Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07942/2017 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre Remotely by Skype for Business	**Decision & Reasons Promulgated**
On 19 November 2020	**On 6 January 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MAURICE VILLIOUS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms G Brown, instructed by Bristol Law Centre
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Jamaica who was born on 29 July 1998. He entered the United Kingdom on 20 February 2002 and was granted six months' leave to enter in line with that of his mother. He was, at that time, 3 years old.

2. On 4 December 2002, his mother applied for an extension of her leave as a student with the appellant included as her dependent. On 17 March 2003, the appellant was granted further leave until 17 March 2004 in line with his mother.

3. On 17 March 2004, the appellant's mother applied for an extension of her student visa again with the appellant as her dependant. On 7 May 2004, that application was refused. On 21 January 2005, the decision was withdrawn and reconsidered and again refused. The appellant's mother unsuccessfully appealed against that decision and she became appeal rights exhausted on 9 March 2016.

4. On 2 August 2010, the appellant's mother lodged an application outside the Immigration Rules on compassionate grounds but this application was refused on 7 March 2011. On 8 June 2011, the respondent reconsidered her decision and granted discretionary leave until 8 June 2014.

5. On 29 May 2014, the appellant's mother lodged another application outside the Immigration Rules on compassionate grounds and, as a result of that, on 1 August 2014 was granted discretionary leave until 1 August 2017. The appellant was granted leave in line with that of his mother.

6. On 31 August 2016, the appellant was convicted at the Bristol Crown Court of the offences of affray and possession of an offensive weapon in a public place. On 30 September 2016, he was sentenced to twelve months' detention in a Youth Offender Institution on both counts to run concurrently.

7. On 15 October 2016, the appellant was served with a notice of a decision to deport him based upon that criminal conviction. On 28 October 2016, submissions were made on behalf of the appellant. On 16 December 2016, the appellant was served with a signed deportation order. Removal directions were set for 20 June 2017 but these were cancelled and the decision to deport him made on 16 December 2016 was withdrawn.

8. A fresh decision to deport the appellant and to refuse his human rights claim was made on 15 July 2017.

The Appeal to the First-Tier Tribunal

9. The appellant appealed to the Fist-tier Tribunal. The appeal was heard by Judge L Murray on 13 January 2020. In a decision sent on 10 February 2020, Judge Murray dismissed the appellant's appeal under Article 8 of the ECHR.

10. Judge Murray concluded that neither Exception 1 nor Exception 2 in s.117C(4) and (5) of the Nationality, Immigration and Asylum Act 2002 (as amended) ("the NIA Act 2002") applied. As regards Exception 1, Judge Murray was not satisfied that there would be "very significant obstacles" to the appellant's integration into Jamaica on return (see s.117(4)(c)). Further, in relation to Exception 2, Judge Murray, although satisfied that the appellant had a genuine and subsisting relationship with his qualifying partner, was not satisfied that the effect of his deportation would be "unduly harsh" (see s.117C(5)). Finally, Judge Murray was not satisfied that there

were "very compelling circumstances over and above those in Exceptions 1 and 2" so as to outweigh the public interest (see s.117C(6)).

The Appeal to the Upper Tribunal

11. The appellant sought permission to appeal to the Upper Tribunal. On 18 April 2020, the First-tier Tribunal (Judge O'Keeffe) refused the appellant permission to appeal. The application was renewed to the Upper Tribunal and, on 20 July 2020, UTJ Perkins granted the appellant permission to appeal.

12. On 26 August 2020, the Secretary of State filed a rule 24 response.

13. In reply to that rule 24 response, on 23 September 2020, the appellant filed a rule 25 reply.

14. The appeal was listed for a remote hearing by Skpye for Business on 19 November 2020. I was based in the Cardiff Civil Justice Centre in court and Ms Brown, who represented the appellant, and Mr Howells, who represented the Secretary of State, joined the hearing remotely by Skype.

A Preliminary Matter

15. At the outset of the hearing, Ms Brown made an application inviting me to recuse myself on the basis of imputed or apparent bias. The basis of this application was my knowledge of the contents of para 14 of the respondent's rule 24 notice. In that paragraph, the Secretary of State reports that, subsequent to the hearing before Judge Murray, the appellant was on 29 July 2020 sentenced to ten months' imprisonment at the Bristol Crown Court for possession of a blade in a public place.

16. Ms Brown indicated that two applications had been made prior to the hearing on the appellant's behalf, on 5 November and 11 November, seeking a direction from the Upper Tribunal that the respondent should delete para 14 of the rule 24 reply and serve an amended rule 24 notice for the purposes of the hearing. She indicated that both applications had been rejected and that, in effect, she was now seeking to renew that application to me.

17. Ms Brown submitted that para 14 of the rule 24 reply was not relevant to whether Judge Murray's decision disclosed an error of law and should be set aside. She submitted, having knowledge of this conviction created a situation of imputed or apparent bias, namely that a fair-minded observer would conclude that there was a real possibility that a judge determining the error of law issue would be biased.

