Upper Tribunal
(Immigration and Asylum Chamber)

McLarty (Deportation – proportionality balance) [2014] UKUT 00315 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14 May 2014	**16 June 2014**

Before

MR JUSTICE GREEN

UPPER TRIBUNAL JUDGE DAWSON

Between

S ECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KENROY DAVE McLARTY

Respondent

Representation :

For the Appellant: Mr T Wilding, Senior Home Office Presenting Officer

For the Respondent: Mr M Clapham from Chase Legal Services

(1) There can be little doubt that, in enacting the UK Borders Act 2007, Parliament views the object of deporting those with a criminal record as a very strong policy, which is constant in all cases (SS (Nigeria) v SSHD [2013] EWCA Civ 550). The weight to be attached to that object will, however, include a variable component, which reflects the criminality in issue. Nevertheless, Parliament has tilted the scales strongly in favour of deportation and for them to return to the level and then swing in favour of a criminal opposing deportation there must be compelling reasons, which must be exceptional.

(2) What amounts to compelling reasons or exceptional circumstances is very much fact dependent but must necessarily be seen in the context of the articulated will of Parliament in favour of deportation.

(3) Where the facts surrounding an individual who has committed a crime are said to be “exceptional” or “compelling”, these are factors to be placed in the weighing scale, in order to be weighed against the public interest.

(4) In some other instances, the phrase “exceptional” or “compelling” has been used to describe the end result: namely, that the position of the individual is “exceptional” or “compelling” because, having

weighed the unusual facts against the (powerful) public interest, the former outweighs the latter. In this sense “exceptional” or “compelling” is the end result of the proportionality weighing process.

DETERMINATION AND REASONS

Introduction

1.
This is an appeal brought by the Secretary of State for the Home Department (“SSHD”) against the determination of the FtT dated 13 December 2013 in which the FtT allowed the appeal of Mr Kenroy Dave McLarty (the “Respondent”) against the deportation order of the SSHD dated 14 June 2013 made pursuant to Section 32(5) UK Borders Act 2007. Permission to appeal the decision of the FtT was granted upon the basis that it was arguable that the FtT had erred in particular in its application of the proper test to be applied in cases involving the prima facie compulsory deportation of those with criminal records.

Facts

2.
The facts may be summarised as follows. Mr Kenroy Dave McLarty is a citizen of Jamaica born on 22 February 1981. He first came to the UK on 15 July 2002 as a visitor. He joined the army later that year and was therefore exempt from immigration control pursuant to section 8(4) of the Immigration Act 1971. On 25 June 2005 he married Ms Olivene Christie. Ms Christie was a Jamaican national at the time of the marriage but was, as of the date of the appeal to the FtT, a British citizen.

3.
On 30 March 2007 the Respondent was convicted of fraud arising out of the rental of a motor vehicle.

4.
On 7 October 2007 the Respondent was discharged from the army as a result of cannabis misuse. He was nonetheless granted indefinite leave to remain by the SSHD. His application for naturalisation was, however, refused on 4 December 2008 by virtue of his earlier conviction for fraud.

5.
The Respondent has four children aged between 3 and 10 with his wife. He also has a child aged 3 with another woman. As of the date of the hearing before the FtT two of the children had British citizenship.

6.
On 18 January 2012 the Respondent was convicted at Croydon Crown Court of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of class B drugs into the United Kingdom. The offence involved the importation of in excess of 15 kg of cannabis for which he was to be paid £6,000. Under the arrangement he was to import the drugs via Heathrow and hand them over to a courier at the airport. He was sentenced, for this offence, to a term of imprisonment of two years and six months following a trial. In his short sentencing remarks the Recorder stated:

“There were no real mitigating circumstances in this case. There is some evidence of family hardship, but the introduction of significant amounts of a dangerous substance into this country through illegal importation is a very serious matter.”

7.

On 14 June 2013 the Appellant made a deportation order pursuant to section 32(1) UK Borders Act 2007 upon the basis that, pursuant to section 32(4) of that Act, his deportation was conducive to the public good. This entitled the Respondent to a right of appeal. The reasons accompanying the deportation order were detailed. It suffices, for present purposes, to summarise them as follows:

(1) The decision to remove the Respondent to Jamaica would give rise to an interference with his Article 8 Convention rights and may not be in the best interests of his children.

