UPPER TRIBUNAL
(Immigration and Asylum Chamber)

R (on the application of Miguel Nesta Cover) v Secretary of State for the Home Department IJR [2014] UKUT 00376 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard: 7 July 2014

Before

UPPER TRIBUNAL JUDGE GILL

THE QUEEN ON THE APPLICATION OF
MIGUEL NESTA COVER Applicant

(ANONYMITY ORDER MADE)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT Respondent

Representation:
For the Applicant: Mr G Ó Ceallaigh, of Counsel, instructed by First Law Partnership.
For the Respondent: Ms C Patry, of Counsel, instructed by the Treasury Solicitor.

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JUDGMENT
Delivered on: 12 August 2014

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Anonymity Direction

In order to secure the anonymity of the applicant's children throughout these proceedings I direct pursuant to Rule 45(4)(i) of the Asylum and Immigration Tribunal

(Procedure) Rules 2005 that no report or other publication of these proceedings or of any part or parts of them shall name or directly or indirectly identify the applicant's children. Failure by any person, body or institution whether corporate or incorporate [for the avoidance of doubt to include either party to this appeal] to comply with this direction may lead to a contempt of court. The direction shall continue in force until the Upper Tribunal (IAC) or an appropriate court shall lift or vary it. The parties confirmed that anonymisation of the applicant himself was not necessary.

Judge Gill: The applicant challenges the lawfulness of a decision of the respondent of 17 October 2013 to refuse to revoke a deportation order made against him on 19 December 2012. He asserts that the decision contains public law errors such that it should be quashed. He also challenges the lawfulness of the respondent's decision to certify his human rights claim (Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms) as clearly unfounded under section 94(3) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The effect of the certification (if upheld) is that the applicant may only bring an appeal against the respondent's decision of 17 October 2013 (if it is lawful) to refuse to revoke the deportation order after he has left the United Kingdom.

Immigration history and factual background

2. The applicant is a national of Jamaica, born on 6 March 1983. On 30 August 1993, when he was 10 years old, he was granted indefinite leave to enter on his arrival in the United Kingdom to join his mother who was settled in the United Kingdom.

3. On 16 June 2003, he was convicted at Horseferry Road Magistrates' Court, of three motoring offences (failing to stop after an accident, having no insurance and driving without a driving licence). He received a fine and a driving ban.

4. On 29 October 2003, he was convicted of two counts of robbery and sentenced to 30 months at a young offender's institution to be served concurrently.

5. On 30 December 2004, the respondent decided not to pursue deportation action against the applicant but he was issued with a warning letter stating that, should he come to adverse attention in the future, the respondent would be obliged to further consider the question of deportation.

6. On 19 November 2009, at Woolwich Crown Court, the applicant was convicted of wounding with intent to do grievous bodily harm. On 1 December 2009, he was sentenced to seven years' imprisonment. He did not appeal the conviction or the sentence.

7. The conviction on 19 November 2009 precipitated deportation action. On 19 December 2012, a deportation order was made against the applicant under section 32(5) of the UK Borders Act 2007 and his Article 8 claim refused under para 398 of

the Statement of Changes in the Immigration Rules HC 395 (as amended) (the Immigration Rules).

8. The applicant appealed the decision. On 13 April 2013, he married his then partner. The couple have two children, a daughter ("D") who was born in November 2007 and a son ("S") who was born in February 2009. The applicant's appeal was heard before the First-tier Tribunal (Immigration and Asylum Chamber) (FtT (IAC)) on 17 April 2013 (Judge of the First-tier Tribunal Youngerwood and Miss R I Emblin – JP) (hereafter the "panel"). The panel dismissed his appeal under the Immigration Rules and on human rights grounds (Article 8) in a determination promulgated on 29 April 2013.

9. On 2 July 2013, the applicant's representatives requested the respondent to revoke the deportation order, relying upon the following documentary evidence:

   (i) An independent social worker's report by a Ms Maxine Jones of Nia Youth & Family Services dated 25 June 2013; and

   (ii) An OASys risk assessment dated 20 June 2013.

10. Mr Ó Ceallaigh accepted that the following documents, which post-date the decision of 17 October 2013, could not be relied upon to impugn the lawfulness of the decision:

   (i) the OASYs report dated 14 November 2013 (C33-47); and

   (ii) the London Probation Report dated 12 November 2013 (C48).

11. The respondent considered these documents and made the decision on 17 October 2013 that is the subject of judicial review proceedings.

The determination of the applicant's appeal in April 2013 by the panel

12. The documentary evidence before the panel included the sentencing remarks of Judge Byers and a completed NOMS1 form. The panel heard oral evidence from the applicant, his wife and his mother. It had two handwritten letters from the applicant's sister and aunt.

13. The circumstances of the offence of wounding with intent to do grievous bodily harm were that the applicant went to the home of a woman and attacked her in her kitchen with a knife, leaving her with two large cuts to the side of her head which required medical treatment. Her two children were at home at the time, although they were not in the kitchen. An assessment report dated November 2012 that was before the panel stated that the applicant knew the victim because she had sold him cannabis. He himself started selling crack cocaine and the victim's brother owed him

(the applicant) money. The applicant went to the victim's home due to her brother's death.