18. Ms Brown relied upon the statement of the relevant law set out in the Upper Tribunal's decision in Ortega (remittal; bias; parental relationship) [2018] UKUT 298 (IAC) at [22].

19. Mr Howells accepted that para 14 of the rule 24 notice was not relevant to the error of law issue and, if I concluded that I should recuse myself, then the rule 24 notice would be refiled with para 14 omitted. He made no further submissions.

20. Having heard the submissions of both parties, I rejected Ms Brown's application to recuse myself on the basis of imputed or apparent bias and indicated that I would give my reasons in my decision on the appeal. I now do so.

21. The relevant law is summarised in [22] of Ortega where the Upper Tribunal (Lane J, President and UTJ Pitt) adopted the UT's reasoning in Alunbankudi (appearance of bias) [2015] UKUT 542 (IAC) at [6]–[8] as follows:

> "22. The Upper Tribunal decision of Alubankudi (Appearance of bias) [2015] UKUT 542 sets out in paragraphs 6 to 8 the "Governing Legal Principles" to be applied when considering an allegation of bias:
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> 6. Every litigant enjoys a common law right to a fair hearing. This entails fairness of the procedural, rather than substantive, variety. Where a breach of this right is demonstrated, this will normally be considered a material error of law warranting the setting aside of the decision of the FtT: see AAN (Veil) Afghanistan [2014] UKUT 102 (IAC) and MM (Unfairness; E&R) Sudan [2014] UKUT 105 (IAC). The fair hearing principle may be viewed as the unification of the two common law maxims audi alteram partem and nemo judex in causa sua, which combine to form the doctrine of natural justice, as it was formerly known. These two maxims are, nowadays, frequently expressed in the terms of a right and a prohibition, namely the litigant's right to a fair hearing and the prohibition which precludes a Judge from adjudicating in a case in which he has an interest.
>
> 7. Further refinements of the fair hearing principle have resulted in the development of the concepts of apparent bias and actual bias. The latter equates with the prohibition identified immediately above. In contrast, apparent bias, where invoked, gives rise to a somewhat more sophisticated and subtle challenge. It entails the application of the following test:
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> > 'The question is whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'
>
> See Porter v Magill [2001] UKHL 67, at [103].
>
> In Re Medicament [2001] 1 WLR 700, the Court of Appeal provided the following exposition of the task of the appellate, or review, court or tribunal:
>
> > 'The Court must first ascertain all the circumstances which have a bearing on the suggestions that the Judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the Tribunal was bias. The material circumstances will include any explanation given by the Judge under review as to his knowledge or appreciation of those circumstances.'

> In Lawal v Northern Spirit [2003] UKHL 35, the House of Lords reiterated the importance of first identifying the circumstances which are said to give rise to apparent bias."
>
> 8. The authorities place due emphasis on the requirement that the hypothetical reasonable observer is duly informed. This connotes that the observer is in possession of all material facts. See, for example, Taylor v Lawrence [2002] EWCA Civ 90, at [61] - [63]. Furthermore, the hypothetical fair minded observer is a person of balance and temperance, " *... neither complacent nor unduly sensitive or suspicious*", per Lord Steyn in Lawal at [14]. Finally, it is appropriate to emphasise that the doctrine of apparent bias has its roots in a principle of some longevity and indisputable pedigree, namely the requirement that justice not only be done but manifestly be seen to be done: see, for example, Davidson v Scottish Ministers [2004] UKHL 34.""

22. At [23] in Ortega, the UT identified its task:

> "Our task is therefore to place ourselves in the position of a "duly informed" hypothetical reasonable observer in order to assess whether the First-tier Tribunal decision discloses an absence of judicial impartiality or real possibility of such."

23. As will be clear from this summary, the test of imputed or apparent bias is an objective one ("the fair-minded observer"); there must be a "real possibility" of bias; and the "hypothetical reasoned observer" is "duly informed", namely is in possession of all material facts.

24. In Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48, the Supreme Court recently approved the approach to apparent or imputed bias in a judicial context derived from the case law set out in Ortega (see [52]-[53] per Lord Hodge with whom the other Justices agreed).

25. In the circumstances of this appeal, the "fair-minded observer" would be aware that an Appellate Judge in the UT was well-aware that his or her role was restricted, in the first instance, to determining whether the judge in the First-tier Tribunal had made an error of law in reaching his or her decision.

26. That observer would also be aware that judges of UTIAC have experience in determining appeals, initially limited to concluding whether a Judge of the First-tier had made an error of law, then whether that decision should be set aside and, if necessary, thereafter remaking the decision on the evidence relied upon at the date of the UT's hearing (whether on the same day as the error of law hearing or subsequently).

27. The fair-minded observer would also be aware of the consistent practice that any evidence not relied upon before the First-tier Tribunal could only be admitted in the UT in accordance with para 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended). The practice, which was indeed followed in this appeal, is that prior to the initial error of law hearing, the parties are directed that an

application under rule 15(2A) is necessary if either party wishes to rely on evidence not before the First-tier Tribunal and that application is to be accompanied by the additional material that the party wishes to rely upon. That would, in a case such as the present, include any reliance by the respondent if the decision were to be remade, on any conviction of the appellant after the First-tier Tribunal's decision.

