Upper Tribunal
(Immigration and Asylum Chamber)

Farquharson (removal – proof of conduct) [2013] UKUT 00146(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 26 February 2013	.....

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE CLIVE LANE

SIR JEFFREY JAMES KBE CMG

Between

LINCOLN FARQUHARSON

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

(1) Where the respondent relies on allegations of conduct in proceedings for removal, the same principles apply as to proof of conduct and the assessment of risk to the public, as in deportation cases: Bah [2012] UKUT 196 (IAC) etc applicable.

(2) A criminal charge that has not resulted in a conviction is not a criminal record; but the acts that led to the charge may be established as conduct.

(3) If the respondent seeks to establish the conduct by reference to the contents of police CRIS reports, the relevant documents should be produced, rather than a bare witness statement referring to them.

(4) The material relied on must be supplied to the appellant in good time to prepare for the appeal.

(5) The judge has a duty to ensure a fair hearing is obtained by affording the appellant sufficient time to study the documents and respond.

(6) Where the appellant is in detention and faces a serious allegation of conduct, it is in the interests of justice that legal aid is made available.

Representation :

For the Appellant: Howard Cheng of Duncan Lewis, Solicitors

For the Respondent: Mr K. Norton, Senior Home Office Presenting Officer

Order: the names and identities of any of the complainants referred to below are not to be disclosed in connection with any report of these proceedings

DETERMINATION AND REASONS

Introduction

1.
On 22 January 2013 a differently constituted panel of the Upper Tribunal decided to adjourn this appeal from a decision of First-tier Tribunal Judge Clayton in order for the appellant to have a further opportunity to obtain legal representation, consider the documentary evidence provided by the respondent and submit any evidence and witness statements on which he intended to rely. We refer to the Ruling and Directions on 23 January 2013 (attached as Annex A) for the history of this appeal and the error of law relied on.

2.
The Tribunal indicated (at [20] (a)) that it was minded to conclude that Judge Clayton's decision of 22 March 2012 should be set aside because the appellant had not had a fair opportunity to respond to the case of the Secretary of State. A strict time table was set for filing further evidence and it was indicated that a further adjournment of this appeal was highly improbable.

3.
At the hearing on 26 February the appellant was represented by new solicitors. We are indebted to them for preparing the case within a constrained time scale. It is extremely important that claimants who are detained and facing removal from the United Kingdom are able to access legal representation to present an Article 8 appeal, particularly, as in the present case, where they face serious allegations relating to their conduct in the United Kingdom. In compliance with the directions previously issued, the appellant produced a witness statement from himself, his mother, step-father and two half brothers, to which we will refer in due course.

4.
Mr Cheng also produced a short skeleton argument, most of which was directed to whether there had been an error of law. We clarified with Mr. Norton that no submission was to be made to us that the First-tier hearing was fair and accordingly as envisaged in the previous directions we found that the refusal to adjourn the hearing in February 2012 was unfair and a material error of law. As further envisaged in the earlier directions, the Tribunal indicated that it would re-make the decision on appeal for itself in the light of the evidence that had now been tendered before us.

5.
At the outset of the appeal, Mr. Cheng sought a further adjournment in order to obtain medical reports on the appellant's mother. We refused the application but received in evidence a helpful letter from her GP dated 19 December 2011 outlining her extensive medical history from 1990.

6.
For the Secretary of State, Mr Norton relied on a 337 page bundle of edited CRIS reports (Crime Recording Information System) that had not been tendered before Judge Clayton and the witness statement of DC Mahmood compiled from those reports that had been served on the appellant on the same day of the hearing below.

7.

Mr Norton explained that the Secretary of State abandoned any reliance on allegations contained in the decision letter of 28 October 2011 paragraph 7 under the sub heading “Reports of Assaults” other than the first entry, relating to the appellant’s arrest on suspicion of having committed assault occasioning grievous bodily harm on his then partner in 2004. The allegations abandoned were not supported by information in DC Mahmood’s statement or entries in the CRIS reports. Mr Norton also abandoned the allegation at page one of DC Mahmood’s statement that “intelligence indicates FARQUHARSON is a regular class A drug user” as no supporting data from intelligence logs had been provided. We entirely dismiss those matters from our consideration. Further Mr Norton submitted that the six incidents supported by documentary evidence on which reliance was placed by the Secretary of State were not adduced as evidence of “previous criminal record” as the decision letter suggested but rather as material evidence under limb (iv) of rule 395 C “Personal history, including character, conduct and employment record”. DC Mahmood was tendered for cross examination.

8.
The appellant supplemented his recent statement and was cross-examined; the appellant’s mother and step brother Stephen Bennett were tendered for examination. The material parts of their evidence will be considered further below. Mr Cheng then applied to call a witness, Yvonne Griffiths, who had not made a statement in accordance with the directions we issued. Having seen a letter from her, identifying what she could contribute to the appeal, we refused the application. She was the appellant’s aunt. She had no new information to contribute to the Article 8 appeal. In her letter she referred to the murder of her son in Jamaica after his removal from the United Kingdom. This event was also mentioned by other witnesses. It has never formed the basis of a claim by the appellant to remain, and could not credibly do so in light of the fact that Jamaica is considered a safe country of origin (Nationality, Immigration and Asylum Act 2002 s. 94(4)(n)), albeit prone to violence in a number of its urban areas.

9.
With these preliminary observations, we will set out our determination in the following way:

a.
The evidence relating to private and family life

b.
The evidence relating to the six incidents.

c.
Application of the facts to the Immigration Rules and the Article 8 issues

d.
Conclusions.

Private and family life

10.
The appellant is a national of Jamaica. His date of birth has now been clarified as being 7 July 1966 as opposed to 7 November or any other variations that have appeared from time to time in the documentation before us. His mother was aged 15 at the time she gave birth to him. She raised him as a single parent in Jamaica until she came to the United Kingdom in about 1984 when the appellant would have been about 18. The appellant lived with his grandmother in her property in Jamaica until

she came to the United Kingdom in 1986. At some time thereafter, we were informed that the family property was sold.

11.
The appellant's mother married Kenneth Bennett (born in Jamaica, February 1941) and is now known as Joanne Bennett. She has had two children by Mr Bennett: Stephen born 1986 and Jonathan born 1987. They are all British nationals by birth or application. This family unit live together at [address] in London SW4, although Stephen Bennett told us that having completed his university education he is thinking of moving out of the family home shortly as is his younger brother.

12.
Other family members of the appellant in the United Kingdom include his sisters, who are in employment and live in households of their own and who have not made statements; his great uncle, who is very elderly, frail and lives alone in a flat in Battersea; and two aunts, including Yvonne Griffiths whose son was murdered in Jamaica in 2007. His grandmother lived in separate accommodation in the United Kingdom until her death in April 2012.

13.
Little is known about the appellant's life in Jamaica from 1986 when his grandmother came to the United Kingdom and November 1999 when he came aged 33. His statement makes no mention of where he was living and what he was doing, other than to confirm that he has a single conviction of possession of cannabis for which he was fined in 1994. Mrs Bennett believed her son was living with friends after the family home was sold. Jonathan Bennett's witness statement refers to "Lincoln has barely much family in Jamaica". Mrs Bennett was not able to help about precisely what wider family there was in Jamaica, although she acknowledged that there were 'lots of Hutchinsons', which we understand to be her maiden name, and the broader family of which she formed a part. She does not maintain relations with the appellant's father. She last visited Jamaica in 2011 to take her elderly mother back to her homeland for a final visit before her death.