(2) Nonetheless the decision was in accordance with the permissible aim and object of preventing disorder and crime and protecting health and morals.

(3) In relation to the Respondent's family life with his four children from his wife the SSHD found, in relation to each of them, that it was unreasonable to expect them to accompany the Respondent to Jamaica as this would deprive each child of rights and entitlements that they enjoyed or would enjoy as British and EEA citizens.

(4) That pursuant to the judgments of the Supreme Court in ZH (Tanzania) (FC) v SSHD [2011] UKSC 4 that where it was proposed to deport the parent of a British citizen child the British citizenship of the child would weigh particularly heavily in the consideration whether to remove the parent. Though it was recognised that nationality could not be a "trump card" (ibid paragraph 30).

(5) However deportation did not, on the facts of the present case, leave the children with no choice but to follow the father because the mother could remain and act as their primary carer, as she had done in the past.

(6) It was accepted that the Respondent had a subsisting relationship with his wife. It was also accepted that there were "insurmountable obstacles" to family life with the Respondent's wife being able to continue outside of the UK. This was because of the best interests of the children, two of whom possessed British citizenship.

(7) However because the Respondent did not himself meet the residence requirements the fact that his wife could not accompany him was not dispositive.

(8) The SSHD proceeded to balance the position of the wife and children against the public interest in deportation. As to this the SSHD concluded that whilst the rights of the children were important they did not always trump other interests. Accordingly even if it was in the best interests of the children to remain in the United Kingdom it was still open to the mother to exercise an independent judgment to relocate with the children to Jamaica in order to continue a family life with her husband there. In particular the SSHD balanced these interests against the public interest. She referred to the conviction of the Respondent before the Crown Court for the importation of a substantial quantity of a dangerous drug. In particular the decision letter records as follows:

"The Secretary of State is satisfied that the nature and severity of your offences are factors which fully engage the public interest in securing your removal from the United Kingdom as the subject of a Deportation Order, both in the interests of preventing further offending of this nature on your part, and establishing a deterrent.

The Home Office is satisfied that your convictions for drugs – importation of Controlled Drugs for which you were sentenced to 2 years and 6 months' imprisonment for each offence, to be served concurrently, are ones which may be regarded as serious, and which compel the UK Border Agency to give significant weight to the question of protecting society against crime.

It would be noted that offences involving drugs are offences which have a wide impact on the health and morals of the community at large – both in terms of the deleterious effect on the health of those who take the drugs imported, and in terms of the associated effects of crime and anti-social behaviour that are fostered by such activities. It is clear that your offences are representative of your willingness to gain profit from the source of such a negative impact on the community of the United Kingdom.

Even if it were accepted that you were rehabilitated and posed no risk to the public, it is not accepted that this alone would render your deportation disproportionate.

As stated above, your crime may be regarded as serious. It is considered that it is appropriate for the Secretary of State to give weight to the public good and public interest, which would be served by your removal from the United Kingdom, irrespective of the nature of any future risk of re-offending."

8.
One evidential matter upon which the SSHD relied was that the Respondent's wife had relatives in the United Kingdom who could provide her with support and assistance in the event that the Respondent was removed to Jamaica. This finding was made because in a questionnaire submitted to the SSHD by the respondent giving reasons why he should not be deported he explained that in relation to the children the "other" family that the children had in the United Kingdom were "maternal family ".

9.
We turn now to the decision of the FtT. The Tribunal set out, in a careful judgment, its findings of fact. In paragraph 24 the FtT observed that the Respondent's wife was born in Jamaica, had family in Jamaica but had no family at all in the United Kingdom. It is stated that her mother, grandmother and uncle were in Jamaica and two sisters lived in the USA.

10.
Between paragraphs 14-37 the Tribunal set out, in detail, the chronology of the case and provide relevant background information as to the Respondent's prior criminal offences. Apart from the difference in the evidence as to the Respondent's wife's family there are no material differences between the facts as found in the decision and those as found by the FtT.

11.
The FtT sets out the relevant statutory framework. In particular pursuant to section 32(5) UK Borders Act 2007 concerning "automatic deportation" the SSHD is required to deport the Respondent unless one of the exceptions set out in section 33 apply. Under section 33(2) an exception exists where removal of the foreign criminal in pursuance of a deportation order would breach that person's Convention rights. In the present case it was contended by the Respondent that deportation would infringe his Article 8 rights. The applicable "Immigration Rules" are paragraphs 398, 399 and 399A. These provide as follows:

"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."

