eflects the fact that the Rules cannot address the specific circumstances of all cases and that deportation will not be the correct course where the person facing deportation can show the impact of deportation will be unjustifiably harsh even having regard to the public interest in deporting foreign criminals".

Legal Background

78. Sections 3(5) and 3(6) of the Immigration Act 1971 set out the three circumstances in which a person is liable to deportation, only one of which is material in this appeal; where the Secretary of State deems a person's deportation conducive to the public good. Section 5(1) of the 1971 Act provides the Secretary of State with discretion to make a deportation order against a person who is liable to deportation.

79. The immigration rules in force as at the date of the Secretary of State's decision to make the deportation order in this case (8 April 2010) stated as follows:

> "364. Subject to paragraph 380 [which is not relevant for the purposes of this appeal], while each case will be considered on its merits, where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Secretary of State will consider all relevant factors in considering whether the presumption is outweighed in any particular case, although it will only be in exceptional circumstances that the public interest in deportation will be outweighed in a case where it would not be contrary to the Human Rights Convention and the Convention and Protocol relating to the Status of Refugees to deport. The aim is an exercise of the power of deportation which is consistent and fair as between one person and another, although one case will rarely be identical with another in all material respects…"

80. From the 9 July 2012 onwards the Immigration Rules were substantially amended by HC 194 with the intention of creating a new framework for the consideration of claims based on Article 8 ECHR grounds. Paragraph 364 was deleted from the Rules and the following relevant 'new' rules were incorporated:

> "A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 9 July 2012 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.
>
> 362. A deportation order requires the subject to leave the United Kingdom and authorises his detention until he is removed. It also prohibits him from re-entering the country for as long as it is in force and invalidates any leave to enter or remain in the United Kingdom given him before the Order is made or while it is in force.
>
> 363. The circumstances in which a person is liable to deportation include:
>
> (i) where the Secretary of State deems the person's deportation to be conducive to the public good;
>
> …
>
> 397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the

Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would not be reasonable to expect the child to leave the UK; and
(b) there is no other family member who is able to care for the child in the UK; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK, or in the UK with refugee leave or humanitarian protection, and

(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision
(discounting any period of imprisonment); and

(ii) there are insurmountable obstacles to family life with that partner continuing outside the UK.

> 399A. This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or
>
> (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

Relevance of the 'new' immigration rules to our decision

81. The Secretary of State submits that the tribunal is required to determine the issue of whether the appellant's deportation would lead to a breach of Article 8 ECHR by reference principally to whether he meets the requirements of the 'new' rules. It was asserted that, if he does meet the requirements of those rules, then his appeal ought to be allowed because those rules reflect where the public interest lies; however, if he does not meet the requirements of the new rules then his appeal ought to be dismissed.

82. The application of the new rules to appeals against decisions of the Secretary of State made prior to the 9 July 2012 has recently been considered by the Upper Tribunal [Upper Tribunal Judges Storey and Coker] in the reported decision of MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC). The tribunal was not persuaded that the new rules had retrospective effect such that they were of application to decisions of the Secretary of State taken prior to 9 July 2012. It further concluded that the new rules were not conclusive of the Article 8 issue; there were two questions, (i) whether the decision is in accordance with the Rules and (ii) whether it is accordance with the law as interpreted by the senior courts whose decisions are binding. The tribunal noted a number of respects in which the new rules appeared to apply tests that have been disapproved of by the courts.

83. In the light of the submissions we have received we propose to analyse the case on the factual findings we have reached, both under the provision of the new rules and the law applicable at the time of the original decision. We agree with the panel's decision in MF that a human rights claim that should have succeeded in 2010 applying the law and policy then applicable should not be defeated by new provisions that are in many respects considerably more restrictive.

84. However, we recognise that the issue may proceed on appeal to the Court of Appeal. Further, in principle it may be open to the SSHD to make a

fresh decision to deport applying the new rules. Here the substantial delay in this appeal coming before the Upper Tribunal is the responsibility of the appellant. We therefore propose to examine the claim by reference to the new Immigration Rules as well as the principles of law binding on us concerned with the evaluation of Article 8 cases.

