Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17511/2016 (V)

THE IMMIGRATION ACTS

Heard at Field House *via CVP*
On 8 October 2021

Decision & Reasons Promulgated
On 25 November 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

DKG
(Anonymity Direction Confirmed)

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

Representation:
For the Appellant: Mr. P Uzoechina, Solicitor, Patterson & Co
For the Respondent: Mr. S Kotas, Senior Presenting Officer

Introduction

1. This is an appeal by the appellant against the decision of Judge of the First-tier Tribunal Beach ('the Judge') sent to the parties on 24 March 2020 by which the appellant's appeal against the decision to refuse him leave to remain in this country on human rights (article 8) grounds and to deport him to Jamaica was dismissed.

2. Judge of the First-tier Tribunal Buchanan granted the appellant permission to appeal on all grounds by a decision dated 8 June 2020.

3. This Tribunal was only made aware by Mr. Uzoechina at the hearing that an 'early' draft of the grounds accompanied the appeal notice, and not the 'final' draft. This resulted in 'ground 5' not having been placed before Judge Buchanan and various other paragraphs differing from that which the appellant had intended to rely upon. This can properly be identified as an unfortunate state of affairs. Mr. Uzoechina provided both the Tribunal and Mr. Kotas with the 'final' draft and Mr. Kotas expressed no objection to this draft constituting the grounds of the appeal.

4. Exceptionally, I granted the appellant permission at the hearing to rely upon the final draft of his grounds, observing the overriding objective and noting the respondent's position.

Anonymity Order

5. The Judge issued an anonymity order observing "the appellant has young children whose private and family life may be affected if an anonymity order is not made".

6. The Tribunal is mindful of the observations of Elisabeth Laing LJ in *Secretary of State for the Home Department v. Starkey* [2021] EWCA Civ 421, at [97]-[98], made in the context of deportation proceedings, that defendants in criminal proceedings are usually not anonymised. Both the First-tier Tribunal and this Tribunal are to be mindful of such fact. I am satisfied that the appellant in this matter has already been subject to the open justice principle in respect of his criminal convictions, which are a matter of public record and so considered to be known by both the local community and the wider public.

7. I raised the appropriateness of the order continuing with the parties at the outset of the hearing. Unfortunately, Mr. Uzoechina's submissions were of such length that the hearing ended at 17.45 with Mr. Kotas being unable to remain any longer. Whilst satisfied that Mr. Kotas was able to present the entirety of his case on behalf of the respondent, it was not possible to address the issue of the order before the conclusion of the hearing. Having not heard submissions from either representative, particularly as to the children's circumstances, I conclude, with hesitation, that it would not be fair to set aside the order at this time.

8. Any future consideration of anonymity in respect of the appellant should observe that his criminal convictions are a matter of public record when assessing whether his protected rights under article 8 ECHR outweigh the public interest in open justice, as protected by article 10 ECHR: *Cokaj (anonymity orders, jurisdiction and ambit)* [2021] UKUT 202, at [17]-[28].

Remote Hearing

9. The appellant was removed to Jamaica on 1 July 2016, his asylum application having been certified under section 94B of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').

10. The hearing was conducted on the CVP platform, permitting the appellant to attend through the provision of video conferencing facilities by the British High Commission, Kingston, Jamaica. The hearing commenced at 14.30 UK time to permit the appellant the opportunity to view proceedings.

11. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

12. During the hearing the microphone on my desk ceased to work. Several other microphones placed elsewhere in the hearing room were utilised. The representatives and the appellant confirmed that they could hear me, and each other. They confirmed that they were able to follow proceedings throughout. The appellant confirmed the same.

Background

13. The appellant is a national of Jamaica and is presently aged 30. In August 2002, when aged 10, he entered the United Kingdom as a visitor. He made an in-time application for leave to remain in this country, which was rejected by the respondent on 3 April 2003. A subsequent application for leave to remain was also rejected as invalid. He was served with enforcement papers as the family member of an overstayer in March 2008, when aged 16.

14. He applied for leave to remain in July 2012. The application was refused by the respondent on 19 April 2013. The appellant withdrew his appeal against this decision in October 2013.

15. He applied for leave to remain in October 2013 and the application was refused by a decision dated 18 December 2013 with no attendant right of appeal.

Family

16. The appellant has been in a relationship with 'C', which has ended and resumed on occasion. They have two children, aged 10 and 7. Before the appellant's removal, they did not reside together, the appellant alternating between his parents' and C's homes.

17. The appellant was in a relationship with 'T' and they have a child, aged 8. T visited the appellant in Jamaica in 2017, after his removal. She did not attend the appeal hearing before the First-tier Tribunal.

Criminal offending

18. The appellant was convicted of shoplifting in February 2009, when aged 17, and given a three-month referral order.

19. In June 2009, when aged 18, the appellant was convicted of robbery and possession of a lock-knife. He was given a conditional discharge for thirty-six months.