14.
The appellant confirmed that his account given to Judge Clayton of his movements after his arrival in the United Kingdom was accurate. From this it appears that after arrival in the United Kingdom as a visitor in November 1999, he lived with his mother and the rest of her family at the address mentioned in [11] above for eight months before moving out to start college in East London. He was given leave to remain to study until October 2002 but did not complete his studies. He has remained without leave thereafter. He told the judge that from October 2002 to May 2010 he lived with his great uncle in Battersea and helped look after him. From the evidence relating to the allegations it seems more probable that he started living with his great uncle after 2004. He visited his other family members and helped out with the care of his grandmother. His half brothers regard him as important personality in their family.

15.
Apart from some building work that he performed when a student, and some pocket money given by his grandmother, uncle and mother for helping out in domestic tasks he claims never to have worked and has no known source of income.

16.
Between 2006 and 2011 he has been remanded in custody on suspicion of a number of different offences of rape. Although precise dates are not available these periods appear to be: March 2006 to September 2006; December 2006 to October 2007; May 2010 to September 2010 and April 2011 to

October 2011. Since October 2011 he has been held in immigration detention at Dover and his mother travels to visit him weekly. There is frequent telephone contact between them.

17.
Mrs Bennett's medical letter tendered at the hearing demonstrates that since 1990 she has suffered from a variety of medical conditions including type 2 diabetes, hypertension, osteoarthritis, retinal lesions, obesity, ventricular hypertrophy, vitamin D deficiency, ischaemic heart disease, abnormal angio-cardiography and glaucoma. She is prescribed a wide variety of medication. She used to work at St Thomas's Hospital until December 2010. As she gets older she requires increasing assistance with shopping, laundering, and taking her medication. Her husband is also not in the best of health and has had a stroke recently. We note that Mr Bennett's letter of 17 February 2013 submitted to us states:

" From time to time Lincoln would drop by the house to assist his mother with daily duties and support her with mobility. Lincoln would also come to the house to visit my two sons…and spend quality time bonding with his brothers. Lincoln should not be removed from the country as he is the only help to my wife and I am not in the greatest of health myself to assist her on day to day duties".

18.
We accept that Mrs Bennett has close bonds with her eldest son, and wants him to remain in the United Kingdom during her retirement and to assist in the event of deterioration of her medical problems. We note, however, that on the remand dates set out at [16] above, he would only have been at liberty for four months since she ceased employment at St Thomas's Hospital, and so the assistance he has been able to offer her over the past two years must have been very limited.

The allegations of conduct arising from the six incidents

Summary

19.
The Secretary of State relies on the fact that between March 2006 and April 2011 the appellant has been arrested and charged on five separate occasions for offences of rape. Some of these occasions involved multiple rapes, and on at least two occasions involved anal as well as vaginal penetration. According to the complainants these offences were committed between May 2003 and April 2006. Only two of these complaints proceeded to trial. Incident 1 was tried at the Woolwich Crown Court but the jury were unable to agree a verdict in February 2007 and the complainant was unwilling to give evidence for a second time. Incident 3 was tried first at the Central Criminal Court in May 2007 and then at the Woolwich Crown Court in October 2007. Both juries were unable to reach a verdict. Consequently in both cases the CPS offered no further evidence and acquittals were entered. In Incidents 4 and 6 the CPS assessed that the credibility of the complainant was significantly impaired and the test for proceeding with a prosecution was not met. In both cases no evidence was offered in June 2007 and October 2011 respectively. In Incident 5 the complainant herself withdrew the allegation she had made once she became aware that her husband would have to attend the intended trial to give evidence.

20.
Incident 2 concerned a different kind of crime. In August 2004 (and not April as indicated in the decision letter relying what appears to be a typographical error in the CRIS report) the appellant was arrested on suspicion of assault causing harm to his partner after a domestic argument between them. The officers witnessed injuries to the partner's eyes but she was adamant that she would not make a statement or go to court to prosecute the appellant. The CRIS entries indicate that the appellant was

bailed to attend the police station in September, when he apologised to his partner and the decision was taken not to prosecute further. The appellant disputes this.

21.
On the basis of the summary history outlined above, and the supporting data contained in the CRIS reports, DC Mahmood agreed with the opinion expressed in the Home Office decision letter that the appellant represents a source of future danger to vulnerable women. Taking the available material as a whole including the opinion of DC Mahmood, the Secretary of State alleges that there are positive reasons why the personal circumstances of the appellant including his character and conduct, make removal the appropriate course of conduct despite his presence here for 12 years up to the date of decision.

22.
The appellant disputes that he has ever raped anybody. Each of the five incidents relating to rape were occasions where consensual sex occurred and for one reason or another the complainants then made false allegations of coerced sex. The complainants either had no credibility to justify a prosecution or the jury remained un-persuaded by their evidence. In either event there was no basis for an evidential finding on a civil standard that the appellant had been guilty of conduct from which an inference of risk to women generally or vulnerable women in particular could be drawn. The UT was not in a position to conduct a civil trial of the issue on the limited data available. Further the appellant had never assaulted his partner or been violent to any woman with similar consequences.

Legal principles to assess disputed allegations of conduct

23.
By the conclusion of the submissions it appeared to us that the parties were not far apart on the applicable legal principles. We are concerned with an appeal against a decision to remove a person who has overstayed his leave to remain rather than a discretionary decision to deport on the grounds of conduct making such action conducive to the public good. Nevertheless, where the Secretary of State makes an allegation of conduct in the course of an overall assessment of the merits of the claim to remain or the decision to remove in the light of Article 8 and the provisions of former immigration rule 395C, it is for the Secretary of State to substantiate the conduct relied on to the standard of the civil balance of probabilities.

24.
The Secretary of State relies on the decision of the Upper Tribunal in Bah (liability to deportation) [2012] UKUT 196 (IAC). In that case the UT observed

“30. We explored the matter in oral argument and in the light of the observations in the SIAC cases. Mr. Singh agreed that the approach in EO (Turkey) should be amended. We are grateful for his revised submissions to the effect that:

i)
The Secretary of State’s decision to deport an individual is taken when the factual foundation for it is such that she considers that the threshold for deportation action on conducive to public good grounds is reached.

ii)

On appeal, the Tribunal decides for itself whether on the facts found that deportation is conducive to public good and that, in reaching its decision, the Tribunal is not bound by the Secretary of State's view of the seriousness of the offences in question.

iii) Where any assertion of fact by the Secretary of State material to the assessment of whether deportation is conducive to the public good is in dispute, it must be established by her on the civil standard of the balance of probabilities.

31. We agree with these three propositions. A decision to deport a person who is not a British citizen is founded on a certain assessment of facts and a view taken that conduct character and associations revealed by that factual assessment reach a standard that makes deportation appropriate subject to a human rights claim or other relevant considerations in opposition to the decision. It is clear that the Secretary of State may be called on to justify her assessment of the factual foundation for the decision, if disputed. It therefore follows that the Tribunal can reach a different decision as to whether a person is liable to deportation."

The Tribunal returned to the issue in the following passage:

"46. In the instant case, the Secretary of State wishes to rely upon information about the individual's actual or potential activities and connections which fall short of criminal conduct or which have not resulted in any criminal convictions but which the Secretary of State considers makes an individual liable to deportation and justifies the exercise of the discretion to make a deportation order. In other words, the Secretary of State considers that, in the light of the individual's character, conduct and/or associations, his deportation is conducive to the public good. It is possible that this may arise even where the intended deportee does not have any criminal convictions at all.