28. In my experience, it has never been suggested that that process, which is likely to put before a UT judge determining whether there is a error of law material not relevant to that decision but which may become relevant if an error of law is established and the First-tier Tribunal's decision has to be remade, is wrong in principle because adverse material contained in such an application will lead to a situation of imputed or apparent bias by the judge determining the error of law issue.

29. Further, if Ms Brown's submission is correct, it would likely lead to a judge in a civil case who, for example, during the course of a hearing ruled that particular evidence (adverse to one party) was inadmissible, thereafter being unable to continue with the hearing as knowledge of that evidence would give rise to a real possibility of bias in the fair-minded observer. As a generality, that is not, in my judgment, the true position. A fair-minded observer would be well-aware that judges are able to reach decisions, particularly in the appellate context when making decisions on error of law, putting to one side any material which, though not relevant at that stage but might become relevant later, and determining the legal issue untainted by any prejudice which, it is contended, might flow from knowledge of that adverse material.

30. In my judgment, the "duly informed" "fair-minded observer" would not consider that there was a real possibility that a judge of UTAC determining whether the First-tier Tribunal's decision involved an error of law would be biased (or prejudiced) by knowledge, derived from a respondent's rule 24 notice, that subsequent to the First-tier Tribunal's decision an appellant has committed a further offence or offences but which are not relevant to the error of law decision.

31. For these reasons, therefore, I rejected at the hearing Ms Brown's application that I should recuse myself on the basis of imputed or apparent bias.

The Grounds of Appeal

32. In her oral submissions, Ms Brown adopted the grounds of appeal to the Upper Tribunal and principally relied upon the more detailed grounds to the First-tier Tribunal. Grounds 1–3 challenge the judge's findings and conclusion that Exception 1 in s.117C(4) was not met. Ground 4 challenges the judge's adverse finding that Exception 2 in s.117C(5) was not met. Ground 5 challenges the judge's finding and conclusion that there were not "very compelling circumstances" satisfying the test under s.117C(6).

33. Before setting out those grounds, one issue was clarified by Mr Howells at the outset of the hearing. In the respondent's rule 24 notice, it was contended that the appellant could not satisfy the first requirement in Exception 1 in s.117C(4)(a) namely that he had been "lawfully resident in the United Kingdom" for "most" of his life. That was

not in issue before Judge Murray and Mr Howells accepted, on the basis of the appellant's immigration history, that the appellant had, in fact, spent "most" of his life in the UK and so he accepted that the appellant met the requirement in s.117C(4)(a). Mr Howells accepted that the only issue in Exception 1 was that which was decided against the appellant by Judge Murray namely whether there were "very significant obstacles" to his "integration" in Jamaica on return as required by s.117C(4)(c).

34. Ground 1: First, the judge reached a perverse conclusion that the appellant could integrate into Jamaica because he had a grandmother and other relatives there who would be able to assist him. That conclusion was not supported by any evidence. The evidence was that he had no relationship with anyone in Jamaica save his grandmother whom he has spoken to from time to time. Secondly, the judge had been wrong to conclude that the mere presence of relatives in Jamaica was sufficient to establish that there were not "very significant obstacles" to his integration. That conclusion ran counter to the "broad evaluative assessment" required following the decisions in Parveen v SSHD [2018] EWCA Civ 932 and Kamara v SSHD [2016] EWCA Civ 813. Thirdly, it was irrational for the judge to conclude that the appellant could be accommodated by his grandmother simply on the basis that she had been able to accommodate the appellant, his mother and brother for a five week stay in 2012. Fourthly, given the evidence was that the appellant's mother sent a total of £536.97 to the appellant's grandmother in Jamaica and is a school dinner lady and cleaner, it was an error to conclude that she would be able to provide financial support to the appellant if he returned to Jamaica.

35. Ground 2: The judge erred in concluding that the appellant would be able to integrate on return to Jamaica because he had been bought up within a Jamaican family and a wider Jamaican community in the UK. The judge failed to take into account country expert evidence of Dr Luke de Noronha in particular, that the "question of culture and reintegration is not reducible to having been raised in a Jamaican household". Further, the appellant's evidence was that most of his family that he knew in the UK were "African" coming from "all different types of cultures".

36. Ground 3: The Judge was wrong to discount the expert evidence of Dr de Noronha that had identified risks to the appellant on return to Jamaica such as the inability to obtain employment, of being exploited, of becoming the victim of extortion or robbery and even being killed. The judge had been wrong to conclude that Dr de Noronha's opinion was based upon the appellant having no family members in Jamaica to offer him support. The expert's opinion was, it is contended, not based upon a lack of family support.

37. Ground 4: In concluding that the impact of the appellant's deportation would not be "unduly harsh" upon his partner under Exception 2, it is contended that the judge was wrong to state that, as regards their relationship, the appellant had spent the "majority" of his time since the relationship commenced in 2018 in prison or detention. That was factually inaccurate.