20. In September 2009 he was sentenced to eight weeks' imprisonment for possession of a class A drug (cocaine).

21. In May 2010 he was convicted of possession of a class B drug (cannabis) and fined £50.

22. In November 2010 he was convicted of resisting or obstructing a constable and sentenced to a community order and a curfew requirement for eight weeks with electronic tagging.

23. In March 2011 he was convicted of a failure to comply with the requirements of a community order and ordered to continue to serve the community order. He was made subject to a curfew requirement for two weeks.

24. In May 2013 the appellant was convicted of possession of a class B drug (cannabis) and fined £60.

25. In February 2015 the appellant was convicted of possession with intent to supply a class B drug (cannabis) at Wood Green Crown Court and was sentenced to eighteen months' imprisonment. The sentencing judge remarked, *inter alia*:

> 'You have pleaded guilty rather late in these proceedings to having cannabis in your possession with intent of supplying it. That it seems to me is perfectly plain on the evidence that I have looked at. Police officers obviously had sufficient and good information about drugs and when they exercised that warrant and got into your girlfriend's home, there was your rucksack with all your merchandise inside it; over 250 bags, over 226 grams of cannabis, all bagged up, some of it ready to be sold no doubt in £10 deals on the street. You had the wherewithal to carry out a business and there was the evidence on your mobile telephone that that was exactly what you were engaged in. The requests were there for amounts of cannabis.
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> … However, you got the money to start up your illegal business; it certainly was a business, you had the money in order to be able to do it, you had the merchandise in order to be able to do it and I take the view that you were doing it for profit. …'

Deportation proceedings

26. The respondent served a deportation order upon the appellant on 21 April 2015, accompanied by a decision to refuse a human rights claim. The appellant's human rights claim was certified under section 94B of the 2002 Act. That decision was subsequently withdrawn, following the grant of permission in judicial review proceedings (JR/4971/2015).

27. A new decision was issued on 28 July 2015. A supplementary decision letter was served on 9 October 2015. The human rights claim was again certified under section 94B of the 2002 Act. The applicant's challenge to this decision by means of judicial review proceedings was refused in February 2016

Asylum application

28. The applicant claimed asylum on 1 April 2016. The respondent refused the application by a decision dated 26 May 2016, certifying the claim under section 94B of the 2002 Act. A further decision letter addressing article 8 was issued on 16 June 2016. A judicial review challenge seeking a stay of removal was refused on 16 June 2016(JR/6184/2016).

29. The appellant was removed from this country to Jamaica in July 2016.

Appeal

30. On 25 July 2016 the applicant filed a Notice of Appeal against the refusal of his human rights claim.

31. The hearing of the appellant's appeal was adjourned on several occasions before being heard by the Judge at Taylor House on 4 and 5 February 2020. The Judge's decision runs to 125 paragraphs over 38 pages.

Grounds of Appeal

32. Eight grounds of appeal are now identified by Mr. Uzoechina. They are identified as follows:

i. The First-tier Tribunal committed or permitted procedural or other irregularity capable of making a material difference to the outcome of the fairness of the proceedings.

ii. There was a material misdirection in law on a material matter.

iii. There was a perverse finding as to the appellant's partner not being a 'qualified partner' for the purposes of section 117C of the 2002 Act.

iv. There was a failure to consider and make a proper finding of fact on the best interests of the children under section 55 of the Borders, Citizenship and Immigration Act 2009 ('the 2009 Act').

v. There was a failure to consider the appellant's appeal under paragraph 399A of the Immigration Rules ('the Rules').

vi. The finding that the appellant's partner, C, and their children could relocate to Jamaica was "against the weight of evidence, perverse and irrational".

vii. The First-tier Tribunal was "adversely selective" as to witness evidence.

viii. The finding that the appellant could not meet the requirements of the private and family life exceptions established by section 117C(4) and (5) of the 2002 Act was unlawful.

33. Several of the grounds advance numerous additional grounds of challenge.

34. It is unfortunate that in granting permission to appeal Judge Buchanan only considered the first three grounds. Having identified that there were no merits to the first two grounds, Judge Buchanan identified that in respect of ground 3 he found it difficult to understand the reasons for extending the statutory definition set out in section 117D(1) of the 2002 Act. He proceeded to grant permission to appeal on all grounds. The appellant and his representatives may have been aided with the presentation of a clear assessment of the merits, or otherwise, of each individual ground by Judge Buchanan to permit proper consideration as to whether each and every ground of appeal enjoyed sufficient merits to be advanced at the oral hearing.

35. As explained to Mr. Uzoechina the grounds are unhelpfully drafted, and would have been aided by proof reading, but I was satisfied that by the end of his submissions they had been explained with sufficient clarity.

36. At the hearing Mr. Uzoechina withdrew the element of ground 4 predicated upon the Judge having found at para. 91 of her decision that the appellant enjoyed "parental responsibility" for his children. He accepted the reference to parental responsibility, with its attendant legal meaning, was not accurate. The Judge found that the appellant "has a genuine and subsisting parental relationship with the two children".

