Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/18887/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 April 2019	**On 7 May 2019**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR DAVENAND JAIPUL

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr E Fripp, Counsel instructed by Fadiga & Co

DECISION AND REASONS

BACKGROUND

Procedural Background

1. This is an appeal by the Secretary of State for the Home Department. For ease of reference, I refer below to the parties as they were in the First-tier Tribunal albeit that the Secretary of State for the Home Department is technically the Appellant in this particular appeal. The Respondent appeals against a decision of First-tier

Tribunal Judge Hodgkinson promulgated on 8 February 2017 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 26 July 2016 refusing the Appellant's human rights claim in the context of a decision to deport the Appellant to Guyana.

2. As will be immediately evident from the above, the Decision was made some time ago. It is necessary to say something about the procedural background. Permission to appeal the Decision was granted initially by First-tier Tribunal Judge Astle on 6 June 2017 in the following terms so far as relevant:

> "…2. The grounds argue that the Judge erred in stating that the Appellant's mother had leave to remain. He erred in giving weight to an immaterial matter in paragraph 37. He failed to give adequate reasons as to why the Appellant could not reintegrate in Guyana and failed to resolve the conflict between the finding that the Appellant had integrated into the UK and his offending combined with his immigration history. In considering the appeal outside the Rules, the Judge failed to give due consideration to the public interest.
> 3. It is arguable that the Judge erred in equating the difficulties outlined in paragraph 39 to "very significant obstacles" to integration in paragraph 399A of the Rules. It is also arguable that he failed to give due weight to the public interest. Permission is therefore granted. The remaining grounds may also be argued."

3. The error of law hearing came before Upper Tribunal Judge Allen on 17 July 2017. He reached the following conclusions as to error of law:

> "[24] In my view what this passage in the judge's decision fails to take into account is the point made in Bossade of breaking the continuity of the social and cultural integration in the United Kingdom. Before the appellant started offending it would have been difficult indeed to deny that he was socially and culturally integrated into the United Kingdom. However I consider that the Judge erred in not considering whether there had been a breach in the social and cultural integration of the appellant in the United Kingdom by his sustained period of offending, bearing in mind also that the level of seriousness increased, and also bearing in mind the other criminality and undesirable behaviour in which the appellant was involved during that period of time over and above the offences for which he was convicted. Accordingly I find the judge erred in law in his assessment of social and cultural integration.
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> [25] With regard to the question of whether there were very significant obstacles to the integration of the appellant into Guyana, I consider that Mr Melvin is right on this point and that there is little to show beyond obstacles. The appellant would be returning to a country with which he has clear cultural links although no family members still present. He was back there as recently as 2010. Although he has no employment history that is as true of the United Kingdom as Guyana, and as the judge pointed out at paragraph 34 he is capable of undertaking employment and being self-sufficient should he have the opportunity to do so. The judge also noted that the appellant has no accommodation in Guyana and logically would need some form of financial support at least in the early stages and his father said he could not assist him with any significant or material financial support and the judge also bore

in mind that the appellant has never lived independently and has never had to support himself.

[26] These matters to my mind cannot rationally be described as going beyond obstacles or at the highest significant obstacles. The test of very significant obstacles is a high one indeed. It is again a matter of simply comparing fact situations rather than a point of law, but again the facts in Bossade are not without relevance here. There the Tribunal was not persuaded there would be very significant obstacles to the integration into the Democratic Republic of Congo of a man who did not speak Lingala and had no experience of living in that country as an adult or even as a young person. It seems that he had no family there either. It was thought reasonable to infer that his family would seek to help him financially and that he had grown up in a household where French was spoken and the DRC is a Francophile country.

[27] It is not simply a matter of making comparisons of course. Judge may legitimately differ as to the outcome of the determination of a point such as this on identical facts but this in my view goes beyond simply a matter of disagreement. I do not consider it could rationally be concluded that on the facts as presented to the judge the appellant would face very significant obstacles to integration into Guyana, if removed. Accordingly I find an error of law in that regard also."