38. Ground 5: In assessing there were "very compelling circumstances" under s.117C(6), the judge failed to take into account the evidence concerning the abuse which the appellant suffered at the hands of his mother. That, it is contended, was relevant to the public interest which was not fixed but flexible (relying upon CI (Nigeria) v SSHD [2019] EWCA Civ 207 and Akinyemi v SSHD [2019] EWCA Civ 2098).

Discussion

Grounds 1, 2 and 3

39. I will take Grounds 1 to 3 together as they all challenge the judge's finding in relation to the application of Exception 1 in s.117C(4) of the NIAA Act 2002.

40. By virtue of s.117C(3), the deportation of a foreign criminal, such as the appellant who has not been sentenced to a period of imprisonment of four years or more, will be in the public interest unless Exception 1 in s.117C(4) applies or Exception 2 in s.117C(5) applies.

41. s.117C(4) provides as follows:

> "Exception 1 applies where –
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated into the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported."

42. Ms Brown accepted that it was for the appellant to establish Exception 1, in particular as the only outstanding issue under Exception 1, that there were "very significant obstacles" to his "integration" into Jamaica on return.

43. In Parveen v SSHD the Court of Appeal considered the test of "very significant obstacles" in s.117C(4)(c). The Court (at [9]) referred to the decision of the Upper Tribunal in Treebhawon [2017] UKUT 13 (IAC). Underhill LJ said this:

> "The [meaning of 'very significant obstacles'] was recently addressed by the Upper Tribunal (McCloskey J and UTJ Francis) in *Treebhawon v Secretary of State for the Home Department* [2017] UKUT 13 (IAC). At para. 37 of its judgment the UT said:
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> > "The other limb of the test, 'very significant obstacles', erects a self-evidently elevated threshold, such that mere hardship, mere difficulty, mere hurdles and mere upheaval or inconvenience, even where multiplied, will generally be insufficient in this context."
>
> I have to say that I do not find that a very useful gloss on the words of the rule. It is fair enough to observe that the words "very significant" connote an "elevated" threshold, and I have no difficulty with the observation that the test will not be met by "mere inconvenience or upheaval". But I am not sure that saying that "mere" hardship or difficulty or hurdles, even if multiplied, will not "generally" suffice adds anything of substance. The task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied

> on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as "very significant".”

44. In Kamara v SSHD the Court of Appeal explained (at [14]) the idea of “integration”. Sales LJ (as he then was) said this:

> “14. In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.”

45. Consequently, the test of “very significant obstacles” sets an “elevated threshold” and the task of the judge is to assess what, if any, obstacles there were to the appellant’s integration in Jamaica and whether those obstacles were “very significant”. The idea of “integration” requires a broad evaluative judgment to be made and whether the appellant would be a “enough of an insider” in Jamaica in terms of his understanding of life, with a capacity to participate and be able to operate on a day-to-day basis in society and to build up within a reasonable time human relationships to give substance to his private and family life in Jamaica.

46. Judge Murray cited Kamara, Treebhawon and Parveen at paras 26–28 of her determination. There can be no doubt that she had well-in mind the correct approach when applying s.117C(4). Ms Brown’s submission under Grounds 1–3 is, in essence, that the judge failed properly to apply that test in the light of the evidence including the expert report of Dr de Noronha.

47. At paras 31–34, the judge set out the evidence from the appellant, his mother and brother as to the circumstances that would await the appellant in Jamaica as follows:

> “31. … The appellant’s first witness statement is at page 1 of his bundle. He says that he went to Jamaica in 2012 with his mother and brother. It was ‘alright’ and had nice beaches but he did not want to live there. It was not for him and he did not know anyone there. His grandmother was there and she was in her late 60s and unable to look after him. He would be homeless. He had not looked into Jamaica as a place to live and would not know what to expect. His grandmother relied on her pension. He did not know anything about Jamaican culture and his mother did not speak Patois.
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> 32. His brother, [ ] states at P41 of the appellant’s bundle that they visited Jamaica in 2012/13 for 5 to 6 weeks and saw distant family and relatives. It was a nice break and they got away from the stresses of UK life. The appellant would be distraught if he was away from him and his mother.

> 33. His mother's [ ] statement is at P62 of the bundle. She says that she has family in Jamaica but that they are not really close. She has third and fourth cousins and her mother is there. Her cousins cannot look after or support the appellant. Her mother was too old to take him in and she was the one supporting her. Her mother was not working. They have more family in the UK.
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> 34. In cross-examination [the appellant's mother] said she also had brothers in Jamaica and that the appellant would be unable to stay with her mother because there was not enough room. Her brother struggled and did not support her mother."

48. Then at para 35 the judge made the following findings:

> "35. I find that the appellant would clearly not be without relatives or connections on return. The appellant stated in his witness statement that his grandmother had a pension. There has been no disclosure in relation to this and he denied that he had said this in his witness statement in cross-examination. No financial evidence either in relation to the appellant's mother or grandmother's circumstances has been provided. The appellant, his mother and brother were all able to stay with his grandmother in 2012/2013 for five – six weeks and I also therefore do not accept that she would not have the room to accommodate him. It is said that she is in her late sixties and so would not be able to support him. However, he is now an adult and hence would need accommodation in the first instance rather than support. I also do not accept that his mother would be unable to send him money as she already sends it to her own mother and supports the appellant in the UK.