Preliminary Issues

Rule 15(2A) applications

37. By Decisions dated 4 October 2021 the Tribunal granted both parties permission to rely upon evidence filed by means of applications made under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. The Decisions confirmed that it

was in the interest of justice for the documents, which had not been placed before the First-tier Tribunal, to be considered at the error of law hearing.

38. The applicant was granted permission to rely upon an independent social worker's report prepared by Julie Meek, dated 9 August 2021.

39. The respondent was granted permission to file and serve two reports: (1) Noriko Takahashi and David Jones, social workers, dated 10 June 2019, and (2) Peter Horrocks, social worker, dated 22 November 2019. Both reports are concerned with independent social worker assessments conducted by video link. The respondent accepted that these non-case specific reports should have been placed before the First-tier Tribunal and explained that the presenting officer, Mr. Briant, had not been aware of their existence at the relevant time. I note the respondent's position that had this evidence been placed before the Judge she would not have reached a different conclusion on the discreet issue, but it was in the interests of justice and fairness that the reports be admitted.

Adjournment request

40. At the outset of the hearing, I observed to the parties that though the appellant was attending from Jamaica, he was not expected to give evidence as it was an error of law hearing and so no issues arose from the guidance provided in *Nare (evidence by electronic means) Zimbabwe* [2011] UKUT 00443 (IAC).

41. Surprisingly, despite acknowledging that the little he knew about the guidance in *Nare* was what he had just been informed at the hearing, Mr. Uzoechina requested an adjournment of the hearing until a decision was issued by the Tribunal in the then pending matter of *Agbabiaka (evidence from abroad, Nare guidance)* [2021] UKUT 00286 (IAC), again a matter of which he was unaware until after the commencement of the hearing. Mr. Uzoechina was unable to explain what benefit his client, the appellant, would enjoy from the adjournment in circumstances where he has been absent from this country for over five years, the challenged decision is now over nineteen months old, and he seeks to return to this country. Further, the eight grounds of appeal relied upon in this matter do not raise a challenge concerned with the *Nare* guidance.

42. Having considered the overriding objective, I refused the application for an adjournment. The appellant was not expected to give evidence at the hearing, as accepted by Mr. Uzoechina. In any event, Mr. Kotas was able to draw to my attention confirmation from the British High Commission in a letter dated 12 December 2017 that Jamaica's Evidence Special Measures Act creates a mechanism for facilitating the taking of evidence from witnesses who are physically present in Jamaica but participating in foreign civil or criminal proceedings. Confirmation was also provided that the Jamaican authorities have informed the British authorities that they raise no objection to the use of video link facilities for the purpose of appellant's providing evidence in support of their own appeal against a decision made in accordance with section 94B of the 2002 Act. In such circumstances, there was no good reason to await the decision in *Agbabiaka*. I observe that there would have been

no merit to any challenge in this matter in respect of the *Nare* guidance, even if such a challenge had been raised.

Decision on Error of Law

43. I am grateful to both Mr. Kotas and Mr. Uzoechina for filing a position statement and a skeleton argument respectively. The position statement was sufficiently detailed to permit Mr. Kotas to rely upon it in the limited time he was granted by Mr. Uzoechina to reply. The appellant's skeleton argument was hindered by the variable use of paragraph numbers, inadequate proof reading and the use of hyperbole - for example, "FTTJ wrongly concluded or envisaged at [103] that level of unduly harsh required under Paragraph 399(b) equates or akin to a hopeless psychiatric madness when [C] would be mental Asylum and her children taken into local authority care" - but I was aided by Mr. Uzoechina's oral submissions.

44. After the hearing, at Mr. Kotas' request, the Tribunal granted the parties permission to file further submissions in respect of the steps to be taken if the decision of the Judge was to be set aside. Both parties filed written submissions. Mr.Kotas' submissions are dated 13 October 2021 and Mr. Uzoechina's are undated.

Ground 1

45. Ground 1 as drafted identifies two distinct and separate challenges:

    (a) Against the appellant's opposition, the FTTJ permitted the respondent to tender police officer unconnected with the proceedings to give a hearsay evidence but denied appellant's request/ application to produce his witnesses, social worker's and probation reports that are crucial to appellant's case and erroneously and unfairly blaming appellant's representative for non production of this evidence/ report whereas FTTJ failed to take into account the appellant's witness statements at para 8-9 confirming his inability to give instructions to his lawyer from abroad and the fact that the Supreme Court has already decided in *Kiarie & Byndloss* that removal of appellant before exercising his right of appeal is unlawful and, in doing so, face with evidence of glaring prejudice and odds against the appellant in preparing his appeal, the FTTJ erred in her failure to direct her mind to, whether the hearing can be fairly and justly determined, which the appellant submits was not.

    (b) At para [71] the FTTJ confirmed that appellant submitted further submissions as directed and respondent was required to respond on 14 February 2020 and a further opportunity for appellant to respond to respondent's submissions by 21 February 2020, however, without respondent's submissions, allowing appellant opportunity to the same or giving any reason(s), the FTTJ erred in proceeding to make her determination. In doing so, the FTTJ's conduct of the hearing was rendered procedurally unfair and denied the appellant right to fair hearing by the FTTJ arguing respondent's case from [105] to [113] whereas the respondent never made such submissions on the matter in issue: s. 3C of the Immigration Act 1971.