4. As to the future disposal of the appeal, Judge Allen said this:

"[29] In conclusion therefore the judge's decision is set aside for material errors of law and there will have to be a re-hearing. I do not know at this stage whether there are any issues of further evidence which will need to be considered, but it seems clear to me that the matter will have to be re-determined in the Upper Tribunal."

5. The Appellant sought permission to appeal from the Court of Appeal against Judge Allen's decision. Permission was granted on 14 August 2018 in the following terms so far as relevant:

"…Judge Allen did not go on to rehear the appeal. This appeal was launched before he had an opportunity to do so. As I understand it, those proceedings are currently stayed pending the outcome of this appeal.

This is a second appeal and the second appeals criteria apply.

The Applicant relies on three grounds. First, in relation to para 399A(b) of the Immigration Rules, it is submitted that Judge Allen erred in the manner in which he dealt with "social and cultural integration", and in particular whether the Applicant's offending and/or periods in custody "broke the continuity" of such integration. Second, in relation to para 399A(c), it is submitted that Judge Allen did not identify any legal basis for overturning Judge Hodgkinson's finding that there would be very significant obstacles to the Applicant's integration into Guyana. In fact, such a legal basis is given: the judge considered that, on the evidence, the finding was legally perverse in the sense that such a conclusion could not reasonably have been reached on the evidence (see para 27). However, there is an

> issue as to whether that justification for interference with the finding below was good as a matter of law.
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> I consider that each of those issues -the second as I have identified it – are arguable, and otherwise satisfy the second appeals criteria. I give leave in respect of each.
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> The third ground seems to me to be, at best, premature. The Upper Tribunal never considered the article 8 requirement, because Judge Allen specifically left that over."

6. Following the grant of permission, the parties agreed that Judge Allen's decision should be set aside, and the appeal remitted to the Upper Tribunal to reconsider whether the Decision contains an error of law. Little is said in the Statement of Reasons about the basis for that agreement save that "the most appropriate way to resolve this matter is to consent to the current appeal being allowed and then to have this matter remitted to the Upper Tribunal de novo". It appears from what is said at [2] of the Statement of Reasons that at least part of the reason why it was thought appropriate to remit turned on the timing of the application for permission to appeal. By order dated 18 February 2019, the Court of Appeal remitted the appeal to this Tribunal "for its reconsideration de novo, in light of the subsisting grant of permission to appeal by First Tier Tribunal Judge Astle of 6 June 2017, as to (i) whether the decision of First Tier Judge Hodgkinson is materially undermined by error of law and (ii) in the event that the decision is so undermined, what to do in consequence."

7. I raised with the parties at the outset how it came to be that the application to the Court of Appeal for permission to appeal Judge Allen's decision was made when it was. It appeared to me that this was contrary to the Tribunal's decision in VOM (Error of law – when appealable) Nigeria [2016] UKUT 00410 (IAC) by reference to sections 12 and 13 Tribunal, Courts and Enforcement Act 2007. Mr Fripp who was also Counsel at the time of the appeal to the Court of Appeal submitted that VOM was wrongly decided. However, I cannot accept that submission, particularly since when VOM was cited to the Court of Appeal in AA (Iraq) v Secretary of State for the Home Department [2017] EWCA Civ 944, it distinguished that case but did not suggest that the case was wrongly decided.

8. I did not hear submissions on the point, however, for two reasons. First, as Mr Jarvis submitted, and I accept, as there is a Court of Appeal order remitting the appeal to the Tribunal, I must reconsider the appeal. It is not open to me to find that a Court of Appeal order is a nullity. Second, Mr Fripp informed me that the issue of timing and jurisdiction had been discussed between the parties when negotiating the statement of reasons. Although I was not shown that correspondence, it can be inferred from what is said at [2] of the statement of reasons that the Respondent was alive to the point and agreed to the remittal as a matter of pragmatics. Of course, parties cannot confer jurisdiction on a court or tribunal if it does not have such jurisdiction. However, if a point was to be taken as to the Court of Appeal's jurisdiction, that should have been raised with the

Court of Appeal. As I have already noted, it is not open to me to disturb the Court of Appeal's order.