14. The completed NOMS1 form assessed the risk of serious harm as "high", stating that "the risk to the public is most likely to occur if a dispute arises as a result of drug-dealing activities, if the applicant is owed money for drugs or if he is in financial need". The applicant was assessed as posing a medium risk to his partner and children as a result of an incident in the home in which he had damaged property.

15. The applicant's risk of re-conviction was assessed as being low or medium but the report stated that the risk of re-conviction was higher than that suggested by the scores, given that the applicant had two convictions for violent offences (robbery and wounding) and his acknowledgment of involvement in drug dealing.

16. The applicant had begun his relationship with his wife three years previously. The applicant's wife and his children are British citizens, as was the applicant's mother according to other evidence that was before the panel.

17. The panel considered the applicant's Article 8 claim under paras 398, 399 and 399A of the Immigration Rules, introduced as from 9 July 2012 by HC 194. It was accepted on the applicant's behalf before the panel that he did not come within para 399 or 399A of the Immigration Rules. It was accepted that he did not satisfy para 399 notwithstanding a genuine parental relationship between the applicant and his British citizen children because there was another family member, namely the applicant's wife, who was able to take care of them in the United Kingdom and also because the applicant did not meet the requirement of continuous residence in the United Kingdom discounting periods of imprisonment.

18. The sole issue before the panel was whether there were exceptional circumstances under para 398. The panel considered that the fact that there was a genuine relationship between the applicant and his partner and between the applicant and his children could not amount, without more, to "exceptional circumstances". Secondly, even if there was a genuine relationship, an application could not succeed under the Immigration Rules unless the requirements of the Rules were met, which was not the case in the panel's view. Lengthy residence was not material in the panel's view because lengths of residence were covered under the Immigration Rules with the result that length of residence that did not satisfy the Immigration Rules could not (in the panel's view) be a material consideration. The panel accepted that questions of the applicant's links with, and any problems relating to, his country of origin may come into the equation, but it considered that the applicant was a fit and healthy young man who had spent his first formative years in Jamaica.

19. The panel concluded that there were no exceptional circumstances outweighing the public interest in deportation. The fact that the applicant nearly met some of the requirements of the Immigration Rules could not avail him because "near-misses" could not be relied upon.

20. As at the date of the hearing before the panel, the judgment of the Court of Appeal in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 had not been delivered. Accordingly, the panel applied the guidance of the Upper Tribunal in *MF (Article 8 – New Rules) (Nigeria)* [2012] 00393 and *Izuazu (Article 8 – New Rules)* [2013] UKUT 00045 (IAC). The panel carried out the five-step assessment explained at para 17 of *R* (*Razgar) v Secretary of State for the Home Department* [2004] UKHL 27.

21. In relation to proportionality, the panel quoted from several authorities, including *R (Londonvi) v SSHD* [2013] EWHC 185 (Admin) in which Leggatt J emphasised the necessity for the respondent or tribunals to consider the principles outlined in the decision in *Maslov v Austria* [2007] 1 F.C.R. 707, stating that there would need to be very serious reasons to justify the exclusion of those who had either been born in, or spent most of their childhood in the host country, all the more so where those offences had been committed when the offender was a juvenile. The panel noted that the Court stressed that there were three important facets of the public interest in the deportation of offenders: the risk of re-offending, deterring foreign nationals from committing offences, and reflecting society's revulsion of serious crimes.

22. In view of the fact that Mr Ó Ceallaigh submitted before me that the decision of the panel was "finely balanced", it is necessary for me to quote paras 22 to 27 of its determination:

> "22. Proceeding to apply the above principles to this particular appellant, the following factors are of relevance:-
>
> (a) As confirmed above, we are satisfied that genuine family life exists between the appellant, his wife and his children.
>
> (b) The effect of the deportation order would be to sever that relationship, because it is clear that the wife and children cannot be expected to move to Jamaica given that they are British citizens and, in any event, it being in our view unreasonable to expect them to do so given their lack of ties with Jamaica and the extent of family life of the wife in the UK.
>
> (c) It is a 'primary consideration', in the balancing exercise, for us to consider the best interests of the children. Some caution must be expressed because, on any basis, the appellant has had very little real contact with his younger child, and the extent of contact with his older child, born in November 2007, has been materially affected by the period of three and a half years imprisonment from 2009. Also, the extent of his criminality, which we consider in more detail hereafter, must be a worrying factor, insofar as it may affect the example he provides for his children. The appellant is considered, in the reports available to us, to be a high risk to the public, and the very serious offence for which he was convicted of [sic] is relatively recent and committed when he was an adult. However, it is not for us to speculate but, rather, make proper findings or inferences on the evidence before us. We were impressed by the evidence of the appellant's wife. She struck us as an honest individual and we, therefore, give some weight to her assertions that, not only is her relationship

and love for the appellant genuine, but that the children, especially the older child, miss, and rely upon, the appellant, and that, albeit in the very brief time he has been released, the appellant has played a significant role in helping to take care of the children. That being so, we are ultimately persuaded that it is not only in the best interests of the children, as conceded by the respondent, to remain in the UK with their mother, but that it is in their best interest to be with their father. That, as we say, is a 'primary consideration' but is not a 'trump card', ultimately, there is really only a single question before us, namely whether the effect of deportation on the family amounts to a disproportionate interference with their rights to private and family life, given that the offences committed by the appellant do of themselves justify deportation unless he meets the relevant exception, relying on Article 8. We also take account of the decision of the Court of Appeal in *Deron Peart* [2012] EWCA Civ 568, emphasising that in considering the best interests of the children, consideration should be given as to how the relationship between the appellant and the children might develop in the future, if the appellant were allowed to stay. That is especially important, given the fact that the appellant has only been very recently effectively reunited with his children.