Our conclusions

85. There is no dispute as to the factual foundation relevant to our consideration of the exercise of the discretion as to whether the appellant's deportation would be conducive to the public good. We have set out the appellant's criminal convictions in paragraphs two and three above, save for one offence, which was committed just a few weeks prior to the hearing before the Upper Tribunal.

86. On the 8 October 2012 the appellant was arrested for possession of Class B drugs, namely cannabis. He received a caution. There is no suggestion that the cannabis was for anything other than his personal use. During his evidence the appellant also accepted that he had used cannabis on a couple of other occasions during the past year. Although there was no police involvement on these occasions we take such acts into account when determining whether deportation of the appellant would be conducive to the public good.

87. As of the date of the immigration decision the Secretary of State's policy on this issue was set out in the January 2010 update to Chapters 11 to 15 of the Enforcement Instructions and Guidance. It is now contained within Chapter 13 of the Immigration Directorate Instructions, titled 'Criminality Guidance for Article 8 ECHR cases'. We have had full regard to the Secretary of State's 'policy' when coming to our conclusions.

88. The appellant committed a significant number of offences in the nine years up to and including 2008. Amongst such offences are those involving the use of drugs, including class A drugs, and one involving the supply of class C drugs. His offending could, certainly up until 2008, be considered to be persistent, and the seriousness of his offending escalated, with the offence committed in October 2008 being serious. There can also be no doubt that dealing in class B drugs to fund a cocaine addiction causes harm to society.

89. Looking at the appellant's circumstances as a whole we agree that, as a first step in the decision making process, the Secretary of State was entitled to conclude in 2010 that his deportation would be conducive to the public good. This means that the appellant can be lawfully deported subject to the human rights claim.

90. In 2010 he had resided in the United Kingdom for 19 years and since the age of six. Weighty reasons were required to justify his deportation in such

circumstances. Further, he could point out that he remained drug free for two years at that stage. Had he remained offence free up to the date of the hearing before us, a further two years, that would have been a powerful factor in his favour. His admitted use of cannabis detracts somewhat against that.

91. At the time of the First-tier hearing the appellant had not explained his personal circumstances accurately to the Secretary of State, and had not attended the hearing. We now have a much fuller understanding of his personal life over the past few years.

92. In the light of the revised decision made in the summer of 2012 we will first examine his case from the perspective of the new rules.

Application of the new rules to the appellant

93. The appellant's circumstances are such that paragraph 398(c) of the Rules is of application. He has not been convicted of an offence for which he was sentenced to a period of imprisonment of at least 12 months and thus does not fall within the regime of automatic deportation, but his deportation is nevertheless conducive to the public good as a persistent offender or someone the Secretary of State was entitled to conclude has caused serious harm by drug dealing.

94. As a consequence, consideration needs to be given to whether the appellant is entitled to the benefit of paragraphs 399(a), 399(b) or 399A and, if he is not, whether he has established that there are exceptional circumstances that entitle him to remain (paragraph 398).

95. Although there is no dispute that the appellant's child, JT, is a British citizen, or that the appellant has a genuine and subsisting relationship with this child, Ms Hooper accepted that the appellant could not meet the requirements of paragraph 399(a) of the Rules as a consequence of the fact that CT 'is able to care for the child'. We were concerned as to whether the new rules should be read literally so as to exclude any appellant from being granted leave to remain on Article 8 grounds under this rule if there was any person able to care for the child, irrespective of whether the child's welfare and best interests required regular contact with the parent who faced removal. We accordingly asked for written assistance on this issue from the Secretary of State; a summary of the question asked and answer received being set out in paragraphs 76 and 77 above.