9. It is in that way that the appeal comes before me to reconsider whether the Decision (of First-tier Tribunal Judge Hodgkinson) allowing the Appellant's appeal contains an error of law.

Appellant's Background

10. The Appellant's immigration history and background is set out at [3] to [14] of the Decision and I do not need to repeat what is there said. The salient points for the purposes of considering whether there is an error of law in the Decision are as follows.

11. The Appellant has been in the UK since 28 March 2002 when he entered to join his mother who was in a relationship with an Irish national and was granted a five-year EEA family permit on that basis. The Appellant was born on 23 April 1994 and was therefore aged nearly eight years when he came to the UK. He was subsequently granted an EEA residence document on 27 March 2003 valid to 7 September 2006.

12. The Appellant was then refused a further residence card in 2006 and 2007 but was granted one again in November 2007 valid for five years. On 19 October 2012, an application for permanent residence was refused and on 27 June 2014, he was served papers as an overstayer.

13. The Appellant's criminal offending began in September 2011 with a conviction for theft. He moved on to various drugs possession offences and theft. He was then convicted on 30 April 2014 of battery and assaulting a police officer. On 9 January 2015 came his first term of imprisonment of thirty-six weeks for affray. On 5 February 2015, he was convicted of wounding inflicting grievous bodily harm and sentenced to nine months imprisonment. On 17 July 2015, he was convicted of robbery and possession of drugs (cannabis) and sentenced to two years and six months imprisonment. Separately, the Appellant has come to the attention of the police for other offences of which he has not been convicted. I will need to return to that evidence below.

14. The Appellant's mother has since reconciled with the Appellant's father in the UK, her relationship with an Irish national having broken down. Both parents continue to live in the UK. The Appellant attended school and college in the UK. Between 2011 and 2013, the Appellant attended Croydon college. He attributes his offending to the taking of drugs and gambling to support his habit. He also blames alcohol as a contributing factor. He has never worked in the UK.

DISCUSSION AND CONCLUSIONS

15. I have set out an extract from Judge Allen's decision at [3] above. I have not done so in order to rely upon what is there said. That decision has been set aside with agreement of both parties by the Court of Appeal. It is however a useful summary of the competing submissions regarding the error of law in the Decision. I have regard to it only for that reason and I do not take into account Judge Allen's findings or conclusions when reaching my own conclusions below. As will be evident from the extract cited, the Respondent relies on two aspects of the Decision as containing an error of law; the Judge's findings in relation to social and cultural integration in the UK and his findings in relation to whether there would be very significant obstacles to integration in Guyana. I take those in turn.

Social and Cultural Integration

16. This part of the Respondent's case was given prominence in Mr Jarvis' oral submissions and I therefore begin with this issue.

17. Before coming to the Judge's findings about this issue, it is necessary to have regard to the background evidence which the Judge had before him. I have already referred to the Appellant's offending which is set out at more detail at [8] of the Decision. Whilst relevant to the extent of the Appellant's social and cultural integration, it is nonetheless not the only focus of the Respondent's case. As I have already mentioned, there was evidence from police officers concerning the Appellant's criminal offending and other offences of which he had not been convicted. A summary of that evidence appears at [9] and [10] of the Decision as follows:

> "[9] Additionally, I have the statements of two police officers. The first is a lengthy and detailed statement of a PC Bijal Raichura ("PC Raichura"), dated 14 December 2015. PC Raichura was unable to attend the hearing. However, another police officer, PC David Glicksman ("PC Glicksman"), from the same department, attended in her place in order to give oral evidence with reference to PC Raichura's statement, that statement having been prepared solely from police records. The second statement is that of a PC Garland, who has some personal knowledge of the appellant and his past criminality, PC Garland's statement being dated 3 December 2015.
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> [10] The respondent's supplementary bundles comprise PC Raichura's said statement, together with a large volume of police records, as referred to in that statement. That statement, and the supporting records, inter-alia refer to other encounters by the police with the appellant which did not result in convictions. It is the respondent's case, with reference to PC Raichura's said statement, and the accompanying records, that there have been numerous additional criminal or antisocial acts committed by the appellant in association with his former acquaintances, in respect of which he was not convicted. They include a number of alleged robberies, an attempted robbery, handling stolen goods, common assault and affray, theft of a vehicle, disorderly/threatening behaviour, an incident outside

> a local betting shop in February 2014, shoplifting, intimidating a witness or juror and drunk and disorderly. The alleged robberies referred to appear to have involved the appellant and his then associates allegedly assaulting and stealing from individuals whom they encountered on the street by chance."

18. The Judge accepted that evidence at [46] and [47] of the Decision. That is not disputed by the Appellant. Indeed, Mr Fripp relied on that passage as showing that the Judge was aware of the evidence of anti-social behaviour when reaching his findings about social and cultural integration. That passage of the Decision reads as follows:

> "[46] As I have indicated above, there are also, in addition to the appellant's convictions, numerous additional accusations made against him, some of them serious, and encounters with the police, during the period 2011, running up to his ultimate incarceration in 2014, when it would appear that he was remanded in custody pending conviction and sentence in 2015. In oral evidence before me, the appellant indicated that he could not recall everything referred to, although he did not go so far as to deny their occurrence, and they clearly did occur, as they are clearly documented in the records annexed to PC Raichura's said statement. In the presenting circumstances, I am satisfied that the appellant was involved in criminality and undesirable behaviour during that period of time, over and above the offences for which he was convicted.
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> [47] In PC Garland's evidence, he gave indication that it was his view that the appellant would continue to commit offences and I have given due weight to that indication, whilst bearing in mind that PC Garland's evidence in that regard is clearly based upon his view that the appellant is unlikely to be a reformed character, and based upon his past conduct. Of course, the appellant asserts that his incarceration has taught him a very solitary [salutary?] lesson, that he did not realise, until threatened with deportation, that he was potentially liable to be removed. His evidence is that he has now formed the clear intention, first, never to abuse drugs or alcohol in the future and, second, not to associate further with his former acquaintances."

19. Before coming to the Judge's findings about the evidence regarding social and cultural integration, I make a few observations about the factual background and evidence which the Judge needed to take into account.

20. As appears from [17] of the Decision, the Appellant remained in detention as at the date of the hearing before Judge Hodgkinson which took place in January 2017, therefore only about eighteen months after the Appellant's last conviction. I assume he remained detained either in accordance with his criminal sentence or was in immigration detention. As a result, though, although the evidence given by the police officers covered the period only up to July 2015, there could have been no further evidence about the Appellant's behaviour in the community as the Appellant was detained at all times thereafter.

21. The Judge therefore had evidence that the Appellant had been involved in criminal offending and anti-social behaviour from 2011 to 2015. He had been in the UK for about nine years when he started offending but nonetheless the most

recent period of his liberty (when aged between seventeen and twenty-one) was a four-year period when the Appellant had committed a large number of offences, mostly with impact on the community and had behaved in a manner which was anti-social more generally.

22. Although the Judge summarises the police evidence in a way which is broadly accurate, it is worth saying a little more about that evidence. First, PC Raichura is a Metropolitan Police Constable serving on "Operation Nexus" which, according to his statement is "a partnership operation with the United Kingdom Border Agency… and its aim is to tackle the most harmful individuals in society who do not have British Citizenship.". The statement relies on police records in relation to "[the Appellant's] known associates and his links to gang intelligence". The statement detailing the Appellant's activities runs to thirty-nine pages. There is a bundle of evidence in support of that statement running to over a thousand pages.