(d) We fully take account of the requirement in *Maslov* (above), that, in the case of a settled migrant lawfully present and who had spent the major part of his youth in the UK, which we consider applies to the appellant, very serious reasons are needed to justify removal.

(e) A crucial factor in this balancing exercise must be our consideration, in accordance with the case law detailed above, of the weight we give to the clear public interest factors which arise in this case, based upon the appellant's criminality.

23. In considering this last factor, the following factors, and our views thereon, are relevant:-

(a) Having shown his disregard for traffic law in 2003, the appellant shortly thereafter was convicted of two offences of robbery and sentenced to thirty months in a Youth Offending Institution. This was when he was aged about 20 and therefore not a juvenile and was also before his relationship had been formed with his current partner. The appellant's criminality was, therefore, set in motion well before any problems relating to finances arose in the context of his relationship with his current partner.

(b) Of great significance is the fact that the respondent did not, as she was entitled to, institute deportation proceedings for the serious robbery offences, but, rather, allowed the appellant to get away, in terms, with a clear warning as to his future conduct.

(c) That warning was clearly ignored by the very serious offence committed in 2009, at a time when his family life, with this wife and two children, had been established.

(d) In relation to the 2009 offence, it is clear, that contrary to representations made on behalf of the appellant, he did not plead guilty but, as can be seen from the sentencing remarks (above), contested the case. The judge added that the appellant had 'shown no remorse'. The offence was extremely nasty, involving attacking a woman with a knife in her home and where there were children present in the

home, albeit not apparently in the room where the attack took place. Even more worryingly, the judge referred to a 'drugs background' to the case, and this is confirmed by the report, quoted above, as to the appellant having acknowledged his involvement in drug dealing and, even more serious, by the reference in the assessment report of 2013 as to the appellant having started to sell crack cocaine. It seems fairly clear that this very serious assault on the woman was simply due to a debt owed by her brother. Hardly surprising, in our view, that the appellant is considered to be a high risk to the public and he is not, frankly, assisted by the incidents of domestic violence, albeit relatively minor, referred to in the evidence (above).

24. There is no mitigation that we can see in relation to this very serious offence and, indeed, Ms Nnamani did not seek to argue such mitigation. She only makes very brief reference to the fact of the conviction in her skeleton argument as being a relevant consideration for us. We note that the appellant has expressed his remorse before us and has not tried to mitigate his offence but, frankly, it would be difficult for him to do so in any event.

25. At the end of the day, we have to balance the factors supporting and affecting the appellant's family and private life in the UK, and especially his life with his wife and children, taking full account, as a primary consideration, that the best interests of the children, on our finding, are to remain with the appellant, and to balance those factors as against the very clear duty to consider the public interest, that interest being greater in deportation cases than in ordinary removal cases, as established in case-law quoted above.

26. In our view, we cannot minimise, let alone ignore, the very serious criminality of this appellant in committing offences when he as an adult and especially after the clear opportunity and warning given to him, offences for which there are [sic] absolutely no mitigation. They are offences of extreme gravity, with a background of serious drug dealing. We consider that we would be totally failing in our duty to consider the public interest and need to express deterrence and revulsion at the appellant's crimes, and to consider the protection of the public against future criminality, by affording greater weight, in this particular case, to the appellant's clear family life in the UK and the best interests of his children. There are cases where there can only be sympathy for an appellant's partner, as in this case, where the consequences of an appellant's criminality is to break up the family and, even more so, where the children are to be affected. That, however, is bound to be the consequence of a deportation order, made on proper grounds, and where the Tribunal is satisfied that the interests and protection of the public outweighs the interests, however powerful, of the continuance of family life in the UK. LJ Sedley, in the decision in *Ad Lee* [2011] EWCA Civ 348, commented, in relation to that case, that the tragic consequence was that this family, albeit short lived, would be broken up forever because of the appellant's bad behaviour. That was often the consequence of deportation. That, sadly, is the consequence which will follow from our findings. There are, in our view, 'very serious reasons', to use the wording from *Maslov* (above), in this case justifying deportation.

27. We conclude that, having carefully considered the relevant factors and the balancing exercise inherent in the Article 8 issue, following the principles of *Razgar*, adapted to deportation cases, the respondent establishes that the decision is lawful and proportionate."

The fresh evidence

23. The report dated 25 June 2013 of Ms Maxine Jones followed her visit to the home of the applicant and his wife on 24 June 2013. Ms Jones was a founder and director of Nia Youth & Family Services. She said she had undertaken an independent social work assessment. On the first page of her report, Ms Jones listed the documents that were before her. This does not include the panel's determination.