47. The question then arises whether, in an appeal before the Tribunal, the Secretary of State is permitted to rely upon allegations of criminal conduct which have not resulted in criminal proceedings even if this involves the admission of hearsay evidence and evidence from unnamed or undisclosed sources or anonymous sources. Here, the panel permitted the Secretary of State to rely upon the evidence of police officers who, in turn, relied upon the evidence of sources which the officers refused to disclose in evidence, thus diminishing the appellant's ability to test the evidence. If such evidence is admissible, what is the approach the Tribunal should adopt in assessing the evidence and the standard of proof to be applied in determining whether any allegations of criminal conduct are proven? We turn to consider these questions in turn."

As to the standard of proof, the Tribunal concluded:

"63. We consider that any specific acts that have already occurred in the past must be proven by the Secretary of State, and proven to the civil standard of a balance of probability. The civil standard is flexible according to the nature of the allegations made, see House of Lords in Re B [2008] UKHL 35, and a Tribunal judge should be astute to ensure that proof of a proposition is not degraded into speculation of the possibility of its accuracy.

64. As to the assessment of future risk based on past conduct, we conclude the panel was right to apply a standard of reasonable degree of likelihood. The judgment in Rehman suggests that, where an assessment of the future risk is being made, something less than the civil standard of the balance of probability applies (see, in particular, para 22). We say this because it suggests that deportation will be conducive to the public good if the cumulative effect of the material before the Tribunal is such that, after considering the individual's own personal circumstances, the Tribunal proportionately and

reasonably concludes, on the whole of the material before it as to the past and the future, that the individual's deportation is conducive to the public good.

65. We summarise our conclusions as follows. We are satisfied that where the Secretary of State seeks to exercise the power to make a deportation decision against a person who is not a British citizen or otherwise exempt under the Immigration Acts, she must first identify the factual basis for the exercise of the power in the decision letter or amplified reasons for the decision; second, where the factual basis is contested she must satisfy the Tribunal of the factual basis on the balance of probabilities. Third, any material relevant to meet that standard may be received by the Tribunal whether it is hearsay or a summary of information held by others, if it is supplied in time and in accordance with case management directions but the weight to be attached to such material will depend on its nature, the circumstances in which it was collected or recorded, the susceptibility of the informant or original informant to error, and the extent to which the appellant is able to comment or rebut it."

25.
The provisions of the Immigration Rules relating to administrative removal were in similar terms to those relating to discretionary deportation. The above reasoning applies to allegations of conduct relied on by the Secretary of State in removal as well as deportation cases.

26.
Mr Cheng points out that the nature of the material in the present case is different than that relied on in the decision in Bah. There have been no material convictions or proven facts in the United Kingdom at all. The CRIS data relating to the rape complaints essentially is no more than a recitation of the terms of the complainants' witness statements and the appellant's response to questioning. If the credibility of the complainants is undermined or their testimony unconvincing there is really nothing else to go on to establish whether the sexual activity in question was consensual or not. Unless that is established, then there can be no finding of conduct established to the civil standard. The mere fact that the appellant has had casual sexual relations with a number of women who have proved to be fragile or vulnerable in a number of ways does not amount to relevant conduct. The Tribunal is not acting as a court of morals.

27.
We acknowledge the task we face in assessing the material before us is a challenging one, but we propose to review the material to the standard set out above to determine if we are satisfied on balance of probabilities as to any conduct relevant to the application of rule 395C. We are astute to the need to avoid speculation. If the material renders itself capable of more than one interpretation we should only draw one adverse to the appellant if on the balance of probabilities there is no other reasonable explanation on the material before us.

CRIS reports

28.
Before we embark on this task, we can indicate that we find the information loaded on to the CRIS reports by and large accurate as to the data it purports to contain: details of a complaint, arrest, response, actions taken and conclusions. The CRIS system does not permit amendment or deletion and thus cannot be manipulated by some dishonest police officer with an animus against the appellant. This does not mean that what a witness is recorded as saying will be accurate. Typographical or similar errors may be made in loading the data. In general, however, this is a rigorous system where the upload of data is supervised by senior officers. We observe that police need accurate data when conducting further inquiries. Further, we find DC Mahmood to be an honest

witness. He has had no previous dealings with the appellant, and only came into the case as an officer on the UKBA Police liaison team to search the computer and produce relevant extracts of the material downloaded.

Incident 2

29.
We propose to start with Incident 2. This was the first occasion that the appellant was interviewed by the British police about criminal conduct. It was as a result of this arrest and interview and the personal samples then taken that he was linked back to Incident 1 that occurred the previous year.

30.
On 7 August 2004, the CRIS report (p.72) indicates that at 01.37 hours officers attended at Marine Tower 16 th Floor where a woman had previously made an emergency call and stated that her partner had assaulted her and she had locked herself in the room. She told police that her partner wouldn't give her the keys to the flat in her name and had left before the police arrived. The police noted that the complainant had a swollen right eye which was shut and asked her what had happened. She is recorded as saying:-

"...her partner had hit her twice, once in the mouth and the other in the eye. The assault had taken place of 05/08/2004 at about 10.30pm. I asked the victim if she report this to police, she didn't, all she wanted was to get her keys back and get the partner out of her life ".

The police action continues:

"T here are no witnesses. The victim was very reluctant to pursue any allegation against the suspect, as he had in the past threatened her, also starting that she (sic) had friends that would harm her … she stated that she would no give any statements nor go to court…the suspects resides at the address and has done so for approximately 2 years".

31.
The police next visited the premises on 8 August after the complainant spoke of verbal threats from the suspect in the vicinity of her home to the effect "I'll kill you". At 08.10 the same day the police were called to the flat by the complainant and found the suspect talking to the complainant on the intercom. He was arrested on suspicion of GBH. The next entry reveals that Mr Farquaharson (sic) was interviewed at Lewisham Police Station and gave a no comment interview. He was bailed to return to the police station on 7 September. The police obtained authority to charge him with assault but the complaint remained adamant that:

"…nothing could make her stand up in court when the suspect is there. She would be too scared."

32.
The complainant subsequently told the police that her injuries had healed and her relationship improved. It was decided to take no further action against Mr. Farquharson. The entry for 7 September notes:

" He returned on bail with the victim and made an apology to her in front of officers for the assault. I have noted the details of the report. The victim has sustained injuries that have been seen and recorded by the officers. The victim gives a full account of the incident but is adamant that all no (sic) further action should be taken. She has given a full withdraw statement. The suspect has admitted the offence in front officers ".

A note by DI Briant the same day states that he was satisfied from the report the guilt of the suspect is clear.

33.
In his witness statement for these proceedings the appellant states:

“ The police are alleging that I hit my girlfriend…I have never hit her, and I do not know what this allegation is all about. I have never hit anyone. In the police records it said that I apologised to her in front of officers, however, I did not do this at all. I cannot apologise for something which I have not done”.

34.
When questioned about this, the appellant stated that he was aware that his partner at the time had injuries to her eyes after she went out with a friend. He understood that her ex-husband had done this to her and he was phoned by the police to ask whether he could pay for the taxi cab fare to bring her home. He had never been arrested, interviewed or bailed about this matter. He had made no apology. When asked further about this, he stated that there was a lot going on in his head at the time and his final answer was that he had no recollection of any of these things.