23. Although the Judge is, again, broadly accurate in his description of the Appellant's activities as set out in that statement, those activities were not simply attacks on random members of the community (including violence and intimidation). That in itself is clearly anti-social behaviour. However, the statement also includes instances of aggressive behaviour towards the police – see for example the offence of assault on a constable of which the Appellant was in fact convicted, swearing and spitting at police when he was arrested for other offences and aggressive behaviour towards the police (see also PC Garland's statement in this regard). Although the Appellant was not convicted of some of the other offences, given that the Judge accepted the evidence in the police officers' statements, it is appropriate also to note that some of the offences involved threats to bomb properties of witnesses and suggestions by the Appellant that he would use a knife when robbing his victims if they did not cooperate.

24. I turn then to the way in which Judge Hodgkinson dealt with this evidence at [37] of the Decision as follows:

> "I consider the respondent's reasoning, as set out in the above paragraph of the RFRL, as adopted by Mr McRae in his submissions, to be flawed. Of course, it is correct that the appellant has a history of significant criminal offending between 2011 and 2014. However, he arrived in the United Kingdom when he was 7 years old, in 2002. He attended primary and secondary schools in the United Kingdom and he also commenced a college education. He has various qualifications from the time when he was engaged in such education and he also, clearly, has accomplished a number of sporting achievements, as is evidenced by the documents which are before me. Whilst his behaviour in recent years has been totally unacceptable and antisocial, I bear in mind that the appellant would not even fall for consideration under this particular Rule if he were not a foreign criminal liable to deportation. I would add that the appellant speaks English and his only close relatives are in the United Kingdom; a factor of relevance. It is abundantly clear that he has integrated into United Kingdom society, albeit not in an appropriate manner based upon his

behaviour from 2011 onwards. Consequently, I find that the appellant satisfies the requirement at paragraph 399A(b)"

25. Mr Jarvis first submitted that the Judge had disregarded the criminal behaviour on the basis that the relevant provision of the Immigration Rules ("the Rules") would not apply at all if the Appellant were not a foreign national offender. That was perverse. If the Judge were right in that analysis, it would leave out of account a relevant factor when assessing the strength of the Appellant's private life namely the public interest which fell to be assessed in that context.

26. Mr Jarvis also relied on the Court of Appeal's recent judgment in Binbuga v Secretary of State for the Home Department [2019] EWCA Civ 551 which approved the Tribunal's decision in Bossade [2015] UKUT 00415 (IAC) on which the Respondent relied in his grounds. Mr Jarvis drew my attention to what is said by the Court of Appeal in particular at [55] to [59] of the judgment as follows:

> "[55] In my judgment the UTJ was correct to conclude that the FTJ erred in law in regarding TB's association with pro-criminal peers as part of a gang as a "telling" example of his social and cultural integration.
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> [56] Membership of a pro-criminal gang tells against rather than for social integration. In this context, social integration refers to the extent to which a foreign criminal has become incorporated within the lawful social structure of the UK. This includes various incidents of society such as clubs, societies, workplaces or places of study, but not association with pro-criminal peers.
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> [57] Similarly, cultural integration refers to the acceptance and assumption by the foreign criminal of the culture of the UK, its core values, ideas, customs and social behaviour. This includes acceptance of the principle of the rule of law. Membership of a pro-criminal gang shows a lack of such acceptance. It demonstrates disdain for the rule of law and indeed undermines it.
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> [58] Social and cultural integration in the UK connotes integration as a law-abiding citizen. That is why it is recognised that breaking the law may involve discontinuity in integration. As was found in the *Bossade* case at [55]:
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> > "…his history of offending (repeated robbery) betokens a serious discontinuity in his integration in the UK especially because it shows blatant disregard for fellow citizens. ….. We also agree with Mr Jarvis that even when not in prison the claimant's lifestyle over the period when he was committing offences was manifestly anti-social….. We have to decide whether he is socially and culturally integrated in the UK in the present. He is now 29. Whilst his recent acceptance of the reprehensible nature of his criminal conduct is an important factor, we consider the negative factors we have just mentioned indicate that his history of criminal offending broke the continuity of his social and cultural integration in the UK and he has not regained it. This means that currently he has not shown he is socially and culturally integrated."