24. In her report, Ms Jones states, *inter alia*, that the applicant had become a significant part of the lives of the children in the previous six months and that their separation from him would have a "devastating and detrimental effect" on them. She referred to the fact that the applicant had informed her that his wife had informed him that D would run to the door each time there was a knock at the door, calling out his name in expectation of his return home. Based on this evidence, Ms Jones said that D was "a little girl who was accustomed to running to the door expecting her father's return" and that the significance to her of having her father back in her life should not be underestimated. Now that he was back and playing a significant role in her life, such upheaval would traumatise her and have a detrimental impact on her both in the short-term and in the long-term. She said that research showed that removal of a parent from a child's life often results in feelings of loss and abandonment. Children may feel anger towards the remaining parent and may act out or display aggressive behaviour. The impact on S would be equally devastating and would have deleterious effects on his growth and development. Research showed that boys suffer significantly when they grow up without their fathers in their life, many turning to the "streets" and a life of crime. Given that the applicant's wife would be a single parent, it is unlikely that she would be able to afford sporadic visits to Jamaica. It was likely that the applicant's wife will have major difficulties coping on her own. The risk of her experiencing depression was quite high since she could feel that she is unable to meet the needs of her children.

25. The OASys Report dated 20 June 2013 stated, *inter alia*, that the applicant had undertaken an assessment with the Bexley drugs team. They confirmed that he did not require any further assistance from them, that he had continued to report for supervision and had not presented any concerns in relation to a return to illegal drug use. They did not consider that there were any current concerns in relation to safeguarding issues. The applicant had engaged well with their education, training and employment provider throughout his supervision period to date. The applicant had had no formal warnings whilst on licence and there was no information from the local police or through MAPPA Information Exchange to suggest that there was any further police contact or concerns regarding his behaviour. In those circumstances, the risk that the applicant posed of harm to the public had been reduced from "high risk" to "a medium risk" of harm to the public, known adults and children.

26. The Pre-Sentence Report (PSR) that was before the sentencing judge and the panel assessed the applicant, as stated above, as presenting a high risk of serious harm to the public. The PSR explained "high risk" in the applicant's case meant:

> "Members of the public are at risk of physical or emotional harm arising from being the victim of a robbery (previous conviction) or an assault. Given the use of a weapon in the current offence of wounding, there is a potential for serious injury. The risk to the public is most likely to occur if a dispute arises as a result of drug dealing activities/if [the applicant] is owed money for drugs or if he is in financial need. The [applicant] is assessed as posing a medium risk to his partner and children as a result of an incident in the house in which he damaged property. He received a caution for the his offence (03/04/09)"

27. "Medium risk" in relation to the OASys assessment dated 20 June 2013 was explained as follows:

> "Medium risk means that there are identifiable indicators of risk of serious harm and that there is the potential to cause serious harm but [the applicant] is unlikely to do so unless there is a change of circumstance. He is not assessed as currently presenting imminent risk of harm."

The respondent's decision dated 17 October 2013

28. As at the date of the respondent's decision, the Court of Appeal's judgment in *MF (Nigeria)* had not been delivered. Accordingly, the respondent applied the guidance of the Upper Tribunal in *MF (Nigeria)* and *Izuazu* whilst stating that she did not accept the correctness of the guidance in question.

29. The respondent referred to the fact that para 396 of the Immigration Rules states that, where a person is liable to deportation, the public interest requires it. The respondent concluded that there were no exceptional circumstances under para 398 of the Immigration Rules. The decision-maker considered that the report of Ms Jones and the evidence of the reduction in the risk posed to members of the public of serious harm from "high" to "medium" amounted to "no more than a disagreement with the findings of [the panel]" and "added nothing new that could be considered as exceptional".

30. In response to the reduction in the risk of harm posed by the applicant from "high" to "medium" following his attendance on rehabilitation courses, the decision-maker considered (para 40) that the applicant was still assessed as posing a significant risk of harm to members of the public. Although it was acknowledged from the report that the applicant had fully complied with the conditions imposed by his licence, it was considered that it was in his best interests to do so as failure to do so would have resulted in his recall to prison.

31. In assessing the Article 8 claim pursuant to the approach explained by the Upper Tribunal in *MF (Nigeria)* and *Izuazu*, the decision-maker relied upon the guidance in

Devaseelan * [2002] UKIAT 00702, setting out extracts from the determination of the panel, and concluding that the representations submitted on the applicant's behalf amounted to "no more than a disagreement with the findings of [the panel].

32. The decision-maker distinguished the case of *Maslov v Austria* on the basis that the applicant in that case had committed the offences whilst he was young (at the ages of 14 and 15) and that the offences in question were non-violent in nature, whereas the applicant was aged 26 at the date of his offence and sentenced to seven years' imprisonment for an offence of wounding with intent to do grievous bodily harm.

33. At para 47, the decision-maker noted that the applicant's wife would have the full support of her extended family in the United Kingdom in caring for her children, as evident during the time that the applicant had spent in prison.

34. At para 50, the decision-maker stated that the applicant had failed to demonstrate that his circumstances were materially different now than when considered at his appeal on 29 April 2013. It was therefore considered that his claims under the ECHR must clearly fail.