49. At paras 36–37 and the beginning of para 38, the judge considered Dr de Noronha's report. I will return to this shortly. Then, having done so, the judge continued at paras 38–39 as follows:

> "38. …. Although his mother has provided bank statements at P116 to 155 of the appellant's bundle they contain information in relation to withdrawals and no balance or evidence of payments in. In view of the fact that the appellant's grandmother could accommodate three of them for 5 weeks and it has not been shown that his mother would be unable to send him money I find that it has not been demonstrated that he would not be supported by family or that he would be without funds there. The appellant has obtained some qualifications as evidenced by the certificates at P303 to 308 of his bundle. He has City & Guilds certificates in construction. Despite the unemployment rate in Jamaica, I am satisfied that it has been demonstrated that he would be without employment. He has been brought up within a Jamaican family and the wider Jamaican community in the UK and I conclude that he is therefore a cultural connection.
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> 39. Whilst I accept that he would face obstacles initially as he has not lived there since the age of 3, in view of the fact that he has a grandmother, uncles and his mother's third and fourth cousins there I find that he would be able to integrate and the likelihood is that they would help him make

> further connections. I find that in the circumstances, having regard to the test in relevant case law, the obstacles would not be very significant."

50. Ms Brown submitted that the judge had erred in finding that the appellant could be accommodated by this grandmother and that his mother could provide financial support. She submitted that it was, in effect, unreasonable to conclude that his grandmother could accommodate the appellant simply on the basis of a visit by the appellant, his brother and mother in 2012/2013 when they had stayed with the grandmother for six weeks. Further, it was unreasonable to conclude that the appellant's mother could provide financial support to the appellant. Ms Brown relied upon the fact that the evidence was that the appellant's mother worked as a school dinner lady and cleaner (see para 1 of her statement at page 62 of the appellant's bundle). Further, as set out in para 12 of the grounds, Ms Brown relied on the evidence in the bank statements from the appellant's mother showing that over the six-month period between July and December 2019, the appellant's mother had only sent the appellant's grandmother a total of £536.97. Ms Brown also relied upon the "very modest expenditure" shown in the bank statements of the appellant's mother.

51. Had the judge simply relied upon the appellant being accommodated and financially supported in Jamaica on return, there would be no doubt, as Ms Brown submitted, that the judge would have failed properly to consider the "broad evaluative question" identified in Kamara of whether the appellant could "integrate" in Jamaica". The judge did not do that, as I will deal with shortly, when she considered Dr de Noronha's evidence.

52. As regards the evidence concerning accommodation and financial support, the appellant provided little evidence to support his claim (and that of his mother) that his grandmother could not accommodate him and that he could not obtain financial support from his mother. The evidence was that his mother provided him financial support in the UK. It is unclear whether the judge's attention was drawn to the specific payments made to the appellant's grandmother by his own mother set out in Ms Brown's grounds at para 12. They were, undoubtedly, relatively modest payments. However, as I have said, the judge took into account that the appellant's mother already provides him with financial support in the UK. As the judge noted, the appellant provided no specific financial evidence as to his mother's income or his grandmother's circumstances other than, as regards his grandmother, stating that she lived on a pension. The judge also concluded in para 38, that despite the unemployment rates in Jamaica, given his qualifications the appellant had not demonstrated that he would be without employment in Jamaica. Likewise, as regards accommodation with his grandmother, there was no evidence that his grandmother no longer had available the accommodation in which the appellant, his mother and brother had stayed in Jamaica in 2012 on a visit. It was reasonably open to the judge to infer that that accommodation would be available to the appellant, at least in the short term, until he was self-sufficient.

53. The judge's findings were not inconsistent with the evidence and, in my judgment, were findings rooted in the evidence and reasonable inferences from that evidence.

The judge's findings were within the range of reasonable conclusions open to the judge on the evidence. Consequently, I reject Ground 1.

54. Integration is, however, more than a matter of accommodation and subsistence. The "broad evaluative judgment" identified in [14] of Kamara requires a more vigorous investigation into an individual's ability to fit in and be, or become, part of the community in the country to which he is returning. The appellant, of course, came to the UK age 3 and so, for all intents and purposes, apart from the short visit to Jamaica in 2012 has never lived in the community and culture in Jamaica. Before the judge, the appellant relied upon the expert report of Dr de Noronha to support his contention that he would be too much of a 'outsider' on return to Jamaica. Grounds 2 and 3 contend that the judge failed properly to grapple with and give weight to Dr de Noronha's expert opinion which supported the appellant's case that he could not effectively integrate in Jamaica given his situation of not having lived there since the age of 3.