35.
We do not accept the appellant’s account of this matter. He acknowledged that he was living with a girlfriend at the time and that she received injuries to her eyes, but said this was nothing to do with an argument with him and an assault for which he was arrested and questioned. Despite the variation in the spelling of the name Farquharson we do not regard as plausible that this was a case of mistaken identity. Tellingly, the subsequent history reveals that DNA samples taken from the suspect when he attended the police station related to the appellant and connected him to other incidents. He must have attended the police station for the samples to be taken. The appellant is not being frank with us about his arrest, interview and apology. It is incomprehensible that he could have forgotten all this, despite the fact that he has made a number of other visits to the police station subsequently. It is equally inconceivable that the police fabricated allegations of an arrest, police bail, interview and admission but then took no action against the appellant. We note the report was reviewed by a Detective Inspector at the time.

36.
The only sensible explanation is that the appellant had indeed assaulted his then partner, was arrested and questioned about it but by the time he was bailed to return he had agreed to apologise to his partner in the hope no criminal prosecution would follow. He was by then unlawfully present in the country and if the matter had gone to court his immigration status might well have been discovered.

37.
In the light of the above, we further conclude that his partner’s expressed fear of the appellant if she made a statement or gave evidence against him accurately records her state of mind at the time. Although she was consistently unwilling to go to court against him, the police assessment was that the crime was established and there were no concerns about her credibility. We note that the appellant has not given any explanation as to why she would have made false allegations against him, although he has had ample opportunity to do so.

Incident 1

38.

At 07.15 on 8 May 2003, an incident report was loaded on the CRIS to the effect that on the previous day the police had attended a location at Rushey Green London SE6 where a female complainant stated she had been raped by an unknown male. The complainant had been spoken to by this male and had agreed to drive him to the upper level car park of Milford Towers, Catford. The male left the car (apparently to see if his girlfriend was at home) and returned two minutes later. There was then some light kissing and touching that proceeded to sexual intercourse in the front seats of the car that was uncomfortable. The male then took the complainant's mobile phone and a sleeping bag from the back of the car and placed it on the ground in part of the car park sealed off with plastic sheets. Sexual intercourse resumed until the complainant asked the male to stop although she could not be sure when this was. The male then left. An unused but unsealed condom and wrapper were recovered at the scene. Subsequent inquiries revealed that the complainant was suffering from depression and had learning difficulties that meant she had to be interviewed with an appropriate adult present.

39.
By October 2004 the police had associated this incident with the appellant. Attempts to arrest him were made at his mother's address but a man claiming to be his father said he had not been seen for a fortnight and he did not know where the appellant was living but the appellant's mother might have a number for him. Attempts were also made to trace him at Marine Tower, the address of his former girlfriend but without success. In May 2005 there is an entry that the appellant's mother stated that she had last seen him a fortnight previously; she believed he was living in the Catford or Deptford areas with a partner but did not have a contact address for him.

40.
On 14 March 2006, the appellant was arrested on suspicion of the rape described as incident 3 below. Semen found on the swabs at the time of Incident 1 matched the DNA of the appellant provided when he was arrested for assault on 8 August 2004 (Incident 2). When interviewed about Incident 1 he denied all knowledge of being in Catford at the time of the offence in 2003, all knowledge of Milford Towers or the car park and persisted in that account even though it was put to him his semen had been identified inside the complainant.

41.
The complainant was willing to give evidence in this case that proceeded to trial at Woolwich Crown Court where the jury could not agree on 6 February 2007. The complainant then made a withdrawal statement as she was unwilling to attend court again.

42.
The appellant explained in his witness statement that this was a case of being solicited for sex by a woman who drove to a car park for this purpose. Sex was consensual and the mobile phone was taken so that the appellant could sell it on her behalf but she was dissatisfied with the price obtained.

43.
We are unable to reach any conclusions on the appellant's conduct in this case. We accept that the account above indicates that the CPS and the trial judge must have been satisfied that there was a case to answer of sexual penetration without consent. The record of the complainant's account available to us does not make it at all clear when consent ceased, or whether the Crown case was that the victim had such a fragile mental functioning that she was incapable of consent. There is no record of evidence outside the narrative of the complainant to indicate what the conduct was. There is a reasonable suspicion that the appellant had sexually exploited and raped a vulnerable woman, but we cannot be satisfied that other explanations can be excluded.

Incident 3

44.
At 01.22 on 14 March 2006, an entry was made about police attendance at the 15 th floor of a tower block in Lewisham the previous evening. From the appellant's account of the incident he states he was living on another floor of this block at the time, and this may therefore be Marine Tower where Incident 2 occurred. In any event the female occupant of a flat on the 15 th floor had returned to find herself locked out after a visit out of London. The appellant offered to force the door and having done so entered the flat with the complainant. There was conversation and they sat together on a single bed. There was some tickling and then he became forceful pulled down her panties entered her and had sex even though she told him she did not want to have sex with him. The suspect left the flat and the complainant spent some time crying before phoning the police. When they attended her flat the appellant returned saying, "where's my girl friend?" when he was arrested at 20.40 and taken to Lewisham Police station.

45.
Subsequent interview of the complainant revealed that she complained of digital then vaginal and anal penetration:

" she describes the intercourse as being painful and says when the suspect put his penis into her anus, it was excruciating. Forensic examination showed four abrasions to the anus, one of which showed fresh bleeding "

46.
The police entry describes the complainant as having psychiatric and mental disorder and was intimidated. This case proceeded to a trial and re -rial without the jury being able to reach a verdict. The CPS and the judge must therefore have been satisfied that there was a credible case to go before the jury.

47.
In his witness statement before us and his answers in cross examination the appellant explained that this was an opportunistic but consensual sexual encounter with a neighbour when the locks to her flat had been changed after it had been ransacked in her absence. He believed that the rape allegation was made because the complainant wanted a transfer of housing away from Deptford. In answer to questions from the Tribunal he denied anal penetration as part of the sexual activity and had no observations to make on the injury. In closing submissions Mr Cheng reminded us we had not seen a full medical report as to when or how the injuries were caused and whether they were consistent with any other cause.

48.
We accept that we have not seen the full medical statements in this case and there remains room for debate as to how far there was consent or apparent consent to some sexual intimacy in this incident. However, this was a prompt complaint of rape leading to a detailed interview and medical examination within 24 hours. The complaint included anal rape and there were four abrasions to the anus that are consistent with forcible penetration of the anus. Furthermore, the finding of recent bleeding is consistent with recent forcible anal penetration. Such penetration without lubrication is highly likely to be very painful or excruciating as the complainant is recorded as saying.

49.

Mr Cheng alerted us to the possibility of a woman consenting to a painful sexual experience, but this was not the appellant's case; he denied anally penetrating this or any other woman he had had sex with.

50.
We do not accept the appellant's evidence about this incident. We conclude that it more probable than not that the incident included painful sexual penetration that the complainant did not consent to, and in particular it included anal penetration. We are satisfied that the appellant was indifferent to the consent of the complainant when gratifying his sexual urges, and continued to penetrate her, causing her pain and injury.

Incident 4

51.
Incident 3 led to the appellant's remand in custody for a period before he was released on bail pending his trial, we understand around September 2006. On 11 December 2006 he was arrested again that was alleged to have happened in the early hours of the morning of Saturday 9 December 2006.