Relevant case law

12.
The scope and effect of these Rules has been considered on a number of recent occasions.

13.
In particular in SS (Nigeria) v SSHD [2013] EWCA Civ 550 the Court of Appeal underlined an aspect of the weighing exercise that any Tribunal is required to undertake but to which, in the view of the Court of Appeal, inadequate emphasis had hitherto been given. This was in relation to the fact that the presumption in favour of deportation was a presumption embodied in primary legislation and was not therefore a policy formulated by executive decision. For the Court of Appeal this was of real

importance and meant that when the public importance was placed in the proportionality scales it carried substantial weight. Lord Justice Laws (in paragraph 28) stated of previous jurisprudence (from this jurisdiction but also from the Strasbourg Court): “There is no acknowledgement … that the weight to be attached in an article 8 case to a State’s policy of deporting foreign criminals may be greater where the policy is made, not by the executive government, but by the legislature. But this seems to me to be of very great importance”. In paragraph 50 he reiterated that: “… it is the importance attached by Parliament itself that matters”.

14.
From this the Court of Appeal deduced that the width of the margin of appreciation of the SSHD in criminal deportation cases was a wide one. This was because of the quintessentially political and moral nature of the value judgment embodied in the legislation:

1.
“In my opinion, however, this is a central element in the adjudication of Article 8 cases where it is proposed to deport a foreign criminal pursuant to s.32 of the 2007 Act. The width of the primary legislator's discretionary area of judgment is in general vouchsafed by high authority: Brown , Lambert , Poplar , Marcic , Lichniak and Eastside Cheese , cited above. But it is lent added force where, as here, the subject-matter of the legislature's policy lies in the field of moral and political judgment, as to which the first and natural arbiter of the extent to which it represents a "pressing social need" is what I have called the elected arm of government: and especially the primary legislature, whose Acts are the primary democratic voice. What, then, should we make of the weight which the democratic voice has accorded to the policy of deporting foreign criminals?

(2) THE NATURE OF THE POLICY: MORAL AND POLITICAL

2.
The importance of the moral and political character of the policy shows that the two drivers of the decision-maker's margin of discretion – the policy's nature and its source – operate in tandem. An Act of Parliament is anyway to be specially respected; but all the more so when it declares policy of this kind. In this case, the policy is general and overarching. It is circumscribed only by five carefully drawn exceptions, of which the first is violation of a person's Convention/Refugee Convention rights. (The others concern minors, EU cases, extradition cases and cases involving persons subject to orders under mental health legislation.) Clearly, Parliament in the 2007 Act has attached very great weight to the policy as a well justified imperative for the protection of the public and to reflect the public's proper condemnation of serious wrongdoers. Sedley LJ was with respect right to state that "[in the case of a 'foreign criminal' the Act places in the proportionality scales a markedly greater weight than in other cases.

3.
I would draw particular attention to the provision contained in s.33(7): "section 32(4) applies despite the application of Exception 1…", that is to say, a foreign criminal's deportation remains conducive to the public good notwithstanding his successful reliance on Article 8. I said at paragraph 46 that while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed.”

15.
The court emphasised, in the light of this consideration, that when applying the test of proportionality a principle of “minimal interference” should be adopted. This meant that whilst fundamental rights could never be treated as token or as a ritual nonetheless the discretionary judgment enjoyed by the primary decision-maker, though variable, meant that the court’s role was to keep in balance with that of the elected arms of Government. The court considered this was especially important in cases where a child’s rights were being balanced against the deportation of a foreign criminal (ibid paragraph 42).

16.
In paragraph 47 the court drew together various jurisprudential threads and stated:

“47. It is worth drawing these general considerations together.

(1) The principle of minimal interference is the essence of proportionality: it ensures that the ECHR right in question is never treated as a token or a ritual, and thus guarantees its force.

(2) In a child’s case the right in question (child’s best interests) is always a consideration of substantial importance.

(3) Article 8 contains no rule of ‘exceptionality’, but the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail.

(4) Upon the question whether the principle of minimal interference is fulfilled the primary decision-maker enjoys a variable margin of discretion, at its broadest where the decision applies general policy created by primary legislation.”