55. The judge dealt with Dr de Noronha's report at paras 36 – 38 as follows:

> "36. I have considered the conclusions of Dr Luke Noronha against the background of these findings in relation to the appellant's family's connections in Jamaica. No issue has been taken with Dr Noronha's expertise and the report complies with the relevant Practice Directions. The basis of his report is that the appellant seemingly does not have any family members to support him (para 6). Dr Noronha concludes that the appellant will be unable to pass as a Jamaican on return due to his actions and mannerisms and will be immediately visible as someone who has lived outside Jamaica and this will present risks. He states that the vast majority of people deported to Jamaica end up living in low-income neighbourhoods in urban settings and many deported people are vulnerable to extortion and robbery. He states that there is a very real risk that he will be subject to serious physical violence and it is essential that deported persons have family support or personal resources and resilience. If he does not have family support, and no means of paying rent he will be homeless. In relation to employment he states that the current unemployment rate is around 9.6% and higher among young adults between 16 and 24 (20% to 25 %). The vast majority of employers will not hire anyone without a clean record and the appellant does not seem particularly employable. In conclusion, he states that at P262 that he would face several profound obstacles to integration relating to cultural alienation, family estrangement and stigma, housing and homelessness and vulnerability to crime, violence and extortion; employment; and maintaining family life.
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> 37. In his addendum report at P264 of the bundle he states that he confirms his findings and that the Guardian has since reported that at least five men deported from the UK were killed in May 2019. He also states that the NGO provision for deported persons in Jamaica is now even thinner on the ground than when he wrote the report in March 2019.

> 38. The conclusions in the expert's report are premised to a large extent on the absence of family members to support him and the absence of financial support. …."

56. Under Ground 3, Ms Brown submitted that the judge was wrong to consider that Dr de Noronha's report was premised on the appellant having an absence of family members to support him and other support in Jamaica. She referred me to his report at page 252–255 and paras 7–9, 11 and 20 as well as the whole of the section to which that belongs under the heading "cultural alienation, family estrangement and stigma" (paras 4–20 of the report).

57. Mr Howells submitted that the judge had not erred in law and that there were numerous references in the expert report to a person who lacked family support in Jamaica. He referred me to a number of paragraphs in the report (including paras 6, 25, 51 and 56) as well as the conclusion in para 57 where Dr de Noronha stated that: "without family support", the appellant was likely to be vulnerable to "destitution, cultural alienation, stigma, social isolation, homelessness and marked vulnerability of extortion, crime and violence."

58. Dr de Noronha does, in a number of places in his report, refer to a lack of "family support" or "family members" (see e.g., paras 6 and 57).

59. In his first report at paras 5 and 6, Dr de Noronha says this:

> "5. In my research, I have met over 100 deported persons. Most return and live with family members. Sometimes, deported persons have loved ones to return to, and work to rebuild their lives with the support networks as their foundation. In my experience, these individuals tend to have emigrated from Jamaica as adults and to have only been away from the island for a few years; their family connections tend to be secure in Jamaica.
>
> 6. [The appellant] does not fit this description, and seemingly does not have any family members to offer him any support. His mother mention in her witness statement that her mother is too old to take him in, and that their only other family members are distant cousins. More broadly, deported persons are often resented by members of families and communities when they return and face profound forms of stigma."

60. At para 7, Dr de Noronha speaks of deported persons being defined by

> "many people in their families and communities as unwanted failures".

61. At para 8, Dr de Noronha says this:

> "Even if [the appellant] were able to find a distant family member to take him in, this would not necessarily provide him with security."

62. In my judgment, however, the basis of Dr de Noronha's views is not exclusively focused upon a person who has no family support.

63. At para 20, Dr de Noronha says this:

> "Importantly, for the [the appellant], the question of his cultural familiarity with Jamaica is not only about his 'culture and customs', but about his familiarity with

> how things operate in Jamaica – in terms of norms, customs, language, economics, and respect. In other words, the question of culture and reintegration is not reduceable to having been raised in a Jamaican household, but relates to whether [the appellant] understands how to navigate life in Jamaica. This is especially marked in the context of poverty, underemployment, and the high levels of violent crime. In the following sub-Sections, I emphasise the difficulties [the appellant] will face in finding work, secure housing and personal security – all of which will compound and be compounded by his lack of familiarity with how things work in Jamaica."

64. The expert then goes on to consider "housing and homelessness", "NGO support services", "employment", "vulnerability to crime, violence and extortion" and "maintaining family life". At para 55 it is states that the appellant:

> "Would face several profound obstacles to reintegration in Jamaica. These relate, broadly, to cultural alienation, family estrangement and stigma; housing and homelessness; vulnerability to crime, violence and extortion; employment; and maintaining family life …"

65. At para 56 Dr de Noronha states:

> "While [the appellant] may have some familiarity with Jamaican language and culture, having left age three he is certainly not likely to be 'familiar with the cultural, social and economic aspects of life in Jamaica'. In fact, his lack of familiarity is likely to put him at serious risk of destitution and render him vulnerable to crime and violence."