52.
At 06.00 on 9 December police were called to a house occupied by a friend of the complainant. The complainant gave a brief account of a visit to a pub with the suspect and a friend, and a return to the complainant's home address where non consensual sex took place in different rooms. The complainant was a methadone user who had been drinking three cans of cider the previous evening. The police found drugs paraphernalia in the front room: burnt tin foil and cigarette stubs and a condom wrapper and a used condom were also found. The complainant's fuller account indicated that the suspect had some crack cocaine that he took and encouraged the complainant to take some before stating that he wanted to have sex with her despite her professed unwillingness. He left her some Nigerian currency that was subsequently found.

53.
The account recorded on 11 December includes the following:

"The victim said she was very scared and did what he wanted because she was frightened that he would hit her if she didn't. This took place on the floor in the bedroom in front of the door. Victim continued to scream. She pretended again that she needed to go to the toilet to get away from the suspect. Victim got up and ran out of the flat naked, she said she was running for her life. Victim knocked on the caretaker's door in Vanguard Street and told him what had happened. ……the caretaker then called the police and gave the victim a coat to put round her…she was forced to have sex for two hours …it was just after 2.00 when she knocked on the caretakers door".

54.
This complainant was considered unreliable by the CPS and the matter was dismissed on 1 June 2007. Part of the weakness of the complainant's credibility was that she had made three previous rape allegations that she either did not pursue or had accepted that she had fabricated material.

55.
The appellant's account to us was that the complainant was a friend of his former girlfriend (the complainant in Incident 2), and that he had consensual sex with her after drinking alcohol. He states:

“at no point did (the complainant) suggest we stop having sex. After we finished having sex, I wanted to leave, but (the complainant) wanted me to stay. There was consent all the time ”

56.
We do not accept the appellant’s account. Despite the evident difficulty with the unsupported testimony of a drug user with a history of unreliable complaints, there are two features of the evidence recorded in the CRIS documents that together support an account of forced sex.

57.
First, the medical findings recorded at 18.01 9 December 2006 (Bundle 92) state:

“multiple genital injuries found as below...periurethral oedema with petechial haemorrhages-red bruising and tender. Two lacerations and multiple fine abrasions in the genital area ”.

We accept, of course, that non-consensual sex may not leave genital injuries and consensual sex may in certain circumstances leave traces of injury.

58.
Second, and more significantly, the complainant‘s account that she fled the flat naked is supported by a statement taken from the caretaker on 13 December 2006 (Bundle p 99):

“A statement has now been taken from the caretaker who was the first complainant. He describes the victim banging on his door and that when he opened it she was shouting that she had been raped by a black male. She was naked apart from a bra and socks that she was wearing. The first complainant gave her his wife’s coat to put on. He telephoned the police ”.

59.
What we take from this is that there was a prompt complaint of rape that caused the caretaker to call the police and that at the conclusion of a supposedly consensual sexual episode with the appellant, the complainant was running naked through a public space, shouting and banging on the caretaker’s door for help.

60.
We heard nothing from the appellant to explain this conduct by the complainant. We had raised with Mr Cheng when he was asking questions of DC Mahmood our particular interest in parts of the evidence that could be said to give independent support to the complainant’s account, amongst which we mentioned both this evidence and the neighbour’s evidence in Incident 6 (below).

61.
The combination of factors relating to this evidence, leads us to conclude that, on balance, the only reasonable explanation is that by the end of the sexual encounter between the complainant and the appellant, she had been submitting through fear to sexual acts she did not want to happen, and was desperate to get away from him.

Incident 5

62.
From October 2007 to May 2010 the appellant was not facing trial on criminal charges. In early May 2010 he was arrested on suspicion of another rape, said to have occurred in the flat where he was living with his elderly uncle.

63.

On the morning of 15 May 2010, police attended a complainant who alleged that the previous evening she had met a man at a pub and after some drinking returned to his flat when she went to the bathroom and after she came out she was dragged to the bedroom when the man said “I’m going to hurt you” and “I’m going to make love to you”. She was raped both anally and vaginally over a period of time before she could get away. In the course of this assault she was hit repeatedly with a brown shoe. The only previous sexual contact between them had been some kissing in the pub beforehand. The complainant stated that she believed the man was an illegal immigrant.

64.
The appellant was arrested on 15 May and immigration officers were alerted for the first time. This led to the service of a notice explaining that the appellant was liable to removal as someone who had remained in breach of his leave.

65.
The appellant’s account in interview and before ourselves, was that he had been having an affair with the complainant for some days before the 14 May. They had consensual sex on a number of occasions. On the night in question after consensual sexual intercourse the complainant had received a text from her husband on her mobile phone. This led to a change in attitude as the complainant wanted to get away in a hurry. The appellant points out this complainant subsequently withdrew the complaint when she became aware that her husband would have to attend the trial.

66.
There is support for the appellant’s account in the subsequent inquiries. We accept that this complainant did not first give an accurate account to the police of her sexual encounters with the appellant. When his interview account was put to her she acknowledged that there had been earlier consensual sexual activity. She was clearly very anxious to avoid her husband learning about this affair, and this might provide a motive for claiming that the last encounter was the only one and a forced one.

67.
Nevertheless there are two features of the evidence that appear to be inconsistent with a consensual affair. First, the complainant says that in order to get away from the appellant she had to stun him by smashing a decorative plate over his head, causing him injury. Broken pieces of a ceramic plate were recovered at the scene. When the complainant’s version of events was put to him the appellant told the police that she hit him with the plate because she was angry after she received the text.

68.
Second, the complainant told the police:

“I was so scared and had to get out of the house, so I left all my stuff there. Black sequinned bag with make up, phone charger, bank cards x 2, £60/70 and house keys. Black Nokia phone. Black knickers. Black and white high heeled shoes. Dark purple coat.”

These items of property (save there is no mention of the cash) were all recovered from the appellant’s house the following day. We do not believe that a woman would willingly have left such property behind.

69.

We note as relevant to his family circumstances that in the course of this investigation the police interviewed his great uncle who was found to suffer from memory loss and could not assist as a witness.

70.
On 20 August 2010 having been informed that her husband was a relevant witnesses with respect to a text he sent, the complainant sent this withdrawal statement to the police:

“Lincoln did not rape me on 15/5/10 I have time to think about this what I said the police is not in fact true. Lincoln did not touch me on May 15 2010. I will not go to court or make a statement against Lincoln also I will like withdraw (sic) any statement which I may have told you anything.”

She describes being in a low mood and having relationship problems with her husband and wanting to move on with her life.

71.
In the absence of any evidence external to the complainant’s account, it is difficult for us to reach any conclusions on what happened between the appellant and this complainant on 15 May. The broken plate and the abandoned personal property and clothing, do strongly suggest that the complainant was very anxious to get away from the appellant by any means possible.

Incident 6

72.
At 04.36 on Saturday 30 April 2011, the police were alerted to a complaint of rape said to have occurred 3 hours earlier. The complainant was assessed to be a vulnerable young woman who suffers from paranoid schizophrenia and is on medication and who had been drinking vodka before the incident. She describes being lured from a public house to the appellant’s home by the promise that he had cheap DVDs to offer her she was then subject to violence and forcible vaginal intercourse.

73.
She subsequently changed her account and admitted to misleading police about the original crime scene. The changed account included being threatened with a firearm (imitation or real) that the appellant produced, of which no trace was subsequently found. In due course, the inconsistencies in her account led the CPS to conclude that she could not be regarded as a credible witness and so once more the charge of rape was not pursued to trial.