The applicant's case

The challenge to the section 94(3) certification

35. The applicant's skeleton argument ([68.b.ii]) states that the risk of re-offending has reduced to "low". However, this is based on evidence that post-dates the decision, that is, the OASYs report dated 14 November 2013 (C33-47) and the London Probation Report dated 12 November 2013 (C48). As stated above, Mr Ó Ceallaigh accepted at the hearing that these post-decision documents could not be relied upon to impugn the lawfulness of the decision.

36. Mr Ó Ceallaigh submitted that the panel's determination was "finely balanced". It is said that the new material produced (described above) was significant for the following reasons:

    (i) Mr Ó Ceallaigh submitted that the panel had repeatedly referred to the high risk posed by the applicant. It would be naïve to think that the panel had found that the risk of serious harm was not high, as contended by Ms Patry. Since the hearing, the risk of serious harm to the public had reduced from "high" on the evidence before the panel to "medium". The applicant has lived with his family and committed no further offences.

    (ii) The OASys Report showed that the applicant had demonstrated his remorse to the Probation Services on several occasions. They had been impressed with his conduct.

(iii) The panel had accepted that the applicant's family should not be required to leave the United Kingdom and that it was in the interests of the children for the family to remain together on the evidence already available to the panel at the time. It was clear that the panel considered that, given that the applicant had little contact with the younger son and that he had only been recently reunited with the children, his ties to the children were not strong enough. In addition, there was no evidence before the panel of the actual damage to the children if the applicant was deported.

(iv) Time has passed since the last hearing. Passage of time in itself affects the strength of human relationships. The report of the independent social worker showed that the applicant's relationship with his wife and children had strengthened since the hearing before the panel. The children have very strong relationships with the applicant. Both are likely to be very significantly damaged by the applicant's deportation. The applicant is central to D's life. D is likely to be traumatised if the applicant is removed. His deportation is likely to be devastating for the applicant's wife.

(v) Given that different Tribunals assessing the same facts could lawfully come to opposite conclusions in the Article 8 ECHR balancing exercise, that the panel could have allowed the applicant's appeal under Article 8 without making an error of law. Mr Ó Ceallaigh submitted that the decision of the panel was evenly balanced. The findings of the panel would not be binding in any future appeal. A new Tribunal would have to assess all of the relevant facts as at the date of the hearing which would include an assessment of the new evidence.

(vi) Given the reduction in the risk of serious harm, the strengthening of the family life enjoyed, the remorse of the applicant and the principles in *Maslov v Austria*, the decision to certify the claim was unlawful.

(vii) Although the social worker was not medically qualified, Mr Ó Ceallaigh submitted that one does not have to be qualified in order to express the opinion that the applicant's wife would suffer depression if the applicant were to be removed.

37. Mr Ó Ceallaigh submitted that this was a case where a small factual change in the circumstances could make a difference. This is because the findings of the panel were finely balanced, in his submission.

38. Mr Ó Ceallaigh submitted that the guidance in *Devaseelan* was concerned with factual findings, whereas the instant case concerns an evaluation of an individual's circumstances under Article 8.

The challenge to the lawfulness of the refusal to revoke the deportation order

39. Mr Ó Ceallaigh submitted that the decision to refuse to revoke the deportation order was unlawful and should be quashed for the reasons given at [86]-[89] of the skeleton argument. In summary:

    (i) The decision-maker had failed entirely to engage with the substance of the report of Ms Jones. This was a clear breach of section 55 of the Borders, Citizenship and Immigration Act 2009 (the "2009 Act").

    (ii) The decision-maker had failed to engage with the importance of the reduction in the applicant's risk. This was material, given the panel's repeated mention of the high risk of harm posed by the applicant.

    (iii) It was irrational for the decision-maker to say ([40]) that the applicant's good behaviour during and since imprisonment could be ignored on the basis that it was in his interests to behave in that way in order to avoid being recalled to prison.

40. Mr Ó Ceallaigh submitted that the applicant did not have an alternative remedy in respect of this challenge. Although he could raise the same arguments in an appeal before the FtT (IAC) to challenge the decision on the ground that it was not in accordance with the law, this would not be an adequate alternative remedy. Given that he was not being given an in-country right of appeal, it was important that the decision to refuse to revoke the deportation order be a lawful one.

Relevance or otherwise of the respondent's policy entitled: ""Non Suspensive Appeals (NSA) Certification under section 94 of the NIA Act 2002"

41. At the hearing, Mr Ó Ceallaigh submitted the decision to refuse to revoke the deportation order was made in breach of the policy *entitled: ""Non Suspensive Appeals (NSA) Certification under section 94 of the NIA Act 2002",* although para 49 of the skeleton argument relied upon the policy in the challenge to the decision to certify as opposed to the lawfulness of the refusal to revoke to the deportation order.

42. Mr Ó Ceallaigh referred to the examples at [5.1.10] of the policy of circumstances that are not suitable for certification. He submitted that this guidance applied to considerations of applications to revoke deportation orders. Ms Patry submitted that this policy was not applicable to applications to revoke deportation orders.

43. I record that after some discussion, the parties agreed that it was not necessary for me to resolve the question whether the policy applied to applications to revoke a deportation order, given that it was for me to reach my own conclusion as to whether the applicant's Article 8 claim was bound to fail in an appeal before the FtT (IAC) and that, if I did not uphold the certification, it would be for the FtT (IAC) to reach its own conclusion on whether deportation would be in breach of Article 8. Thus, the

question whether the respondent had failed to apply her policy (if it applies) becomes irrelevant.