96. Having done so we agree that the terms of paragraph 399(a) of the Rules do not provide for a consideration of where the best interests of a child lies, and Ms Hooper was correct to concede that the appellant could not succeed under this limb. However, when we come below to make our overall Article 8 assessment of the proportionality of the interference with the family life of the remaining family members we propose to attach little weight to this aspect of the rules, as we consider that its terms are in clear conflict with

the respondent's duty under Article 3 UN Convention on the Rights of the Child 1989 to make the child's welfare and best interest a primary, albeit not the paramount, consideration. As is well known this duty has been imported into Article 8 considerations by case law, notably ZH Tanzania [2011] UKSC 4, as well as section 55 of the Borders, Citizenship and Immigration Act 2009. We doubt whether it is in any child's best interests to lose the contact and support with a caring and devoted parent simply because someone else can be found to care for them.

97. We now turn to paragraph 399(b) of the Rules. We accept, contrary to the submissions of Mr Allan, that the appellant is in a genuine and subsisting relationship with Ms JD. Whilst Mr Allan correctly identified the fact that appellant's evidence in relation to the year when his relationship with JD began contained a number of inconsistencies, the same was true of much of his evidence regarding dates and times of events that had occurred in his life. At one point, immediately after stating that he had been born in 1984, he gave evidence that he had been 21 years old in 2008.

98. The history of the appellant's relationship with JD was confirmed in the written and oral evidence of JD. She stated that she is currently living with the appellant, and that she has done so since October 2011, although the relationship is older in origin and precedes the decision to deport. JD's evidence, which was tested in cross-examination, and was given clearly, consistently and with precision throughout. We found her to be an honest and truthful witness.

99. We further note that it was the appellant's case that he obtained a variation of his bail conditions from the Secretary of State in order that he may live with JD, rather than with his father whose address he was originally bailed to. Despite having been aware of this assertion for sometime, the Secretary of State has not sought to put forward any evidence to contradict it. If the appellant's evidence in this regard were not accurate, it ought to have been a simple matter for the Secretary of State to disprove it.

100. When coming to our conclusions as to the nature of the relationship between the appellant and JD we found the evidence of Ms Laura Best, produced by the Secretary of State for the purposes of this appeal, to be of some significance. Ms Best is a Social Worker with the London Borough of Bromley Safeguarding and Care Planning Team. She is the allocated Social Worker for JD's daughter, TS. TS has been supported as a Child in Need as a consequence of historical domestic violence involving her natural parents.

101. At paragraph 1.4 of her statement of the 29 October 2012 Ms Best states [the anonymisation being ours]:

> "During my experience working with the family [the appellant] has a positive relationship with [TS] and is a supportive partner to [JD]."

102. We also have before us evidence from the South London Healthcare NHS Trust confirming that JD is currently pregnant, having conceived in, or

around, September 2012. The evidence that the appellant is the father of this child was not the subject of challenge at the hearing.

103. Looking at the evidence as a whole we accept that the appellant and JD first entered into a relationship in approximately 2006, and that the appellant lived with JD, save for the periods of time he spent in prison and immigration detention, until June 2010. At this time the appellant moved back to live with CT. He accepts that he did so in an attempt improve his position with the immigration authorities. He eventually, however, moved back to live with JD in October 2011, shortly after he had been released on bail from immigration detention.

104. We do not accept Mr Allan's contention that the appellant is engaging in the relationship with JD purely for the purpose of enhancing his prospects of remaining in the United Kingdom. The appellant accepts that when he left JD in June 2010 he did so in the belief that by living in a family unit with CT, and his British citizen child, his prospects of remaining in the United Kingdom would be enhanced. Having done so, it is difficult to understand on what basis he could have thought that by leaving CT in October 2011, prior to JD's pregnancy, his prospects of remaining here would be enhanced still further. In any event, we are quite content that the evidence before us discloses, to the balance of probabilities, that the appellant has a genuine affection for JD and that he left CT to move back in with JD as a consequence of this affection.

105. The Secretary of State accepts that JD is a British citizen and that the appellant has lived in the United Kingdom with valid leave continuously for at least 15 years immediately preceding the date of the immigration decision (excluding any period of imprisonment) [paragraph 32 of the Secretary of State's reasons letter of 16 August 2012].

106. We finally, therefore, turn to the requirements of paragraph 399(b)(ii) of the rule; whether there are insurmountable obstacles to family life with JD continuing outside the United Kingdom.