46. At first blush ground 1(b) as drafted is difficult to understand but I am satisfied that Mr. Uzoechina sufficiently clarified the challenge at the hearing.

47. In respect of the ground of challenge identified at ground 1(a), it is appropriate to detail the Judge's reasoning in respect of her refusal to adjourn which runs for some length over several paragraphs:

> '14. At the beginning of the hearing Mr. Uzoechina made an application for an adjournment. … Mr. Uzoechina further submitted that the appellant could not receive a fair hearing without being returned to the UK. He said that the respondent had removed the appellant on the basis of NEXUS evidence and that the appellant had been prevented from finding witnesses in the UK to support his case. He said that the appellant was unable to do this from Jamaica. I asked Mr. Uzoechina for the details of the witnesses which the appellant wished to trace. Mr. Uzoechina referred to Catherine O'Leary who had written a letter of support in 2015 and said that he had written to her at her office address with no response and that a telephone call to her office number had failed to trace her and that she no longer worked for the organisation. He was unable to provide copies of the letter or any attendance note regarding the telephone call because he had left these at his office. He was not able to confirm whether he had attempted calling the witness' personal mobile number as listed on her letter of support or whether he had written to her home address (the letter of support gave that address and stated that she had lived there for 25 years). Mr. Uzoechina said that the appellant also wished to call the alleged victim of the alleged rape which was detailed in the NEXUS evidence. He said that the appellant could not remember the alleged victim's name but would recognise her by sight. Mr. Uzoechina said that the appellant also wished to contact Aaron Blake who was also named in the NEXUS evidence as allegedly being involved in a TWOC incident. He said that the appellant could not remember the addresses of his witnesses and needed to be present in the UK to trace them.
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> 15. Mr. Uzoechina further submitted that the appellant's presence in the UK was required because an independent Social Worker's report was required and the Social Worker would need to consider the interaction between the appellant and his children to confirm that there was an existing parental relationship which was not accepted in the respondent's reasons for refusal letter. He submitted that this could not be obtained without the appellant being present. Mr. Uzoechina referred to the judgment in Kiarie & Byndloss and said that the appellant was not in a position to give full and proper instructions or to obtain expert evidence. He submitted that the appellant's human rights had been breached. Mr. Uzoechina said that there had been difficulties regarding financial aspects of the case with the family struggling to pay. He said that the appellant was removed from the UK without contact with his legal representatives.
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> 16. In his response, Mr. Briant opposed the adjournment request. … Mr. Briant said that the appellant was not saying that the incidents as recorded in the NEXUS evidence had not happened. He said that the NEXUS evidence was provided to add additional background but the focus was on the index offence. He said that it was not a case of the respondent stating that despite

no further action being taken with regard to some of the allegations, the appellant was still guilty. Mr. Briant said that the appellant was able to challenge the police evidence through cross-examination. He submitted that the rape allegation was 11 years ago when the alleged victim was 14 years old that it was submitted that it was unlikely that the appellant would now recognize the alleged victim even if she still lived in the same area.

17. Mr. Briant acknowledged that an independent Social Worker Report might have been of assistance but said that the appellant did not need to be present for that report to be provided. He said that the report could have commented on the impact of the absence of the appellant but the appellant had chosen not to obtain the report so far. Mr. Briant said that the issue of whether the appellant could have a fair hearing outside the UK had been considered in 2018 and there had been no significant change since then. He said that there had been no application prior to the date of the hearing.

18. In reply, Mr. Uzoechina … said that it was unfair on the appellant to prevent him from bringing evidence to support his claim and the appellant should be given an opportunity to prepare his case. Mr. Uzoechina said that the relationship between the appellant and his children needed to be confirmed by watching the appellant and his children together. He submitted that the appellant is prejudiced by being absent from the UK.

19. In considering the adjournment request, I considered the judgment in R (on the applications of Kiarie & Byndloss) v SSHD [2017] UKSC 42, the decision in AJ (s.94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 115 (IAC) and the decision in Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC). I also considered the previous s.94B decision which was promulgated on 12 September 2018. In that decision, Designated Tribunal Judge Peart found that the appellant had had effective legal representation and there was no evidence to suggest that he had not been able to give instructions and take advice from his Solicitor, that there was no evidence to show that the appellant's absence from the UK materially impaired the production of any expert evidence and the appellant could give evidence via video link.