74.
However, the complainant’s account of her post-rape flight from the appellant’s flat mentioned the intervention of neighbours. On 2 May 2011 a police officer spoke to the neighbours and recorded this account:

“Friday the 29 th April 2011 at around midnight going into Saturday (blank) was out in the rear garden taking the washing in when heard a female voice from next door saying get it out get it out. The female was quite loud, not shouting just raising her voice from 87. Then heard female speaking to someone on the phone saying Okay, I will be there in a minute or I am coming soon. Then heard female say Linc, I have got to go, I have got to go. Then heard, No Lincoln no. (blank) then opened the door and called (blank) who was in the living room, telling him to come outside. Both heard No Lincoln no stop it I have got kids no, no. She was pleading with him.…

(blank) then shouted Lincoln come to the window-the window was open. He then heard Lincoln say I am turning it down. Lincoln did not come to the window, it went silent….(blank) told Lincoln that he wanted to see him at the window or he would make a phone call (the police). He told Lincoln to let her out of his house now and he was coming to the front door. He heard Lincoln say all right all right.

(deleted) then went to Lincoln's front door and banged it for a good 30 seconds to a minute. No one came so he went to the rear again and shouted up again. He then heard a knock at the front door. (blank) opened the door and saw Lincoln in front of him with a female behind him. Lincoln was very apologetic, saying sorry for the noise and everything was cool. ….. (blank) was still speaking to Lincoln saying what the fuck was he doing and you cant be doing things like that. Lincoln was non-plussed, everything was cool. (Brain seems it does not process when it comes to females).

(blank) asked the female if everything was alight, the female did not respond, seemed in shock, said she had to meet her sister at the pub. Kept saying she was ok. (blank) said Did he try to rape you? To which the female said, Yes. She again asked if the female was ok was she sure…the female said I will be okay..can you do me a favour and make sure he does not follow me".

The account concludes with a conversation the neighbour had with Lincoln outside the flat. He explained that he had had a drink and a dance with the woman at the pub; she had become flirtatious and had returned to his flat. She took her clothes off, and then she said 'no I don't want to do it anymore'. The note ends with the following:

"(blank) told Lincoln if a girl tells you no it is No. Conversation was focussed on this point. Lincoln was saying it is hard man"

75.
We have quoted this passage extensively because it is a rare contemporaneous account of how the appellant was behaving and what he was saying. At the hearing before us, the appellant did not disagree with any of it in so as it related to things he heard or said. The neighbours had previous experience of the appellant's conduct with women. The information in the account suggests to us that the appellant has difficulty desisting with his sexual acts when faced with objections by the woman concerned.

76.
It was shortly after the CPS decision not to proceed to trial, that the UKBA took the decision on 28 October 2011 to refuse the appellant's application for discretionary leave to remain made a year earlier, and after serving a one stop notice, decided to remove him in accordance with the notice served in April 2010.

Application of the facts to the Rules

77.
Paragraph 395C sets out the list of factors that have for long been used to assess whether the discretion to remove or deport should be exercised. Although they no longer form part of the rules, they necessarily reflect facts that will need to be considered by the decision maker and on appeal the judge before a proper exercise of discretion can be made. In substance they reflect most of the factors that the body of Article 8 case law indicates should be taken into account. We will consider each factor in turn.

78.

Age : The appellant is now 45. He came to the UK when already an adult aged 33. This means first that from the time of his arrival he never had a claim to enter the United Kingdom as a dependent of his mother, and he has not lived in the United Kingdom most of his life. In particular he has not grown up here and this is not the class of case to which the guidance of the European Court of Human Rights in Maslov v Austria [2008] ECHR 546 was directed.

79.
Length of residence in the United Kingdom : Up to the date of the decision he had been present in the UK for 12 years only three of which were with leave. The immigration rules at the time required 10 years lawful residence or 14 years unlawful or mixed residence to qualify for a presumptive grant of indefinite leave subject to countervailing factors. None of the residence from 2002 was as a result of delay by the Home Office in decision making (contrast the observations of Lord Bingham in EB (Kosovo) [2008] UKHL 41). Two years of the unlawful residence up to October 2011 had been spent in custody on remand. He had been investigated for six serious offences between 2004 and 2011 when the last matter was concluded and he had been served with a liability to removal notice for the 18 months before the decision was taken.

80.
Strength of connections with the United Kingdom: His connection is principally his mother who is now a British citizen. He has developed ties with his half-brothers since being here. He was 18 by the time his mother came to the UK and so was never eligible for admission as a dependent.

81.
Personal history, including character, conduct and employment record: He has had no history of employment, extensive study or other factor integrating him to UK society or enabling a positive contribution to be made. We have extensively reviewed his personal conduct above. We are satisfied to the appropriate civil balance that he has used violence and inflicted injury on women when his wishes are frustrated. We are further satisfied that he is forceful in making his sexual demands and his conduct leaves many partners very frightened and anxious to get away from him. We note the persistence of his conduct despite a number of arrests, charges and criminal trials. We note the opinions expressed by his neighbours in the 2011 incident. This occurred at a time when his application for discretionary leave was outstanding. Taken together, we are entirely satisfied that his past treatment of women strongly supports an assessment that he presents a real risk of future harm to women, in particular women are who are vulnerable by reason of addiction, mental capacity or personal circumstances.

82.
Domestic circumstances: He has no spouse, partner of minor child or other dependants in the UK. This is not therefore a case where the interests of any minor child have to be taken into account and given weight.

83.
Previous criminal record: his conviction in Jamaica is of no enduring relevance. He has no record of a British conviction.

84.
Compassionate circumstances: His appeal was largely based on his private life with his mother, siblings and other relatives. His central contention was that if he were to be removed he would not be able to support his mother with her multiple medical needs in the future. No evidence of unusual dependence between mother and adult son has been adduced to suggest that this is one of the

unusual cases where this relationship should be seen as a continuing part of family life. We do not cite the relevant authorities but have them well in mind. In particular, we note that the appellant and his mother only lived together in a common household for eight months since her departure for the UK in 1984. His removal to Jamaica will not lead to separation of family members who have been interdependent for some time. We accept that the immigration consequences of this decision will be a lengthy and indefinite prohibition on his being able to return lawfully to the United Kingdom. We further accept that his mother will not be able to visit Jamaica as often as she has visited Dover. She returned to Jamaica in 2011 but her future state of health may reduce her mobility and restrict her ability to travel long distance. His siblings and aunt will be able to visit him in Jamaica if they wish. All family members have the ability to keep in contact through Skype and electronic means of communication. We note that the appellant and his mother originated from a part of the Greater Kingston area where there has been violence and a nephew was murdered on return to Jamaica in 2007. There is no reason to believe that the appellant was not able to look after himself between 1984 and 1999, and he is a fit strong healthy male who should be able to do so in the future, particularly if his family were willing to support him re-establish himself. We do not accept that all those returned to Jamaica are a vulnerable social group because they are perceived to be rich. We have no doubt that the appellant will be able to disabuse others of any misconceptions they may have had.

Representations received : We have addressed the contents of the letters and witness statements before us in the previous section. We recognise that the appellant will be missed by his family members but in our judgement that need not lead to all severance of connections between them.

Article 8

85.
We have considered the factors that have proved to be weighty consideration in the Article 8 balance above and have not found any in the appellant’s case. He has a private life with his mother and other family members that will undoubtedly be interfered with when the removal decision is implemented. It falls to the respondent to justify that interference as a necessary and proportionate measure in support of a legitimate aim.