Assessment

The certification issue – the relevant legal principles

44. In any future appeal, the FtT (IAC) would be bound to begin the assessment of Article 8 by considering the relevant Immigration Rules, which provide:

"390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

(i) the grounds on which the order was made;
(ii) any representations made in support of revocation;
(iii) the interests of the community, including the maintenance of an effective immigration control;
(iv) the interests of the applicant, including any compassionate circumstances.

391. In the case of a person who has been deported …

396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

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."

(my emphasis)

45. Although Mr Ó Ceallaigh did not go as far as to say that the guidance in *Devaseelan* was not relevant in Article 8 cases which involve an evaluation of the circumstances that apply in an individual case against the state's interests, he appeared to suggest that the guidance was of reduced relevance. In *Devaseelan*, the Tribunal made it clear that the previous panel's findings are an assessment of the issues that were before that panel at the time that decision was made. That is an observation that applies equally in Article 8 cases. Under the *Devaseelan* guidelines, the FtT (IAC) in a future appeal would be bound to remind itself that its task is to evaluate whether deportation would be in breach of Article 8 on the evidence before it taking into account the relevant Immigration Rules and the findings of the panel as a determination of the applicant's Article 8 claim at the date the panel made its decision.

46. In relation to the Immigration Rules, it is important to note that the panel did not have the benefit of the judgment of the Court of Appeal in *MF (Nigeria).* Applying the judgment of the Court of Appeal in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192, the first step for the FtT would be to consider whether para 399 or 399A apply. If

either applied, then the new rules implicitly provide that deportation would be contrary to Article 8. If neither applied, the concluding words of para 398 require consideration of whether there were exceptional circumstances to outweigh the public interest, there being a presumption (para 396 of the Immigration Rules) that the public interest requires deportation.

47. As to the meaning of "exceptional circumstances" in para 398, the Court of Appeal said in *MF (Nigeria)* said*:*

> "42. At para 40, Sales J [in *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin)] referred to a statement in the case law that, in "precarious" cases, "it is likely to be only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of art 8". This has been repeated and adopted by the ECtHR in near identical terms in many cases. At paras 41 and 42, he said that in a "precarious" family life case, it is only in "exceptional" or "the most exceptional circumstances" that removal of the non-national family member will constitute a violation of article 8. In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, 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 our view, it is no coincidence that the phrase "exceptional circumstances" is used in the new rules in the context of weighing the competing factors for and against deportation of foreign criminals.
>
> 43. The word "exceptional" is often used to denote a departure from a general rule. The general rule in the present context is that, in the case of a foreign prisoner to whom paras 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the "exceptional circumstances".
>
> 44. We would, therefore, hold that the new rules are a complete code and that the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence…."

48. It is accepted on the applicant's behalf that he does not satisfy para 399 or 399A of the Immigration Rules. However, it is important to understand the reason why he does not satisfy the requirements of these Rules. The panel noted that it was accepted before it that the applicant did not satisfy para 399 or 399A for two reasons: (i) there was another family member, i.e. his wife, who was able to take care of the applicant's British citizen children; and (ii) the applicant did not satisfy the requirement of continuous residence in the United Kingdom discounting periods of imprisonment.

49. It appears that the panel's attention was not drawn to the fact that there was an even more important reason why paras 399 and 399A did not apply, that is, that para 398(a) applied and *for that reason* paras 399 and 399A *could not* apply. They could not have applied even if the applicant's British citizen children had not had anyone to

take care of them and even if the applicant had satisfied the continuous residence requirement after discounting periods of residence.

50. If there were an appeal, the FtT (IAC) would have to take account of the fact that the legislature had decided that the state's interests were deserving of such weight when considered against circumstances of individuals that those who are caught by para 398(a) are not to benefit from para 399 or 399A. This is the context in which the FtT (IAC) in any future appeal would have to decide whether there are exceptional circumstances in this case that the public interest in deportation is outweighed. This is the context in which the FtT (IAC) would have to consider the weight to be given to the impact of deportation on the applicant, his wife and children and the best interests of a child as a paramount consideration. The FtT (IAC) could not properly place the same weight on these factors as in a case that fell within para 398(b) or (c). To do so would be to ignore the fact that the legislature decided that individuals who received sentences of 4 years or more were not to have the benefit of para 399 or 399A.

51. Furthermore, the FtT (IAC) would also be bound to take account of the fact that the actual sentence passed in this case was one of 7 years, considerably more than the minimum of 4 years for para 398(a) to apply. Again, this is a relevant fact in deciding the weight to be given to the state's interests and whether it is outweighed by other factors.