107. In her refusal letter the Secretary of State fails to pay any regard to the circumstances of TS when considering this issue. TS is a nine year old British citizen (and therefore a citizen of the European Union). She is the daughter of JD. The fact that her mother, JD, is her primary carer is corroborated by Ms Best's statement, and we accept that this is so.

108. In <u>Sanade and others (British children - Zambrano – Dereci)</u> [2012] UKUT 00048 (IAC) the Upper Tribunal [Blake P and UTJ Jordan] asked the following question of the Secretary of State (recorded at paragraph 93 of the decision):

> "Does the respondent agree that in a case where a non-national parent is being removed and claims it is a violation of that person's human rights to be separated from a child with whom he presently enjoys family life as an engaged parent, that a consequence of the CJEU's judgment is that it

is not open to the respondent to submit that an interference can be avoided because it is reasonable to expect the child (and presumably any other parent/carer who is not facing deportation/removal) to join the appellant in the country of origin? If not why not?"

109. Mr Devereux, at that time the Assistant Director UKBA and Head of European Operation Policy, responded as follows:

> "We do accept, however, that in a case where a third country national is unable to claim a right to reside on the basis set out above it will not logically be possible, when assessing the compatibility of their removal or deportation with the ECHR to argue that any interference with Article 8 rights could be avoided by the family unit moving to a country which is outside of the EU".

110. Having considered the Secretary of State's response the Tribunal concluded (paragraph 95):

> "This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so…"

111. The Tribunal further clarified, when looking at the particulars facts of the case before it, that:

> "…as British citizens, Mrs Sanade and her children are citizens of the European Union and as such entitled to reside in the Union. The respondent properly accepts that they cannot be required to leave the Union as a matter of law…"

112. In the case of Izuazu [2013] UKUT 00045 (IAC) the Secretary of State has confirmed that the response continues to apply, subject to a clarification that it only extends to the British citizen spouse or partner where there is in addition a British citizen child. This approach is consistent with the recent decisions of the Court of Appeal in DH (Jamaica) [2012] EWCA Civ 1736, and of the CJEU in O, S -v- Maahanmuuttovirasto [C -356/11 and 357/11: 6 December 2012].

113. Thus, in this appeal, TS cannot be required to leave the European Union to join the appellant in Africa. She needs her mother in order to exercise her residence rights in the Union. To require her mother to join the appellant in Nigeria (a country with which she has no ties of any sort and has never visited) is either to require the child to leave the European Union, or the mother to leave the child. In the latter eventuality there is no evidence of anyone else able to adequately care for the child and so the first issue would be reopened. It is certainly unreasonable to expect either TS or JD to relocate to Nigeria. In our judgment the obstacles to the mother relocating when she has to look after her young child in the United Kingdom are insurmountable, whatever the term means.

114. For the above reasons we conclude that the appellant meets the requirements of paragraph 399(b)(ii) and consequently that he meets all of the requirements of paragraph 399(b) of the Immigration Rules.

115. In case we are wrong in our conclusions in relation to the paragraph 399(b) and, in any event, we go on and consider whether the appellant meets the requirements of paragraph 399A of the Rules.

116. The Secretary of State accepts, in paragraph 36(a) of her reasons letter of the 16 August 2012, that the appellant has lived continuously in the United Kingdom for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment). It is not accepted, however, that the appellant has demonstrated that he has ‘no ties’ to Nigeria.

117. The consistent evidence of the witnesses before the tribunal, which we accept, is that the appellant has only once visited Nigeria since his arrival in the United Kingdom in 1991. We have before us copies of all of the passports held by the appellant since his arrival here. These provide support for his evidence, showing that he made a visit to Nigeria between 8 August 2006 and 18 August 2006.

118. We accept the evidence of the appellant’s father as honest and accurate. He told us that he, the appellant and the appellant’s United Kingdom based sibling, stayed in a hotel during this visit, and that this trip was made in order to attend the wedding of the appellant’s paternal cousin who was, at the time and still is, living in the USA. This evidence was not challenged by Mr Allan and we accept it. The appellant’s father also stated (i) that he has a 95 year old aunt, and other extended family members, living in Nigeria (ii) that his, and his parents’, siblings, save for the aforementioned aunt, have all passed away (iii) that he has been living in the UK for 52 years and (iv) that he has not kept in contact with ‘people’ in Nigeria since his arrival here.