66. Whilst I agree, to an extent, with Mr Howells' observation that at times the expert deals with the appellant as a person with no support in Jamaica, it is plain that his conclusions are not fixed to that premise. Much of what is said, in particular in relation to the appellant's inability to integrate with the "cultural, social and economic aspects of life in Jamaica" is largely premised on the fact that the appellant was 3 years old when he left Jamaica. That, the expert acknowledges, exposes the appellant to vulnerabilities and insecurity which, on any view, is relevant to whether there are "very significant obstacles" to his integration in Jamaica.

67. That latter point is also the focus of Ground 2. That challenges the judge's finding in para 38 that:

> "[The appellant] has been brought up within a Jamaican family and the wider Jamaican community in the UK and I conclude he has therefore a cultural connection".

68. That finding fails to have regard to both the evidence of the appellant and his mother and that of the expert. The appellant's evidence was that most of his family in the UK are "African" and not only Jamaican. At para 112 of his statement (at page 13 of the bundle) the appellant says:

> "Most of my family that come around are African. My family has all different types of cultures, my cousin is from Nigeria and I also have full white English cousins. My family is not only Jamaican. I was born in Jamaica, but I was not raised any differently to a normal English child. All I know is the UK."

69. At para 20 of his first report, Dr de Noronha observers that the appellant's ability to navigate life in Jamaica and the question of culture and reintegration:

> "Is not reducible to having been raised in a Jamaican household".

70. I accept Ms Brown's submission that the judge failed to grapple with the expert's view, in particular in respect of this issue raised in ground 2. But also, in my judgment the judge wrongly placed insufficient weight upon the expert's view as to the cultural, social and physical risks to the appellant on the basis that the expert's report was premised upon a lack of family support which the judge found the appellant would have.

71. For these reasons, I accept that the judge erred as set out in Grounds 2 and 3.

72. It follows, therefore, that the judge erred in law when finding that the appellant did not meet the requirement in s.117C(4)(c) of the NIAA Act 2002 and that finding cannot stand.

Ground 4

73. Ground 4 is directed to the judge's finding that the appellant had not established Exception 2 in s.117C(5), namely that the impact upon his partner would be "unduly harsh" if he were deported to Jamaica. The judge dealt with this issue at paras 40–44 of her determination. There, she said this:

> "40. It is also argued that he has a partner in the UK and his deportation or requiring her to move to Jamaica would be unduly harsh. She is [JR] and a British citizen and therefore a qualifying partner. According to her witness statement at P25 of the bundle they moved in together in May 2018 and then he was recalled to jail in July 2018 but she kept in touch. He visited her a lot after his release from jail.
>
> 41. The respondent did not seek to argue that the relationship is not genuine and according to her evidence they have been in a relationship since 2018. He cannot rely on para 399(b) of the Immigration Rules because the relationship was commenced when his status was precarious.
>
> 42. Whilst I accept, having heard both their evidence, that they are in a genuine and subsisting relationship they are not currently living together and the appellant has since their relationship commenced been sentenced to two further periods of imprisonment. On 5 March 2018 he was sentenced to nine months in a Young Offender's Institution for affray and then on 26 February 2019 sentenced to possession of a knife blade and breach of a criminal behaviour order to a period of thirteen months' imprisonment.
>
> 43. In KO (Nigeria) and others v SSHD [2018] 1 WLR 5273 the Supreme Court held that in determining whether the effect of deporting the foreign criminal would be 'unduly harsh' on the criminal's child within s.117C(5) of the Nationality, Immigration and Asylum Act 2002, one was looking for a degree of harshness going beyond that what would necessarily be involved for any child faced with a parent's deportation. The determination did not require a consideration of the severity of the parent's offence. Following clarification under the Supreme Court, the 'unduly

> harsh' assessment is not of itself a balancing exercise; it is solely an evaluation of the consequences and impact of deportation on the individual concerned; there is no room for the wider public interest to be taken into account in the assessment beyond the difference between the two categories of offender (i.e. those sentenced to less than four years; those sentenced to at least four years). The Court approved the approach in MK (Sierra Leone) [2015] UKUT 223 and MAB (USA) [2015] UKUT 435 where 'unduly harsh':
>
> > 'does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, to note something severe, or bleak. It is the antitheses of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher.'
>
> 44. In circumstances where they have only lived together for a short period, do not currently live together and the appellant has spent the majority of time since their relationship commenced in prison I find it would not be unduly harsh on her if he were deported to Jamaica. I therefore find that he has not met the requirements of Section 117C(5) of the 2002 Act."

74. Ms Brown criticised the judge's reasoning in only one respect. She submitted that the judge had been wrong in para 44 to conclude that the appellant had spent the "majority of time" since their relationship commenced in 2018 in prison. Since April 2018 and up to the date of the judge's decision, the relationship had lasted for one year and nine months. She submitted that, properly calculated, the appellant had during that time spent twelve months *not* in prison either serving a custodial sentence or in immigration detention.

75. At the hearing, there was considerable discussion as to the precise period of time in which the appellant was in prison and/or immigration detention. In his submissions, Mr Howells offered a different timeline for the appellant's imprisonment and/or immigration detention. On his figures, which I will not set out here, he calculated that the appellant had only spent seven months not in custody or detention out of a total of one year and nine months of the relationship. He based that assessment on the Home Office's computer records.