…

21. The appellant has been aware of the NEXUS allegations since the refusal of his application for further leave to remain on 19 April 2013. That application was refused on suitability grounds and the reasons for refusal letter made specific reference to the appellant's convictions at the time as well as to the NEXUS evidence and clearly stated that the respondent believed the appellant to be a member of the Northumberland Park Killers gang. Specific reference was made to the MG11 statement and the information contained within the NEXUS statements. The NEXUS evidence was, at the very latest, provided with the respondent's bundle under cover of letter dated 24 March 2017. The appellant has been aware of this evidence since at least March 2017 when the respondent's bundle was prepared for the current appeal (it is likely that he was, in fact, aware of it from 2013 when the allegations were first raised and when he lodged an appeal against the decision to refuse his application for further leave to remain). The current appeal has been

adjourned on previous occasions; the latest adjournment being 17 July 2019 when this issue could have been raised but it was not raised. Furthermore, the appellant was unable to provide anything other than the most sketchy details of who he intended to trace and how. The appellant's solicitors were unable to provide any documentary evidence to show what attempts, if any, had been made to trace any of these witnesses. There was reference to a letter and a telephone call to the workplace of one of the witnesses, but I was not provided with evidence of these. There was no evidence to show that any attempt had been made to trace Aaron Blake via the electoral register or any other means. It was entirely unclear whether the appellant would ever be able to trace those witnesses or what evidence these witnesses would add. The need to trace these witnesses had not been mentioned at all either in the previous s.94B hearing in June 2018 or at the previous adjourned hearing on 17 July 2019. Directions given by me at that adjourned hearing had also not been complied with by the appellant.

22. With regard to the independent Social Worker's report, it was entirely unclear whether [T] would cooperate with any report given that she had not provided an updated witness statement or attended the hearing. Her last witness statement was from 2017 and Mr. Uzoechina stated that he had been unable to get hold of her. [C] had attended the hearing and could give evidence of her view of the relationship between her children and the appellant as could the appellant via videolink. If an independent Social Worker report was required, this could have been obtained even without the appellant being in the UK. The Social Worker could have observed Facetime contact between the children and the appellant and could have spoken to the children; the oldest of whom is 8 years old and the youngest of whom is 5 years old (and therefore able to express their views with the help of professional guidance). At the hearing in 2018, it had been noted that the appellant had no legal aid or funds for expert evidence and there was no evidence to show that there were now funds available or that an independent Social Worker had even been identified and approached to give a report. There had already been a substantial delay in hearing the appeal and it was not in the interests of justice to prolong the proceedings any further. I therefore refused the adjournment request.'

48. On initial reading ground 1(a) as drafted is opaque as to its intended target(s), with several observations made, some of them sweeping. However, the focus of the ground was given greater clarity by Mr. Uzoechina in his skeleton argument and at the hearing. The challenge is to the fairness of the hearing proceeding with the appellant residing in Jamaica.

49. I make three preliminary observations as to this ground. The first is that the Supreme Court decision in *R (Kiarie and Byndloss) v. Secretary of State for the Home Department* [2017] UKSC 42, [2017] 1 W.L.R. 2380 does not establish, as asserted, that "removal of appellant before exercising his right of appeal is unlawful". The Supreme Court quashed the section 94B certificates in the joined cases on the basis that, in the circumstances of each case, an appeal brought from outside the United Kingdom, against the refusal of the human rights claim, would be a breach of article 8. I note that the Upper Tribunal gave guidance to the First-tier Tribunal as to the

consideration of s94B certificates in *AJ (s 94B: Kiarie and Byndloss questions) Nigeria* [2018] UKUT 115 (IAC) and has recently provided guidance as to access to lawyers in *Juba (s. 94B: access to lawyers)* [2021] UKUT 00095 (IAC).

50. Further, as to the complaint that the Judge unlawfully denied the appellant's request to "produce" witnesses, the application was based upon the appellant being permitted to return to this country to help track down unknown people, including a female who had made a rape complaint, or presently uncontactable people, despite his legal representatives being unable, or having proven dilatory, in seeking to track down such persons. The Judge gave cogent, lawful reasons as to why further delay to permit the appellant additional time to seek to contact witnesses was not in the interests of justice. As for the Judge denying the appellant's request to produce his probation reports, there is no reference in the record of proceedings to such request being made.

51. Finally, Operation Nexus is designed to establish whether a detained foreign national is lawfully in the United Kingdom. If an individual whose immigration status has been considered under Operation Nexus decides to exercise an in-country right of appeal against a decision to deport the respondent allocates the case to an Operation Nexus detective whose main responsibilities include liaising with the respondent in relation to the appellant and presenting information to any tribunal hearing. The detective will normally provide a witness statement summarising the individual's conduct, including reference to incidents contained on internal police systems where the individual concerned may not have been arrested, or even questioned, by police. This statement will be filed with the First-tier Tribunal and served upon the appellant. Confirmation was given in *Farquharson (removal – proof of conduct)* [2013] UKUT 00146 (IAC) that these statements are to be supplemented by the underlying CRIS (Crime Report Information System) reports. Rule 14(2)(a) of the Tribunal Procedure Rules 2014 establishes that the Tribunal may admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom. The respondent was lawfully permitted to rely upon evidence presented by of DC Haysen. The appellant's conflation of the evidence presented by the police officer, which as the Judge observed had been served upon the appellant no later than March 2017, with the refusal to grant an adjournment permitting the appellant to secure evidence with no attendant timetable as to the steps to be taken enjoys no merit.