52. In relation to the certification issue, I reach my own view on the question whether, on the material before the respondent as at the date of the decision, the applicant's Article 8 claim was one that was bound to fail in an appeal before the FtT, applying the approach that the FtT would have to apply if there was an appeal and as explained above. In *ZT (Kosovo) v SSHD* [2009] 1 WLR 348, [2009] UKHL 6, Lord Phillips of Worth Matravers explained the correct approach to the certification issue:

> "22. The test of whether a claim is 'clearly unfounded' is a black and white test. The result cannot, for instance, depend upon whether the burden of proof is on the claimant or the Secretary of State, … in *R(L) v Secretary of State for the Home Department* [2003] EWCA Civ 25; [2003] 1 WLR 1230, paragraphs 56 to 59 I put the matter as follows.
>
> > '56 …
> >
> > 57 … the decision-maker will (i) consider the factual substance and detail of the claim, (ii) consider how it stands with the known background data, (iii) consider whether in the round it is capable of belief, (iv) if not, consider whether some part of it is capable of belief, (v) consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention. If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not.
> >
> > 58 … If on at least one legitimate view of the facts or the law the claim may succeed, the claim will not be clearly unfounded...'

> 23. Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational."

53. I have no hesitation in rejecting the repeated submission in Mr Ó Ceallaigh's skeleton argument and at the hearing that the determination of the panel was "finely balanced". There is nothing at all in the panel's reasoning to suggest this was the case. The words "we consider that we would be totally failing in our duty to consider the public interest and need to express deterrence and revulsion at the applicant's crimes" at [26] come nowhere near showing that the decision was considered by them to be finely balanced, whether taken on their own or in conjunction with the rest of the panel's reasoning.

54. Similarly, Mr Ó Ceallaigh placed much emphasis on his submission that the panel could have allowed the appeal without legal error. However, it does not make sense for me to consider whether the panel could have allowed the appeal without legal error. The fact is that it dismissed the appeal at a time when it did not have the benefit of the Court of Appeal's guidance in *MF (Nigeria)* and, more importantly, that it had not had drawn to it the significance of the fact that para 399 and 399A could not apply because para 398(a) applied. In any future appeal, the FtT (IAC) will begin its assessment of whether there are exceptional circumstances such as to outweigh the state's interests from the correct starting point.

55. The applicant's challenge to the certification rests on four main points, as follows:

(i) the change in the risk of serious harm to the public from high to medium, there being no change in the risk of harm to his partner and children which remained at medium. The change in the risk of re-offending from "low to medium" to "low" is based on post-decision evidence, as explained above;
(ii) more evidence of remorse; and
(iii) the increase in the length of his residence; and
(iv) the report of the social worker of the greater impact on his wife and children of his deportation.

56. For the reasons given at [48]-[51] above, the FtT (IAC) could not properly give much weight to (ii), (iii) and (iv).

57. However, even if I am wrong in my analysis at [48]-[51], the FtT (IAC) could not properly give much weight to (ii), (iii) and (iv) for the following reasons:

(a) On the issue of remorse, I agree with Ms Patry that the panel had before it evidence that the applicant was remorseful. At [7(a)], it quoted an entire paragraph from the applicant's witness statement in which he expressed his remorse and explained the reasons for his remorse. At [7(b)], it recorded the claimant's oral evidence that he felt deeply regretful about committing the offence. At [7(f)-(g)], it accepted the evidence of the applicant's wife that she considered the applicant to be a changed man and that she had no worries or concerns that he would commit any further criminal offences. It noted her evidence that she thought that the applicant was a different person since his release ("a massive, massive change") and believed he had learnt his lesson. At [22(c)], it panel stated that it was impressed by the evidence of the applicant's wife. She struck them as an honest individual. When seen in the context of the evidence of remorse that the panel had, the new evidence of remorse adds little of any significance to the applicant's side of the scales in the balancing exercise.

(b) As to residence, FtT (IAC) could not properly place much if any weight on the increased residence since the hearing before the panel, nor could it place much weight on the overall period of residence even in a fresh re-evaluation. My calculations are that, as at the date of the decision on 17 October 2013 and discounting periods of imprisonment (as opposed to sentences passed), he was just short of satisfying the 15-year period of continuous residence with valid leave for the purposes of para 399(b)(i) and he was short by over 4 years of satisfying the 20-year period of continuous residence in para 399A(a). In relation to para 399, "near-misses" cannot be relied upon. He fell short of satisfying the requirement in para 399A(a) by a long margin. The FtT (IAC) would be bound to take into account the fact that, in April 2013, the panel had considered *Maslov v Austria* and found that there were serious reasons for the applicant's deportation.

(c) As to the evidence concerning the impact on the applicant's wife and children if the applicant were to be removed, Ms Jones was of the view that the applicant's removal would have a devastating and detrimental effect on both of the children and that the applicant's wife would have major difficulties coping on her own. Given that she does not have any medical qualifications, the Tribunal in a future appeal could not properly place much if any weight on her opinion that the applicant's wife would experience depression. Furthermore, as Ms Patry correctly pointed out, there is nothing to indicate that Ms Jones had a copy of the determination of the panel. The list of documents she referred to on the first page of her report does not include the panel's determination.

Ms Jones also does not appear to have taken into account the fact that the children had coped during the applicant's period of incarceration in prison, although it is true to say that the impact of the applicant's removal following his return to the family home is likely to be greater. In addition, Ms Jones has not assessed why D could not adapt once again to the removal of her father from her life. In relation to both children, there are a number of generic

comments about the effects that children might face if a parent is removed from their lives.