86.
There are at least two legitimate aims. The first is the economic and social well being of the nation that is promoted by orderly immigration control by removing those who do not quality for leave to remain when applying discretionary considerations set out in rule 395 C. The protection of the public from harm is another. This is engaged in the light of our conclusions on the appellant’s character and conduct and or assessment of the risk he presents to vulnerable women. Combined, those represent very weighty reasons to justify his expulsion. As against that is his private life and the likely loss to his mother of his society. Whilst that is a compassionate factor, in our judgment it is not one that outweighs the weighty public interest in his removal.

87.
In our judgement, therefore, the decision is in accordance with the Immigration Rules, the law and is a justified and proportionate response to his Article 8 rights. We re-make the decision under appeal by dismissing the appeal.

Conclusions

88.

We regret the passage of sixteen months between the UKBA decision and the final determination of this appeal by the Tribunal, as the appellant has been in immigration detention throughout this time. We hope that there may be some lessons to be learned from this case that will make effective and fair decision making possible in the future within a significantly shortened time scale.

89.
First, the UKBA must consider carefully what allegations of conduct it wishes to rely on in the absence of a conviction or other authoritative finding of fact. In our judgement the agency should not allege conduct that it is not prepared to prove to the appropriate civil standard. The decision in Bah demonstrates that conduct based on intelligence and crime reports can be relied on in immigration appeals provided that there is some decree of transparency about how the material is accumulated and what it consists of. If intelligence is so sensitive that a sufficient gist of it cannot be disclosed, then it should not be raised in the appeal. Mere assertion will not be enough.

90.
Second, where deportation or removal proceedings are based on information derived from police sources, a police witness statement should be made available enclosing the relevant documentary material. That material must fairly reflect the strengths and weaknesses of any assessment and should not be cherry picked to present one side only if there is material that exculpates as well as inculpates. The witness statement should reveal that this exercise has been undertaken to obviate the need for third party disclosure requests under the Upper Tribunal Rules. The judge must ensure that the hearing is fair.

91.
Third, material is likely to be considered the more cogent, the greater the extent to which it is supported by other relevant documents. In the present case we have searched for data relating to the incidents independent of the complainant's narrative. The CRIS extracts might have been supported by witness statements made by forensic medical examiners or eye-witnesses. This will not always be necessary, and the Tribunal is not conducting a re-trial, but it may well prove helpful. We anticipate that the CPS should be able to assist the UKBA and indeed the Tribunal and, where material is sensitive, appropriate directions as to its return and use can be made if requested in advance.

92.
Fourth, the material relied on should be served on an appellant in good time so he can read it, understand it and prepare such response to it as is considered appropriate. Thus, service of the witness statement of DC Mahmood on the day of the adjourned First-tier hearing was far too late to give such a fair opportunity. Further as the grounds of appeal stated and we agree, this statement was in any event insufficient to enable the judge to reach independent conclusions without the supporting documentary material. The first tranche of such material was only served on the appellant at the adjourned date of the hearing before the Upper Tribunal; again that was far too late for this appellant to be able to absorb and respond to although he had been aware of DC Mahmood's witness statement for nearly a year. If there has been a significant shift in the way a case is put from the original decision letter, a brief skeleton argument identifying the real issues would be helpful to the Tribunal and opposing party.

93.
Fifth, it is important that legal representation should be available in such cases. The appellant told us that his reading ability is not great. He was able to read back parts of his statement to us to our satisfaction, but absorbing the detail in the CRIS reports would undoubtedly have been a challenge

without professional assistance. The appellant will also have been disadvantaged by a long period of pre-appeal detention. We hope that legal aid is granted readily in such cases whatever the apparent weight of the case against him. Without it there is a very real risk that his common law right to a fair hearing will be undermined.

94.
In the event, we are grateful to both representatives for the assistance they have given us and the way the appeal was conducted.

95.
For the reasons we have explained:

i)
The decision of the First-tier tribunal contained an error of law

ii)
We re-make the decision by dismissing the appeal.

All members of the panel have contributed to this decision.

The Hon Mr Justice Blake

Chamber President

7 March 2013

ANNEX A

Heard at Field House	**Determination Promulgated**
On 22 January 2013	
	.....

Before

THE PRESIDENT, THE HON MR JUSTICE BLAKE

UPPER TRIBUNAL JUDGE DAWSON

Between

LINCOLN FARQUHARSON

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: In person

For the Respondent: Mr K. Norton, Senior Home Office Presenting Officer

RULING AND DIRECTIONS

1. The appellant is a Jamaican national born in November 1966 and now aged 46. He had limited leave to enter and remain in the United Kingdom as a visitor and then a student from November 1999 until October 2002. He has remained without leave since then.

2. On 16 May 2010 he was arrested on suspicion of having committed the crime of rape. On the following day he was charged with rape and a notice of his liability to removal served on him. On 3 September 2010, the CPS offered no evidence against him. On 25 November 2010 his then solicitors A-Z Law submitted an application for him to be granted leave to remain by reason of private/family life. That application was decided on 28 October 2011. On 25 May 2011 the appellant was charged with another count of rape of which he was acquitted on 14 October. It is possible that the UKBA deferred determination of the leave application until this charge had been resolved.

3. On 28 October 2011 his application was refused. The decision letter noted five occasions between 2003 and 2011 when he was charged with rape, although no charge resulted in a conviction. There were further occasions between 2004 and 2010 when complaints of assault were made against him but again none of these complaints or charges resulted in a conviction. The decision letter quoted the opinion of a Detective Constable that the appellant was considered to be threat to vulnerable women, but did not include the statement it was quoting from. It was concluded that the appellant's removal promoted a legitimate aim of prevention of disorder and crime and the maintenance of effective immigration control and in the light of what was known about him, including his "criminal conduct" it was proportionate.

4. Grounds of appeal were filed in early November against this decision by A-Z Law. The grounds were general in nature; they assert that the decision was not in accordance with the immigration rules and the law and was an interference with the appellant's family life. No response was made to the allegations of criminal conduct, notwithstanding the absence of a conviction. At some point thereafter A-Z Law disappear from the scene.

5. The appellant's appeal was due to be heard in January 2012. He had been detained pursuant to immigration powers since November 2011. On the 21 December 2011 the respondent wrote to the Resident Judge seeking an adjournment in order to obtain a witness statement from the police and obtain a print out of the police CRIS reports. It is not clear whether this letter was sent to the appellant personally. It was stated that a copy would be sent to his representatives but it is unclear whether this was done or who his representatives were at this stage. The hearing date was adjourned to 15 February 2012.

6. The appellant was produced on that date. He was unrepresented although he produced a letter of authority for Charles Ette and Co to act on his behalf. He asked for an adjournment for legal representation at his appeal. This application was refused by the judge.

7. It further transpires that on that date a witness statement by DC Mahmood (not the Detective Constable mentioned in the decision letter) was both signed and served on the appellant in person. This gave considerably more information about the allegations of rape and assault and the contention that the appellant was a danger to vulnerable women as alleged in the Home Office letter. The statement made reference to information the officer had obtained through the Crime Reporting Information System (CRIS) but did not have documentary exhibits attached.

8. DC Mahmood gave evidence at the hearing about the contents of CRIS reports. It appears that he did not then produce copies of the documents that he relied on. He was not personally concerned with the appellant's arrest and charge but acted as a liaison officer with the UKBA.

9. Having been refused an adjournment the appellant appeared to take little active role in the appeal although he gave evidence.

10. Judge Clayton dismissed the appeal in a decision promulgated on 20 March 2012. She stated at [37] that the burden of proof was on the appellant. She was satisfied that the appellant was a serious threat to women and had been implicated as being the perpetrator on several occasions of serious offences. She found the decision to refuse discretionary leave and remove the appellant was in accordance with the rules and relevant policy, justified, proportionate and lawful.