> [59] Being part of a pro-criminal gang similarly shows "blatant disregard for fellow citizens" and is "manifestly anti-social".”

27. Mr Fripp did not seek to argue that the Judge was right to disregard the offending and other like behaviour on the basis that the rule would not apply unless the Appellant were a foreign criminal. He submitted that the Judge had taken into account the criminal offending and what he had described as “unacceptable and anti-social behaviour” but had balanced that against the evidence of the Appellant’s social and cultural integration before the period of offending. He said that this followed from what is said at [46] and [47] of the Decision about the police evidence. The Judge there accepted the evidence and would therefore have had that in mind when considering social and cultural integration.

28. I am quite unable to accept Mr Fripp’s submission on this point. On a plain reading of what the Judge says at [37], he has disregarded the criminal and anti-social behaviour on the basis that the rule only applies because, in essence, such behaviour is to be expected from those to who the rule applies. That is not the case. Of course, most criminal offending is anti-social by its very nature (as the Court of Appeal observed in Binbuga at [58]). However, as the Court of Appeal makes clear it is also the nature and degree of the offending which has to be taken into account when considering whether the behaviour amounts to anti-social behaviour and whether that is sufficient to counter any social and cultural integration which has already taken place.

29. The fallacy in the Judge’s reasoning is moreover apparent from the penultimate sentence when he says that the Appellant’s integration has been “not in an appropriate manner based upon his behaviour from 2011 onwards”. There is a tension between that sentence and the earlier sentence which (properly) accepts that the behaviour is far from being inappropriate integration and is in fact anti-social behaviour which needed to be weighed in the balance when considering the issue of social and cultural integration. There is a further tension between the acceptance that the behaviour has been anti-social in recent years and the finding that “it is abundantly clear” that the Appellant has integrated into UK society. None of that is recognised by the Judge in this paragraph because he has disregarded the evidence of the Appellant’s criminal and anti-social behaviour in his analysis.

30. Even if Mr Fripp is right in his analysis of this paragraph, I would find an error of law because, if that is the case, the Judge has failed to provide adequate reasons to support his finding that it is “abundantly clear” that the Appellant has integrated and/or has reached a finding which is irrational based on his record of the evidence and what is said in that paragraph and elsewhere in the Decision about that evidence.

Very Significant Obstacles

31. Strictly, given my finding that there is an error of law in relation to the acceptance that the Appellant is socially and culturally integrated in the UK, I do

not need to deal with the finding concerning very significant obstacles to integration in Guyana. Mr Jarvis recognised that this was the weaker of his two grounds and relied only on the written grounds. Mr Fripp did not therefore consider it necessary to make submissions and relied on his rule 24 statement. I do so however for the sake of completeness.