Similarly Ms Jones has not indicated that she has taken into account the fact that the applicant's wife did cope for considerable periods of time without the applicant. Indeed, there was evidence before the panel which heard the appeal only a few weeks before the report of Ms Jones. Ms Jones does not appear to have taken into account the fact that the applicant's wife had extensive support available to her during the period of the applicant's imprisonment. In her witness statement that was before the panel, she said that her parents, sister, nephew and uncle all live in the United Kingdom and that she would not be able to live in Jamaica because she would be unable to cope without their support in a foreign land.

Furthermore, the panel had accepted that the children and the applicant's wife would be affected by the applicant's removal. The panel accepted that it was in the best interests of the children for the applicant to remain with them in the United Kingdom. The panel accepted that deportation would result in the break-up of this family. If there were another appeal, it is correct that the FtT (IAC) would have to evaluate the Article 8 claim. Nevertheless, it would be bound to take into account the fact that it was found in the circumstances prevailing in April 2013, that deportation with the consequence of a permanent break-up of this family would not in all the circumstances amount to a breach of Article 8.

58. If there were another appeal, the FtT (IAC) would also consider the evidence as to the risk that the applicant poses.

59. Ms Patry submitted that there was in fact no change in the risk of serious harm to the public, given that the panel had found the applicant's wife an honest individual and accepted the evidence that he was remorseful and was a changed man. On this basis, Ms Patry submitted that, although the OASys report stated that the risk of serious harm to the public was high, the panel had factored in the evidence that the applicant was a changed man and that the risk of serious harm to the public was lower than that stated in the OASys report as high.

60. I do not accept Ms Patry's submission that the panel had accepted that the risk of serious harm to the public was lower than as stated in the OASys report. It is not possible to read [22(c)] of the determination in that way. When [22] and [23] are read as a whole, taking into account in particular the final sentence of [22(d)], the panel did not consider that the future risk of serious harm to the public had reduced on the evidence before them from the risk stated in the OASys report as high.

61. Accordingly, the new evidence shows a reduction in the risk of serious harm to the public from "high" to "medium". However, this still represents a significant risk.

62. The risk of harm to the applicant's partner has not changed.

63. There was no evidence as at the date of the decision that the risk of re-offending had reduced, as stated above. However, even if I am wrong about this, the reduction in the risk of re-offending was small and insignificant.

64. Considering the evidence as a whole and applying the duty of anxious scrutiny, I have concluded that an appeal before the FtT (IAC) would be bound to fail. In balancing the state's interests arising from the risk posed by the applicant, the need to deter foreign nationals from committing offences and the need to reflect society's revulsion of serious crimes against (if, they fall to be considered, contrary to [48]-[51] above), the circumstances of the applicant (including his remorse, his increased residence, the overall period of his residence since his arrival at the age of 10 years) and the circumstances of and impact upon his wife and children, the FtT (IAC) would be bound to conclude that the state's interests were not outweighed by the considerations in the applicant's favour and therefore that the applicant's deportation would not be in breach of article 8.

65. I therefore uphold the certification under section 94(3) of the 2002 Act.

The challenge to the lawfulness of the refusal to revoke the deportation order

66. I have set out at [39]-[40] above a summary of the basis of the challenge. The first and obvious point is that the grounds relied upon to support the challenge to the lawfulness of the decision go to the merits of the article 8 case. The applicant will be able to ventilate the merits of his article 8 claim in an appeal to the FtT (IAC), an appeal which he can only bring once he has left the United Kingdom.

67. I do not accept Mr Ó Ceallaigh's submission that an appeal to the FtT (IAC) is not an adequate alternative remedy. Given that I have taken my own view of the material that was before the respondent when she made the decision sought to be challenged and concluded that an appeal would be bound to fail, an appeal brought to the FtT (IAC) after the applicant has left the United Kingdom is an adequate alternative remedy.

68. In any event, I do not accept that the decision letter dated 17 October 2013 is flawed in the public law sense, as contended. Whilst it is correct to say that the report of Ms. Jones is mentioned in terms only at [13] and [16] and that the conclusion is set out at [18] and [19] before the analysis which follows at [20] onwards, the decision letter must be read as a whole. When read as a whole, it is plain that the decision-maker considered that the new evidence of the impact of the applicant's deportation on the applicant's wife and children was not such as to outweigh the state's interests on any legitimate view. It is otherwise difficult to see why the decision-maker discussed the duty in section 55, the Supreme Court's judgment in *ZH (Tanzania)* [2011] UKSC 4 and the reasoning of the panel at [22(c)] in relation to the best interests of the children.

69. The decision-maker also considered the new evidence of the change in risk, at [40]. There is nothing irrational in the view taken by the decision-maker that it was in the applicant's best interest to comply with the conditions of his release on licence.

70. I therefore reject this ground.

Decision

The claim is dismissed.

Signed Date: 12 August 2014
Upper Tribunal Judge Gill

Postscript: Section 19 of the Immigration Act 2014 (the 2004 Act) introduced a new Part 5A of the 2002 Act with effect from 28 July 2014. By then, I had already independently reached my view of the proper construction of para 398(a), 399 and 399A, as expressed at [48]-[51]. I had already decided to conduct the assessment in the alternative explained at [57] onwards, notwithstanding which the applicant failed in his challenge to the certification. I therefore decided not to invite submissions from the parties on the implications for this judicial review claim of the coming into force of section 19 of the 2014 Act.