52. Reliance is placed by the appellant upon the first two questions identified by the Supreme Court in *Kiare and Byndloss*. The first question, addressed at para. 60 of the judgment, is whether the appellant will be able to secure legal representation, which might have been available had the appellant remained in the United Kingdom, and whether the appellant will be able to give instructions to his lawyer and receive advice from the lawyer, both prior to the hearing and during it. The second question, addressed at para. 74 of the judgment, is whether the appellant's absence from the United Kingdom, as a result of deportation or other removal pursuant to the section 94B certificate, is likely to present "difficulties in obtaining the supporting professional evidence which … can prove crucial in achieving its success".

53. The Upper Tribunal in *AJ (s 94B: Kiarie and Byndloss questions) Nigeria* confirmed that in light of the Supreme Court judgment, the First-tier Tribunal should adopt a step-by-step approach, in order to determine whether an appeal certified under section 94B can be determined without the appellant being physically present in the United Kingdom. The First-tier Tribunal should address the following questions:

    1. Has the appellant's removal pursuant to a section 94B certificate deprived the appellant of the ability to secure legal representation and/or to give instructions and receive advice from United Kingdom lawyers?

    2. If not, is the appellant's absence from the United Kingdom likely materially to impair the production of expert and other professional evidence in respect of the appellant, upon which the appellant would otherwise have relied?

    3. If not, is it necessary to hear live evidence from the appellant?

    4. If so, can such evidence, in all the circumstances, be given in a satisfactory manner by means of video-link?

54. The Upper Tribunal cautioned the First-tier Tribunal that it should not lightly conclude that none of the issues covered by the first and second questions prevents the fair hearing of the appeal.

55. The appellant complains that the Judge failed to adequately consider his evidence as to his inability to provide instructions to his legal representatives, who have been on record since his appeal was filed in 2016, and who have previously attended CMRHs, a preliminary 'AJ hearing' in 2018, and an adjourned hearing in 2019. Before this Tribunal the appellant relied upon his witness statement prepared for the hearing in February 2020, at §§8-9:

    '8. With regards to my appeal, I am very worried that the Police is coming up with all different kinds of allegation, even where the courts have found me innocent. I am handicapped in my circumstances because I cannot approach my friends and associates to come to my aid or bear me witness. My lawyer has requested details of those (alleged victims or associates) involved in the police allegation but I cannot give them from here. I need to search for them, especially those that have moved from their addresses. I cannot get their support or witness statement from Jamaica and my lawyer is feeling frustrated.

    9. If I were back home I would be able to locate these people but presently I cannot. Even the police have roped me in with allegation of Gang membership associated with my brother, but it is obvious that the name and date of birth in the police allegation are different from mine. I know that I have not been living up to expectation but I am not a gang member."

56. The Upper Tribunal stated in *AJ (s 94B: Kiarie and Byndloss questions) Nigeria*, at [45]:

> '45. Assuming that the appellant is legally represented, the First-tier Tribunal will need to be satisfied that the appellant has been able to provide adequate instructions to his United Kingdom lawyers and to receive advice from those lawyers. Given the state of modern communications, there is, in general, no reason why communication by telephone and email should not be regarded as adequate, particularly where the appellant's direct instructions can be supplemented by United Kingdom relatives or friends.'

57. The headnote to the decision in Juba details, *inter alia*:

> (1) In the light of *Kiarie and Byndloss* [2017] UKSC 42, the first question to be answered by the First-tier Tribunal in an appeal involving a claim that has been certified under section 94B of the Nationality, Immigration and Asylum Act 2002 is whether the appellant's removal from the United Kingdom pursuant to the certificate has deprived the appellant of the ability to secure legal representation and/or to give instructions and receive advice from United Kingdom lawyers (*AJ (s.94B: Kiarie and Byndloss questions)* [2018] UKUT 115 (IAC)).
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> (2) The task for the First-tier Tribunal in answering that question is fact and context-specific. The Tribunal must, in particular, determine whether the facts demonstrate the kind of inconvenience or difficulty that is inherent in the appellant being outside the United Kingdom; or whether there has been, or will be, an actual impediment in the taking of instructions and receiving of advice.

58. There has been no complaint that the appellant has been unable to contact his solicitor by modern means of communication. The evidence presented strongly suggests that the appellant has been able to provide instructions and receive advice. The inability to provide instructions is identified as solely relating to the identification of means to contact potential witnesses, including a rape victim. For the reasons detailed above, the Judge gave cogent and lawful reasons for refusing the adjournment request on this ground. I am satisfied that the Judge lawfully concluded that the appellant was not subject to impediment in providing instructions.

59. The primary focus of Mr. Uzoechina and Mr. Kotas, both in their written documents and at the hearing, was directed to the refusal to adjourn the hearing to permit the appellant an opportunity to secure an independent social worker's report. The appellant was granted permission by this Tribunal to rely upon a report from Julie Meek, an independent social worker, dated 9 August 2021. This report post-dates the First-tier Tribunal hearing. Reliance is placed by the appellant upon Ms. Meek's request that he be permitted to return to the United Kingdon so that further assessments can be completed on the impact of his absence upon his children. Ms. Meek observes that the appellant's presence and support here in this country with his children "may make it more convenient for the mother's [sic] of his children to contribute to the report as they will no longer be solely responsible for the emotional and physical care of their children." No reasoning is given for this observation. The Tribunal notes that C has been engaged in the appellant's appeal, including

attending his hearing before the First-tier Tribunal. This Tribunal was not informed as to T expressing a recent interest in supporting the appellant in his appeal.