32. The Judge dealt with this issue at [38] and [39] of the Decision as follows:

> "[38] With reference to paragraph 399A(c), of relevance to the appellant's ability to reintegrate in Guyana is, of course, the length of time that he has been absent from his country of nationality. I reiterate that the appellant was 7 years old, going on 8, when he began living in the United Kingdom. He is now approaching 23 years of age and, consequently, has not lived in Guyana for 15 years. He has undertaken much of his primary education in the United Kingdom and all of his secondary education. He has no employment history, either in the United Kingdom or in Guyana. It is evident that the appellant has undertaken at least one visit back to Guyana as, in his oral evidence, his father indicated that the appellant returned to Guyana for a visit, of about three weeks' duration, in 2010 but that this was the last time that he had returned to Guyana.
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> [39] Further, the unchallenged evidence before me is that the appellant no longer has any relatives remaining in Ghana [sic] to whom he might turn for support and, indeed, that he does not know anybody in Ghana [sic]. Such unchallenged evidence is also to the effect that there is no individual to whom he might turn for any kind of support in re-establishing himself in his home country. I reiterate that the appellant has no employment history, although he does have certain qualifications obtained in the United Kingdom, which may or may not assist him in Guyana. The appellant has no accommodation in Guyana and, logically, would need some form of financial support, at least in the early stages. His father's unchallenged evidence before me was to the effect that he could not provide the appellant with any significant or material financial support in Guyana, due to his own financial commitments. I also bear in mind that the appellant to date has never lived independently and has never had to support himself. In all the circumstances, I am satisfied that the appellant has established that any attempt to form a private life in Guyana would entail very severe hardship for him. Consequently, I conclude that he also meets the requirement at paragraph 399A(c) and that, as a result, he meets all the requirements of paragraph 399A."

33. The Respondent's grounds rely on the case of Bossadi (paragraph 276ADE; suitability; ties) [2015] UKUT 42 (IAC) and argue that the Judge has failed to take into account whether the Appellant would be able to re-establish ties. It is also asserted that the Judge has failed to take into account that the Appellant's mother does not have leave (or did not at the date of decision) and has not had leave since 2012. It is said that she could therefore return to Guyana with the Appellant to assist him to reintegrate and that this has not been taken into consideration. It is also pointed out that English is the official language of Guyana.

34. In response, the Appellant, in his rule 24 statement, submits that Bossadi is distinguishable because that relied on ties to the Appellant's home country (namely the presence of his mother) which could be re-established on return.

Here, the Judge has accepted that the Appellant has no friends or family in Guyana. It is said that the other points made are simply disagreement with the Judge's findings.

35. I accept that the Respondent's grounds as pleaded are not strong. Certainly, they would be borderline if this were the only error of law raised. However, I accept that the Judge did make errors of law also in this regard although not necessarily for the reasons pleaded.

36. First, there is some inconsistency between the Judge's findings at [38] and [39] of the Decision when compared with at least one other of his findings. At [34] of the Decision, the Judge says the following:

> "I do not find that the appellant enjoys a family life, in the context of Article 8, with his parents, bearing in mind that the appellant is now 22 years old and is capable of undertaking employment and being self-sufficient, should he have the opportunity to do so. Whilst I appreciate that he wishes to return to live at his parents' home, such is a matter of necessity and convenience and the evidence before me, I find, does not establish that the appellant's reliance upon his parents goes beyond the normal emotional and practical ties between adult children and their parents. Indeed, in his submissions before me, Mr Fripp did not seek to argue otherwise, the focus of the appeal being upon private life."

It is difficult to see why, if the Appellant might be expected to be independent of his parents and self-sufficient in the UK, he could not be in Guyana. He has never worked in Guyana but, as the Judge found, he has never worked in the UK either (and would no doubt face some difficulties in finding employment given his criminal history).

37. Second, and related to the above, the test for what are very significant obstacles is as set out in Secretary of State for the Home Department v Kamara [2016] EWCA Civ 813 as follows:

> "[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."

38. Whilst the Judge may well have been entitled on the evidence to find that deportation to Guyana would be very harsh for the Appellant, his reasoning does

not incorporate the sort of "broad evaluative judgement" called for on this authority. Put another way, whilst the obstacles put forward by the Judge are no doubt obstacles and may well be significant ones, it is not clear why the Judge concludes that they are "very significant" ones, particularly when taking into account his other findings.