119. Mr Allan seeks to persuade us that the meaning of the words ‘no ties (social, cultural or family)’ in paragraph 399A of the Immigration Rules is such that the rule precludes reliance on it by those persons with even the most minimal of links to the country of proposed removal.

120. In approaching our consideration of the meaning of this rule we remind ourselves of the guidance given by Lord Hoffmann in Odelola v Secretary of State for the Home Department [2009] 1 WLR 1230:

> "[4] Like any other question of construction, this [whether a rule change applies to all undetermined applications or only to subsequent applications] depends upon the language of the rule, construed against the relevant background. That involves a consideration of the immigration rules as a whole and the function which they serve in the administration of immigration policy."

121. In Mahad v ECO [2009] UKSC 16, Lord Brown, when considering the question of construction of the Immigration Rules, said as follows:

> “[10] The rules are not to be construed with all the strictness applicable to the construction of a statute or a statutory instrument but, instead, sensibly according the natural and ordinary meaning of the words used, recognising that they are statements of the Secretary of State’s administrative policy. The respondent’s counsel readily accepted that what she meant in her written case by the proposition “the question of interpretation is…what the Secretary of State intended his policy to be” was that the court’s task is to discover from words used in the Rules what the Secretary of State must be taken to have intended…that intention is to be discerned objectively from the language used, not divined by reference to supposed policy considerations. Still less is the Secretary of State’s intention to be discovered from the Immigration Directorates Instructions”

122. We take note of the fact that the use of the phrase “no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK” is not exclusive to paragraph 399A of the Rules; it is also used in paragraph 276 ADE, in the context of the requirements to met by an applicant for leave to remain based on private life in the United Kingdom when such person has lived in the United Kingdom for less than 20 years.

123. The natural and ordinary meaning of the word ‘ties’ imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person’s nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless.

124. We recognise that the text under the rules is an exacting one. Consideration of whether a person has ‘no ties’ to such country must involve a rounded assessment of all the relevant circumstances and is not to be limited to ‘social, cultural and family’ circumstances. Nevertheless, we are satisfied that the appellant has no ties with Nigeria. He is a stranger to the country, the people, and the way of life. His father may have ties but they are not ties of the appellant or any ties that could result in support to the appellant in the event of his return there. Unsurprisingly, given the length of the appellant’s residence here, all of his ties are with the United Kingdom. Consequently the appellant has so little connection with Nigeria so as to mean that the consequences for him in establishing private life there at the age of 28, after 22 years residence in the United Kingdom, would be ‘unjustifiably harsh’.

125. Whilst each case turns on its own facts, circumstances relevant to the assessment of whether a person has ties to the country to which they would

have to go if they were required to leave the United Kingdom must include, but are not limited to: the length of time a person has spent in the country to which he would have to go if he were required to leave the United Kingdom, the age that the person left that country, the exposure that person has had to the cultural norms of that country, whether that person speaks the language of the country, the extent of the family and friends that person has in the country to which he is being deported or removed and the quality of the relationships that person has with those friends and family members.

126. Thus, for the reasons we have given above, if we were deciding this appeal solely in accordance with the provisions of the new rules, as we were invited to do by Mr Allen, we would allow the appeal on the two bases we have indicated.

Application of Article 8 to the appellant

127. However, we go on to make a conventional Article 8 assessment.

128. It is plain, from our conclusions above, that in addition to his private life the appellant has established a genuine family life in the United Kingdom with his son JT by CT, and in his relations with JD and her daughter. The severity of the interference with his private and family life as a consequence of his deportation is such that Article 8 is engaged.

129. It is well established that for an interference with a right protected under Article 8(1) to be necessary in a democratic society, it must be proportionate to the legitimate aim pursued. The legitimate aim in the present case is prevention of crime and disorder.