17.
In paragraph 54 Lord Justice Laws stated this about the strength of the Article 8 evidence needed to counter the policy objection:

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

18.
It is worthwhile reciting the summary of the facts in the case of SS (Nigeria) set out by the Court at paragraphs 56 and 57:

“56. This Appellant was convicted of serious offences of peddling Class A drugs. He had no vestige of a right to be or remain in the United Kingdom, so that immigration policy as well as his criminality favours his deportation. He worked illegally. The UT found (paragraph 57) that he ‘has the potential to present a real risk to members of the public and to society in general due to the effect of drugs’.

57. As for the interest of the Appellant’s son (now aged 5), this is not a case where the Appellant’s deportation will involve the child’s having to move to Nigeria. He will continue to be looked after by his primary carer, his mother, as he was while the Appellant was in prison. The Secretary of State had

made enquiries of the child's mother and also Walsall Children's Services. The Appellant appears to have been selling drugs on the streets whilst he had a very young son at home."

19.
In MF (Nigeria) [2013] EWCA Civ 1192 (decided shortly after SS (Nigeria) (ibid)) the Court of Appeal also addressed the strength of the public interest in deporting foreign criminals. In particular the court focused upon the strength of the "other factors" which would need to exist before a justification for deportation would be set aside. In paragraph 40 of their judgment the Court of Appeal stated:

"Does it follow that the new rules have effected no change other than to spell out the circumstances in which a foreign criminal's claim that deportation would breach his Article 8 rights will succeed? At this point, it is necessary to focus on the statement that it will only be 'in exceptional circumstances that the public interest in deportation will be outweighed by other factors'. Ms Giovannetti submits that the reference to exceptional circumstances serves the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paras 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under Article 8(1) trump the public interest in their deportation."

20.
In paragraph 42 the Court stated that in cases of criminal deportation: "…the scales are heavily weighted in favour of deportation and something very compelling (which will be exceptional) is required to outweigh the public interest in removal". In paragraph 43 the Court stated that the general rule was that in the case of foreign prisoners to whom paragraphs 399 and 399A did not apply "very compelling reasons" would be required to outweigh the public interest in deportation.

21.
Finally, in relation to cases we should refer to the decision of the UT in Masih v SSHD (Blake J and UT Judge Freeman) [2012] UKUT 00046 (IAC). In this case the UT laid down, at paragraph 11 a series of principles which it was intended would be applied in future deportation cases involving criminality. On their face they accurately reflect the law as it stood at the time. But they predate SS Nigeria (ibid) and MF (Nigeria) (ibid). In particular they do not emphasise the fact that Parliament has spoken (in favour of deportation) and this is a consideration that the Court of Appeal in SS (Nigeria) (ibid) has made clear must be given great weight. It seems to us therefore that to be consistent with recent case law emphasising this point Masih should no longer be treated as guidance, on this point.

The criticisms made by the SSHD of the FtT judgment

22.
With that analysis in mind we turn to the criticisms made by the SSHD of the decision of the FtT. These, in summary, are twofold.

23.
First, it is submitted that the Tribunal erred in failing to address and/or apply itself to the "very strong public interest" in deportation in circumstances where, from its reasoning, it is completely unclear as to what extent, if at all, the serious nature of the crime and the wider public interest against the supply of drugs were factors in the Tribunal's findings.

24.
Secondly, it is submitted that the Tribunal judgment lacked adequate reasoning. Where two important countervailing principles collide – the public interest in deportation versus the interests of the

individual in having an opportunity to develop a relationship with his children, fairness requires that the Tribunal provide full and proper reasons in relation to their consideration of both these factors.

Analysis

25.
We turn now to set out our views. The gravamen of the Tribunal's decision is found in paragraph 47, which is in the following terms:

"We return therefore to our assessment of the factors in this appeal (at paragraphs 41 of 42 above). The Secretary of State has conceded in the refusal letter that it is not reasonable to expect the Appellant's family to relocate to Jamaica and that there are insurmountable obstacles to family life with the Appellant continuing outside the UK. We conclude therefore that the Secretary of State's decision to deport the Appellant is disproportionate and that the factors weighing against the deportation are so significant as to require this appeal to be allowed."