Article 8 Assessment: Materiality

39. Finally, the Appellant in his rule 24 statement raises an issue whether the errors I have identified are material as the Judge also allowed the appeal following a consideration of the case outside the Rules based on a wider proportionality assessment ([43] to [54] of the Decision). It is said that the Judge was entitled to allow the appeal outside the Rules even if he was wrong in his assessment within them.

40. I cannot accept this submission. First, the section carrying out the proportionality balance is prefaced by the Judge's finding at [41] of the Decision that the Appellant was not required to show compelling circumstances because he had found that the Appellant met the Rules and that "I have borne in mind that an ability to satisfy a relevant part of the Immigration Rules relating to deportation is illuminating in terms of where the respondent might generally consider the relevant proportionality balance should lie, which factor I have taken into account in assessing proportionality overall." [my emphasis]. The Judge has therefore clearly taken into account in what follows his earlier findings which I have found to be flawed.

41. Second, that is also evident from what is said at [51] of the Decision where the Judge, assessing the case applying Sections 117A-D Nationality, Immigration and Asylum Act 2002 also says when assessing the Appellant's private life that "[s]uch are clearly factors of relevance in terms of the weight to be given to the development of his private life in the United Kingdom. In the presenting circumstances, I am satisfied that some significant weight should be given thereto, which fact, I find, is in tune with my findings in relation to paragraph 399A.

42. For those reasons, the findings which I have found to contain errors clearly infect the proportionality assessment carried out outside the Rules. The errors which I have found to be made out are therefore material.

NEXT STEPS

43. For the above reasons, I set aside the Decision. I have carefully considered whether to retain this appeal in the Upper Tribunal for re-making or to remit to the First-tier Tribunal.

44. Central to that consideration is a further issue which arose in the course of submissions concerning the applicability of paragraph 399A and the private life exception under Section 117C in terms of the lawfulness of the Appellant's

residence in the UK. I have set out the immigration history of the Appellant at [11] to [14] above. As is evident from what is there said, the Appellant has been here for more than half of his life. However, as Mr Jarvis submitted, and I accept, the Appellant has not necessarily been in the UK lawfully for half his life. This is a concession which was made in the Respondent's decision under appeal and Mr Jarvis made clear that he did not rely on this point when arguing that there is an error of law in the Decision. However, he did indicate that, if I were to find an error of law, as I have, the Respondent would be seeking to withdraw that concession.

45. I had initially taken the view that this was a strong point against the Appellant and one which could be dealt with by way of a simple mathematical calculation. However, having heard from Mr Fripp, I am inclined to agree with his submission that, because the Appellant was initially here as the family member of an EEA national (namely his mother's ex-husband), further factual investigation and evidence might be necessary in order to establish the position. Of course, that further factual findings are necessary is not necessarily good reason to remit an appeal rather than to give directions and retain the appeal in the Upper Tribunal.

46. In this case, however, I have taken the view that remittal is the more appropriate course for two additional reasons. First, if Mr Jarvis is right about the lack of lawful residence and that paragraph 399A could not apply, the focus of the case and the appeal will shift significantly. It then becomes an appeal based only on Article 8 ECHR outside the Rules which is likely to change also the nature of the evidence required.

47. Second, the appeal before the First-tier Tribunal took place over two years ago. Whilst I did not understand Mr Fripp to argue that much had changed in relation to the Appellant's private and/or family life, it may well be that more evidence is needed in relation to the development of that private and/or family life over the period which will also require fresh findings.

48. For those reasons, I have decided that it is appropriate to remit this appeal to the First-tier Tribunal. Both parties were agreed that I should do so if I found an error of law as I have done.

DECISION

I am satisfied that the Decision contains a material error of law. I set aside the decision of First-tier Tribunal Judge Hodgkinson promulgated on 8 February 2017. I remit the appeal for re-hearing before a Judge other than Judge Hodgkinson.

Signed Dated: 2 May 2019

Upper Tribunal Judge Smith