76. In the absence of clear records as to, not only the periods of custodial sentence served by the appellant but also periods of immigration detention, it is not possible to determine with any degree of certainty precisely how long the appellant was not in prison and/or immigration detention during the 21 months of his relationship with his partner. On one view, he was not in prison for twelve of the 21 months and on another view he was not in prison for seven of the 21 months. The PNC summary obtained, and provided, by the appellant's representatives after the hearing did not sufficiently clarify the position.

77. Even if Ms Brown's calculation is accepted, and that therefore technically the judge should not have described the appellant as having spent the "majority" of the time of his relationship in prison or detention, I do not see how that mischaracterisation, in

itself, materially affected the judge's finding that the appellant had not established that the impact upon his partner would be "unduly harsh".

78. It is not suggested by Ms Brown that the judge misdirected herself as to the proper approach to the issue of "unduly harsh" following KO (Nigeria) or, indeed, the more recent Court of Appeal's decision in HA (Iraq) and another v SSHD [2020] EWCA Civ 1176.

79. On either view, the relationship was a relatively short one. On either view, the appellant and his partner were not currently cohabiting. On either view, the appellant had spent a significant period of the relationship in prison or immigration detention.

80. There was, put simply, insufficient evidence before the judge to establish that the impact upon the appellant's partner would be "unduly harsh" applying the 'elevated' threshold following KO (Nigeria). None is, in fact, identified either in the grounds or rule 25 reply. The fact that the appellant had a longer relationship with his partner as a "best friend" before 2018 cannot, in my judgment, assist in a material way to demonstrate that the impact upon her now would be "unduly harsh" if he were deported.

81. For these reasons, I reject Ground 4 challenging the judge's finding under s.117C(5).

Ground 5

82. Having concluded that the appellant could not succeed under Exception 1 or Exception 2 in s.117C(4) and (5), the judge correctly went on to consider whether the appellant could succeed under Article 8 on the basis that there were "very compelling circumstances over and above those described in Exceptions 1 and 2" sufficient to outweigh the public interest applying s.117C(6) (see NA (Pakistan) v SSHD [2016] EWCA Civ 662).

83. Given the judge's finding in respect of Exception 1 cannot stand, as that is necessarily the premise upon which the s.117C(6) was applied, then that error also infected the judge's adverse conclusion applying s.117C(6).

84. However, specifically under this ground, Ms Brown submitted that the judge had failed to take into account, in assessing whether there were "very compelling circumstances", the evidence concerning the appellant's problems faced at school and that he had been subject to abuse by his mother as a child, including up to the age of 17. Ms Brown accepted that this evidence did not excuse the appellant's offending behaviour but, she submitted, following CI (Nigeria) v SSHD [2019] EWCA Civ 2027, evidence of such matters as child abuse was relevant. Ms Brown submitted that that evidence was set out in various documents in Section D of the appellant's bundle.

85. Mr Howells submitted that CI (Nigeria) was distinguishable as in that case, there had been evidence of sustained abuse.

86. As I have already said, the judge's conclusion in relation to s.117C(6) cannot stand and the decision in that regard must necessarily be remade together with the decision in relation to Exception 1. Suffice it for me to say here that the evidence relied upon by the appellant as to child abuse was relevant to the judge's assessment under Article 8 applying s.117C(6). The weight to give that evidence would, of course, be primarily a matter for the judge and, no doubt, the more sustained the evidence shows the child abuse to have been, the greater the weight a judge might give such evidence in making the assessment under Art 8.2. Here, however, the judge made no reference to this evidence. That was a failure to consider a relevant matter in the Article 8 assessment and, in itself, amounted to a material error of law.

87. For these reasons, therefore, Ground 5 is made out.

Decision

88. For the above reasons, the judge's decision to dismiss the appellant's appeal under Article 8 involved the making of an error of law. That decision cannot stand and is set aside.

89. Both representatives agreed that, if an error of law was established, the proper disposal of the appeal was to remit the appeal to the First-tier Tribunal to remake the decision. However, it was also accepted that, depending upon precisely what error of law was established, some findings should be preserved.

90. In that latter regard, having rejected Ground 4, the judge's finding that the appellant's deportation would not be "unduly harsh" upon his partner, and so Exception 2 did not apply, stands and is preserved.

91. The remaking of the decision will concern Exception 1 and, so far as relevant, Article 8 applying s.117C(6).

92. In that regard, it is accepted that the appellant meets the requirements for Exception 1 in s.117C(4)(a) and (b). The issue is whether he meets the requirement in s.117C(4)(c), namely whether there are "very significant obstacles" to his integration in Jamaica.

93. Subject to those preserved findings, the appeal is remitted to the First-tier Tribunal in order to remake the decision in respect of Article 8. The appeal to be heard by a judge other than Judge Murray.

Signed

Andrew Grubb

Judge of the Upper Tribunal
15 December 2020