26.
We have come to the conclusion that the Tribunal judge erred.

27.
In paragraph 47 the Tribunal records what is said to be a concession by the Secretary of State that, first, it was not reasonable to expect the appellant's family to relocate to Jamaica, and secondly, that there were "insurmountable obstacles" to family life with the appellant continuing outside the UK . In view of this concession the Judge proceeded to conclude: "… therefore that the Secretary of State's decision to deport the appellant is disproportionate and that the factors weighing against the deportation are so significant as to require this appeal to be allowed".

28.
With respect to the Tribunal the approach adopted is flawed, at a number of different levels.

29.
First, the proportionality test requires a Court or Tribunal to address itself to and assess the aims or object of the policy in question and then to set against that assessment the factors said to warrant departing from the stated object or policy. In the present case the object or policy in question is the public interest, set out in an Act of Parliament, in favour of deporting criminals. It is essential that in any assessment the weight of the specific object be appraised both in the abstract sense of how important that object is in policy terms, but also on the basis of the particular facts of the case – how serious was the specific appellant's criminality.

30.
With regard to the overall weight to be attached to the policy there can be little doubt, as we have set out above, but that Parliament views the object of deporting those with a criminal record as a very strong policy. This is a constant in all cases.

31.
However, the weight to be attached to that object will also include a variable component which reflects the criminality in issue. In this case the criminality took two forms: first, the prior conviction for dishonesty; and secondly the prior conviction for drug importation. Had the only prior offence been the dishonesty then, upon the facts, the Tribunal might arguably have been able to conclude that the countervailing facts outweighed the strong presumption against deportation. However, the drug

importation was, as the sentencing Recorder acknowledged, a serious offence counterbalanced by no material mitigation. The importation was in excess of 15kg, a very large amount on any view.

32.
In her Decision the Secretary of State explicitly set out a number of important reasons which perforce had to be addressed and assessed specifically in the proportionality weighing exercise. These were: the nature and severity of the offence; the need to protect society against crime; the wide impact of drug offences on the community at large; its consequential effects upon other acquisitive crime committed to raise funds to acquire drugs; and, the need to operate a deterrent policy. Although cast in generic terms in the decision these factors acquire added weight in the context of an offence involving the importation of a substantial volume of drugs. In paragraph 47 the Tribunal does not conduct any sort of a balancing exercise with, on one side of the equation, the public interest considerations, and on the other side, the factors prayed in aid to warrant departure from those public policy considerations. But conducting this exercise is the essence of a proportionality test.

33.
With respect to the Tribunal only half of the task was therefore performed. The Tribunal identified factors in favour of the appellant but then proceeded immediately to a finding on proportionality without working through the essential step of measuring those factors against the general and specific public interest considerations arising and taking account of the SSHD's margin of discretion. It is notable in this regard that in paragraph 47 the Judge only refers to the facts and matters set out in paragraphs 41 and 42 of the Judgment and in these paragraphs one finds only the facts favourable to the respondent, Mr McLarty. There is no reference in paragraph 47 to the public interest facts set out in paragraph 43 – these appear to have fallen out of account.

34.
We have therefore come to the conclusion that the Tribunal erred in failing to apply itself to the proportionality test. The Tribunal assessed and took account of the facts favourable to the respondent, Mr McLarty; but did not balance these against the public interest in favour of deportation.

35.
Secondly, we also accept the SSHD's submission that the reasoning is lacking in clarity and/or is generally deficient. In the course of oral argument we posed questions about the structure of the Tribunal's reasons in relation to the exceptional circumstances said to outweigh the public interest in deportation.

36.
In relation to the assessment exercise which is called for, it is necessary to recall that the scales are not evenly weighted. Parliament has tilted them strongly in favour of deportation and it is not for the Tribunal to seek to rebalance those scales. It is clear from case law that for the tilted scales to return to the level and then swing in favour of a criminal opposing deportation that there must be compelling reasons which must be exceptional: see case law above. What amounts to compelling reasons or exceptional circumstances is very much fact dependent but must necessarily be seen in the context of the articulated will of Parliament in favour of deportation.