11. A third firm of solicitors, Gans and Co, helped the appellant submit an application for permission to appeal to the Upper Tribunal. Permission to appeal was granted on 29 March 2012. The decision identifies the core issue as to whether there had been a fair hearing because Judge Clayton had decided to admit DC Mahmood's late served evidence but had not re-considered the question of an adjournment in the light of this. This was something that the appellant needed time to consider and respond to. Directions were made in May 2012 that the CROS reports be produced and that DC Mahmood be available at the further appeal. Unfortunately the matter was not listed promptly thereafter.

12. When the case was listed before us, once again the appellant had no legal representation. He remained in detention and sought an adjournment in order to obtain representation to promote his case and probe that of the Secretary of State.

13. We spent time exploring why the appellant had no representation and what efforts he had made to obtain it. We heard from the appellant and his mother. All he could produce was a letter from Duncan Lewis in August 2012 indicating that they were seeking disclosure of the documents from the UKBA. The appellant told us that subsequently, shortly before Christmas 2012, his solicitor informed him that they were unable to continue to act for him. He was unclear why this was.

14. It appears that representatives had been privately instructed by the appellant's mother in 2011 and there were no further funds to pay for them. As far as we are aware, the claimant was and possibly remains eligible for legal aid as a person in detention who is resisting removal on human rights grounds. The appellant authorised the Tribunal to make inquires of the solicitor at Duncan Lewis as to why they were unable to act for him but these were inconclusive by the time we resumed the hearing.

15. The appellant renewed his request for an adjournment when the hearing resumed. Mr. Norton had been able to obtain DC Mahmood's attendance today and had supplied a bundle of the CRIS reports to the appellant and ourselves on the day of the hearing.

16. We pointed out to the appellant that even without the criminal conduct allegations, his Article 8 claim faced difficulties in that he was an able bodied non-dependent adult who had lived in the United Kingdom for 11 years, 8 of which were without authority and for some of the time he faced serious criminal charges. The case fell to be considered under private rather than family life, despite the presence in the UK of his elderly mother. At the time of the decision the Immigration Rules required 14 years residence (unlawful or mixed legality) before discretionary leave to remain was granted and this was subject to an absence of countervailing factors.

17. Nevertheless, the claimant was insistent that he had points to make and wanted to make, even though the consequence would be a prolongation of his administrative detention.

18. After anxious consideration we decided that the interests of justice required us to give one final opportunity to the appellant to prepare his case and seek representation if possible.

19. We concluded that we should adjourn this appeal to 26 February 2013 10.00 when it will be heard by a panel of the Upper Tribunal, including the President. There will be no further adjournment of this appeal and if the appellant cannot obtain a legal representative who is able to act for him on that day he will have to represent himself.

20. We reach these conclusions because:-

First, as to fairness:

a. There is a strong argument that the FtT judge did not act fairly in refusing the appellant a short adjournment to prepare his case in response to the DC Mahmood statement or requiring the CDRIS reports to be produced.

b. The judge was wrong to conclude that the burden of proof was on the appellant in respect of the criminal allegations made against him. Mr. Norton accepts that as the allegation of criminal conduct was raised by the Secretary of State it was for her to prove them to the judge's satisfaction to the civil balance of probabilities. We accept that the burden of showing an arguable claim that private life was interfered with rested on the appellant but justification was for the respondent.

c. It is a duty of the judge to secure that the appellant has a fair hearing even if the case against him appears to be strong.

Second, as to the absence of legal representation:

a. The appellant has had an opportunity to obtain legal representation and we are not satisfied that he has exhausted every available channel for legal assistance.

b. The Tribunal does not award legal aid and has no power to grant it. It cannot indefinitely adjourn an appeal until it is obtained although we can indicate and so without hesitation that it is highly desirable in the interests of justice that the appellant should be represented, given appropriate advice as to the issues in the appeal and how they should be explored. That remains the case whatever the assessment of the prospects of overall success.

c. We hope that the prison authorities will assist him to obtain representation if at all possible, whether by reviving the connection with Duncan Lewis, or another legal aid firm or pro bono representation from the Free Representation Unit or from the schemes run by the Bar Council, the Law Society or the Attorney General.

Third, as to the need for preparation:

a. Whether he obtains legal representation or not, the appellant will need time to think about his response to the materials relied on and prepare his case.

b. We have today provided him with a copy of the UT's summary core bundle of materials that contains the essential matters including DC Mahmood's statement.

c. Mr Norton has supplied him today with a copy of the CRIS report. Another document will be sent to him by the end of this week to supplement those reports. Late service of this material has caused prejudice to an unrepresented and detained appellant.

d. The appellant disputes his guilt of the charges brought against him. He will, however, need to consider whether he challenges DC Mahmood's evidence drawn as it is from the police computer. This evidence is admissible and is capable of satisfying a Tribunal on the civil standard despite its hearsay nature: see Bah (EO (Turkey) [2012] UKUT 196 (IAC) a copy of which Mr Norton has provided to him in the bundle.

e. The appellant may want to rely on other documents including any assessment by the CPS why the complainants were not satisfied satisfactory witnesses (if this was the case).

Fourth, as to the future conduct of the appeal:

a. In the event that the Tribunal is satisfied that fairness requires us to set aside the First-tier decision and remake it for ourselves, as we are minded to conclude at present, we will remake the case for ourselves on the next occasion rather than remitting the matter to start again at the First tier Tribunal.

b. There has already been unacceptable delay in this case, and the appeal must be concluded as soon as possible commensurate with the requirements of fairness.

c. The fact that the appellant is detained and it is not in his interest or the public interest that this continues for a day longer than necessary.

d. This Tribunal has already given thought to the issues in the case, and will be in a better position to reach its decision on the next occasion in the light of the material served on it today and the directions it has given. The determination of this appeal will be reserved to the President, although Judge Dawson will not be available to sit on the panel.

21. The issues for determination in the event of re-making as they appear to us are as follows:-

i. Can the appellant establish that his length of residence and ties to the UK means that removal would have such an impact as to be an interference with his private life including his relations with his mother?

ii. If so, can the respondent justify such interference as proportionate means of promoting a legitimate aim within Article 8(2) ECHR?

iii. In particular, can the respondent satisfy the Tribunal on the balance of probabilities that the appellant has been guilty of conduct that makes him a risk to the public in general and vulnerable women in particular?

22. To date the appellant has not made a substantive response to the decision letter, the statement of DC Mahmood and the CRIS material. He does not appear to have been asked questions about his criminal conduct by Judge Clayton: see [8] to [10].

DIRECTIONS

23. To assist preparation of the case and to promote a fair hearing, we direct the appellant must provide the following information by the following dates (with or without legal assistance):-

i. By the 12 February he inform the Tribunal and the Secretary of State of his written response (whether by a witness statement or a commentary) to the allegation that he represents a danger to women by reason of his past conduct as set out in the UKBA decision letter, the statement of DC Mahmood and the documents he refers to, now contained in the supplementary bundle.

ii. By the 19 February he must serve any further document or statement of any witness he intends to rely at the appeal. Such witnesses must be available to give evidence on the 26 February unless the respondent indicates in writing before hand that this is not necessary.

iii. The appellant must indicate by the 19 February whether he requires DC Mahmood to attend the hearing.

24. The appeal will be listed at 10.00 on 26 February before a panel to include the President. Time estimate ½ a day.