60. The respondent filed two reports that she accepts should have been placed before the Judge. The reports of Noriko Takahashi/David Jones and Peter Horrocks were obtained by the respondent in 2019 in respect of several appeals considered to be test, or lead, cases before the First-tier Tribunal where issues germane to the "AJ questions" - *AJ (s 94B: Kiarie and Byndloss questions) Nigeria* - were to be heard.

61. The Judge observed at para. 22 of her decision that if an independent social worker report was required, it could have been obtained without the appellant being in the United Kingdom and with the social worker observing Facetime contact between the appellant and children, as well as speaking to the two children. The respondent accepts that such conclusion was contrary to the expert opinion she had received from Peter Horrocks, at paras. 4.6 and 4.10 of his report:

> '4.6 There is clear guidance in terms of undertaking social work assessments, whether parenting assessments or assessments of extended family members. Such assessments are in depth pieces of work and will extend beyond the practical aspects of caring and the nature of the relationship between the carer and the child. Such assessments will include issues such as the abilities as well as the suitability of the parent/carer/, the needs of the child and whether such a placement is appropriate in terms of the child's needs. Aspects of such assessments are practical in nature, whereas other aspects are more abstract and/or there is not necessarily a right or wrong answer. It is more a developing conversation for example around the child's needs and how those needs can best be met in the future. Such assessments combine three different elements, parenting capacity, the child's developmental needs and family and environmental factors. An essential aspect of such assessment will involve the nature of the relationship between the child and the adult and will require face to face observations and in my experience no assessment would be considered to be adequate or complete, without this element. I consider that it would be highly unlikely for a Court to accept such an assessment, if this aspect was lacking. A further aspect of such assessments, will include the wishes and feelings of the child and the abilities of the child to express their wishes and feeling are age dependent. Young children lack the speech to express their wishes and feelings as well as lacking understanding of the issues facing their family. In such circumstances it is vital to observe the interaction between the child and the adult, in order to gain an understanding of the nature of the relationship, on that basis the wishes and feelings of the child can be ascertained.'

> '4.10 As a direct response to the above question, I would consider that for younger children it is not possible to assess attachment, without the presence of both the child and the adult together in the same room. Observing the adult and an older child communicating by video-link, can provide some insight into the nature of the attachment, but there are a significant number of variables, which can neither be controlled and which have a significant impact on such assessments. When describing some of the work undertaken using video-links or the equivalent in the following

> questions, this should become more apparent. I would consider that such observations are only relevant, when the child/young person has the capacity to describe in depth their wishes and feelings. I would be unwilling to provide a cut-off age for a variety of reasons, not least issues around culture, background and experiences of trauma or mental health difficulties in the family.'

62. The appellant submits that the failure to file and serve the two reports prior to the First-tier Tribunal hearing, and the advancing of submissions contrary to the expert opinion at the hearing, establishes procedural unfairness.

63. Fairness is conducive to the rule of law. However, there are no rigid or universal rules as to what procedural fairness requires. In this matter, the respondent has accepted her failures to the appellant and the First-tier Tribunal. The appellant has identified the adverse impact he believes such failure had upon his submission to the Judge that he should be permitted to return to this country to fairly present his appeal.

64. I do not minimise the respondent's failings. However, the difficulty for the appellant is that the Judge gave several reasons for refusing the application for an adjournment to secure an independent social worker's report, an application run in tandem with the appellant's fairness submission. One of the reasons provided is detailed at para. 22:

> 22. … At the hearing in 2018, it had been noted that the appellant had no legal aid or funds for expert evidence and there was no evidence to show that there were now funds available or that an independent Social Worker had even being identified and approached to give a report. There had already been a substantial delay in hearing the appeal and it was not in the interests of justice to prolong the proceedings any further. I therefore refused the adjournment request.'

65. An 'AJ hearing' was held before Designated Immigration Judge Peart on 3 July 2018. The appellant was represented by his present legal representatives. It was accepted on behalf of the appellant that he had no funds to pay for an independent social worker's report but hoped that an identified firm of solicitors with a legal aid contract would take on his case and obtain legal aid fundings. Judge Peart concluded that there was no evidence to establish that the second firm of solicitors had been approached. He further noted that the appellant's present legal representatives had attended two previous CMRHs and no suggestion was made at that those hearings as to an independent social worker's report being required. Judge Peart concluded that there were no private funds to secure a report and that there was no evidence that any other firm of solicitors who held a legal franchise had stated that they were prepared to act for the appellant, nor had they suggested an independent social worker's report was desirable let alone essential.