37.
This brings us to the facts of this case. The two matters which the Tribunal ultimately alighted upon as relevant are those set out at paragraph 47: "The Secretary of State has conceded in the refusal letter that it is not reasonable to expect the Appellant's family to relocate to Jamaica and that there are insurmountable obstacles to family life with the Appellant continuing outside the UK." On

analysis, the reasoning lacks clarity and substance. It proceeds upon the basis of an ostensible concession by the Secretary of State. However, it is necessary to examine closely what that "concession" actually was and whether it, in any event, needed to be re-evaluated in the light of the Tribunal's own fact findings. The "concession" in the SSHD's decision was a limited one. The Secretary of State found as follows: (i) that the wife's family were in the United Kingdom and they could assist in caring for the children in the absence of the appellant; (ii) that two of the children had British citizenship and could exercise those rights and entitlements associated with that status in the United Kingdom; (iii), that it was a matter of choice for the mother whether she left and relocated to Jamaica. The Secretary of State then stated that there were insurmountable obstacles to family life with the appellant's wife being able to continue outside of the UK.

38.
Before the Tribunal the factual basis of the Secretary of State's conclusions altered. At paragraph 24 the Tribunal found that the wife had no family "at all" in the UK and that her mother, grandmother and uncle were in Jamaica and two sisters were in the USA. The upshot of this was that if the wife so chose she could relocate to Jamaica and then be with her family; but if she remained in the United Kingdom there would not, in actual fact, be any family members in the United Kingdom to assist her with the care of the children. At least some of the children had British citizenship but they could also relocate to Jamaica with the mother and they would there be united with the mother's family. The so called "concession" in the Decision does not, so it appears to us, amount to a very great deal and may have been given undue weight by the Tribunal. In any event the fact finding of the Tribunal itself ought to have triggered a reconsideration of the "concession" to see if it was still relevant in the light of the ostensibly significant findings that the wife's family were in Jamaica and this was bound to have at least some possibly significant impact upon the (in)surmountability of the continuation of a family life in Jamaica.

39.
In Ahmed v SSHD [2014] EWHC (Admin) at paragraphs [45] – [48] the High Court, applying and confirming the Court of Appeal in MF (Nigeria) v SSHD [2013] EWCA Civ 1192 and the Upper Tribunal in Izuazu [2013] UKUT 00045, held that the test of insurmountable obstacles did not amount to obstacles which were literally impossible to surmount but was a reference to the actual "degree of difficulty" a couple faced. We can find no assessment of the actual degree of difficulty arising in this case in the Tribunal's determination.

40.
These points serve to highlight the broader point which is that it was the task of the Tribunal to analyse closely the underlying factual reality; proceeding upon an unanalysed "concession" was not enough. It was also the duty of the Tribunal to set out its reasoning.

41.
It follows that the Tribunal erred in not carrying out the proper assessment of the facts on either side of the proportionality equation.

42.
We would, finally, make an observation about the phrases "exceptional" and "compelling" because it is possible that the phrases have been understood in two different senses. It follows from our reasoning above that simply because the facts surrounding a particular individual who has committed a crime may be said to be "exceptional" or "compelling" this is not the end of the story. In such a case the exceptional or unusual position of the individual are factors to be placed into the weighing scale and

they are then to be weighed against the public interest. As such the use of the phrase exceptional or compelling here is no more than a part of the wider weighing process. An individual may be a person of extraordinary courage and fortitude with an impeccable and distinguished military record and have a long history of charitable good deeds. But the crime for which that person is later convicted might be shocking and reveal a propensity to commit further crimes. The mere fact that the person has exceptional features and attributes is not dispositive. It is simply added weight in the scales; no more and no less.

43.
However, in some other instances the phrase “exceptional” or “compelling” has been used in a second way to describe the end result ie that the position of the individual is “exceptional” or “compelling” because having weighed his/her very unusual facts against the (powerful) public interest the former outweighs the latter. In this sense “exceptional” or “compelling” is the end result of the proportionality weighing process. Provided it is always recalled that there are two components to the exercise this is little more than a semantic quibble. However, since it seems to us to have given rise to confusion we have thought it helpful to highlight the point.

Result

44.
We have therefore come to the conclusion that the judgment of the Tribunal must be set aside. We are not satisfied that the Tribunal has addressed itself to the correct test or has conducted a sufficiently detailed assessment of the evidence or set out the reasons for its determination in sufficient terms.

45.
We were invited, should we decide to set aside the Tribunal decision, to decide the case for ourselves by counsel for the SSHD. However we have decided that we should remit the case to the First-tier Tribunal.

46.
There are arguments both for and against in this case and we did not find on the basis of the Tribunal fact finding that we could form a clear view one way or the other. We therefore do not express any view as to the merits but simply remit the matter for a fresh evaluation.

Signed Date 21 May 2014

Mr Justice Green