130. We then turn to the issue of proportionality. In doing so we remind ourselves that the weight the executive attaches to the public interest side of the balancing exercise can largely be gleaned from the new rules. When coming to our decision we have taken full account of appellant's criminal history at the date of the original decision to deport, and his subsequent conduct up to the date of this decision.

131. We have also considered and applied the principles set out in the decisions of the Court of Appeal in N (Kenya) [2004] EWCA Civ 1094, OH Serbia [2008] EWCA Civ 694 and RU (Bangladesh) [2011] EWCA Civ 651; weighing in the balance the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances one consequence for them may well be deportation. We have further placed in the balance the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.

132. In the light of his youth on arrival and his length of residence here we ask the central question posed by Maslov, whether there are weighty reasons to

justify his deportation despite his length of residence and the family life he has established with his child, step child and partner in the UK. This private and family life was established when the appellant was lawfully resident with indefinite leave to remain and substantial weight should therefore be attached to it.

133. For the reasons we have given above, it is not reasonable to require the appellant's British citizen partner, or her child, to move to Nigeria. It is also accepted by the Secretary of State that it would not be reasonable to require the appellant's child to move to Nigeria.

134. The appellant's deportation would render it unlawful for him to return to this country whilst the deportation order is extant. As a consequence, the appellant's deportation would likely result in him being separated from his family for a considerable period of time, and by this we mean ten years or longer, save for visits by the family to Nigeria and indirect forms of communication.

135. By section 55 of the Borders, Citizenship and Immigration Act 2009 we are obliged to treat the best interests of the appellant's child and his step child, TS, as a primary consideration. In relation to the appellant's son JT we place weight on the report from the independent social worker, Christine Brown. Having done so we find that it is in the best interests of the appellant's son that the appellant remain in the United Kingdom. Ms Brown concludes that the appellant currently provides much of his son's positive self-image and that he is a facilitator for his son's social network being established and maintained away from the school environment. This, it is said, is of some importance because the appellant's son's childhood progression has been hindered. Ms Brown further concludes that the loss of the appellant would compromise his son's wellbeing.

136. As to TS, we note that the appellant has lived in the same household as her for over half of her life. Her Social Worker has indicated that the appellant has a positive relationship with TS, and we accept JD's evidence that that the appellant has a close relationship with TS and plays an active role in her care.

137. A central concern of ours has been whether the appellant has remained addicted to crack cocaine. That addiction led him to engage in serious criminal conduct in the past and would pose an unacceptable risk to the public in the future. In these circumstances we would not take his unsupported testimony as determinative on the issue. We have however also had the benefit of the evidence of JD, whom we found to be an honest, straightforward and reliable witness. We accept that she would have been aware if the appellant had resorted to cocaine use and we are satisfied that he has not.

138. The appellant's case would have been considerably strengthened had he remained free of all criminal offending since his release from a custodial

sentence. Unfortunately he has smoked cannabis on his frank admission on more than one occasion in the recent past. We do not consider that such conduct suggests a likely resumption of the use class A drugs or that he would commit unrelated offences to support a drug habit. Looking at the evidence as a whole we do not consider that this conduct, when taken together with his criminal history, justifies interference with the appellant's substantial private and family life.

139. For these reasons we conclude that deportation of the appellant would not be proportionate to the legitimate aim. He is not now persistently offending, and the addiction that led him to commit the serious offence in 2008 has been addressed. He must realise that if he were to take class A drugs again, deal in drugs or commit any offence of equivalent seriousness or a sequence of lesser serious offences, then the assessment would be different, notwithstanding his genuine family life with his partner and child.

140. However on the evidence before us, we conclude that the deportation would be unlawful under section 6 Human Rights Act 1998 and accordingly not in accordance with the law within the meaning of the Nationality, Asylum and Immigration Act 2002.

Decision

The decision of the First-tier Tribunal has already been set aside. We re-make the decision allowing the appellant's appeal. The decision to deport the appellant to Nigeria is neither in accordance with paragraphs 399(a) and 399A of the Immigration Rules, nor in accordance with the law. This is a decision of the panel.

Signed: M O'Connor

A Judge of the Upper Tribunal
Date: 23 January 2013