66. Consequent to the preliminary decision of Judge Peart the substantive hearing listed on 17 and 18 July 2019 was adjourned on the first day because the appellant was unable to attend. The appellant's representative did not inform the Judge at the

hearing as to an independent social worker's report being sought. The next listing of the hearing was on 5 and 6 December 2019. This fixture was vacated in October 2019 as it was identified that there would be no access to required video conference facilities in Kingston, Jamaica, on these dates. Between the date of the new listing being sent to the parties on 24 October 2019 and the commencement of the hearing in February 2020, the appellant provided no indication to the First-tier Tribunal that an independent social worker's report was being sought.

67. A dispute arose before me between Mr. Uzoechina and Mr. Kotas as to whether Mr. Uzoechina had informed the Judge in February 2020 that the appellant had no money to pay for an independent social worker's report. Mr. Uzoechina was adamant that he had not made such comment to the Judge and confirmed that he was content that I consider the First-tier Tribunal's record of proceedings. Having read the record of proceedings, I find that Mr. Uzoechina did not state before the Judge that the appellant had no money to pay for a report. I am satisfied that Mr. Uzoechima informed the Judge that there were difficulties regarding the financial aspects of the case, with the family struggling to pay. He informed the Judge that he started preparing the case the week before the hearing and realised that issues needed to be resolved.

68. The Judge considered two entwined applications. An application for an adjournment, made in part to enable the appellant to secure an independent social worker's report in respect of which the Tribunal had previously been informed, though some time previously, that he had no funds to pay for, which was identified as being required at the beginning of a twice-adjourned, two-day hearing in circumstances where no information was provided as to steps having been taken to identify and contact an independent social worker and with the Tribunal being informed that the family were struggling to provide funds for representation. The second application was a wider one as to determining whether the appellant's appeal could fairly be determined without him being physically present in the United Kingdom. This raised an issue as to whether an independent social worker would need to consider interaction between the appellant and his children when they were present together in this country.

69. I am satisfied that the second application, upon which the procedural fairness challenge is parasitic, can only fall to be considered upon the Judge being satisfied that the overriding objective required an adjournment, which in turn required the Judge to assess, as a relevant factor, whether the appellant could secure an independent social worker's report for a future hearing.

70. I find that in respect of her adjournment decision, the Judge acted fairly: *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC). She considered all material circumstances. She was entitled to rely upon the fact that since at least the time of the hearing held before Judge Peart, some nineteen months previously, the appellant had taken no steps to identify and instruct an independent social worker. No indication as to a report being required was identified at the adjourned hearing held on 17 July 2019. I observe that there was no indication by the appellant's representatives at the

adjourned hearing that if the appellant were able to attend an adjournment would have been sought for a report. The Judge was entitled to rely upon the information provided by Mr. Uzoechina at the hearing in February 2020 that the appellant's family were struggling with the financial commitments arising through pursuing the appeal.

71. Consequently, I find that though the respondent acted in error as to her failure to file and serve the two expert reports at the hearing, or to make submissions consistent with expert opinion, no procedural unfairness arose in this matter. The contents of the reports do not establish as unlawful the Judge's reasoned conclusion as to it not being in the interests of justice to adjourn the appeal to secure an independent social worker's report. No procedural unfairness arose in respect of the proceedings. The appellant's appeal is therefore dismissed on ground 1(a).

72. Alternatively, and in any event, for the reasons detailed below the Judge did not err in law as to her decision that it would not be unduly harsh for C and the children to relocate to Jamaica and reside with the appellant. The appellant's contention as to the requirement for an independent social worker's report was to permit a social worker to observe the children together with the appellant and to predict the effects of separation. It was not the position that an independent social worker in the United Kingdom could properly opine as to the impact upon the children of relocating to, and living in, Jamaica with their parents. As the Judge found that there was no undue harshness in respect of the 'go' scenario established by paragraph 399(a)(ii)(a) of the Rules, the absence of an independent social worker's report is immaterial. The failure to provide the two expert opinions does not adversely infect the Judge's conclusion as to the 'go' scenario. There was no procedural unfairness.

73. I turn to ground 1(b). This is a challenge directed to several paragraphs of the Judge's decision. The starting point for my consideration is para. 71 of the Judge's decision:

> '71. Mr. Uzoechina had not provided a copy of the children under 12 policy despite relying on it. I queried whether the Immigration Rules allowed a visitor from Jamaica to switch to being a spouse in the UK in February 2003 and asked why a copy of the policy had not been provided if the appellant were intending to rely upon it. Mr. Uzoechina was not able to provide an explanation for this. I said that I would agree to a copy of the policy and representations regarding it being provided by 7 February 2020 and allowed the respondent an opportunity to respond to those submissions by 14 February 2020 with a further opportunity to the appellant to respond to the respondent's submissions by 21 February 2020.'

74. The Judge's decision was signed on 3 March 2020 and promulgated om 24 March 2020. The appellant provided submissions, which were addressed by the Judge at paras. 103 to 107. She concluded that the policy was not applicable to the appellant in 2003 as the policy only applied to a child applying to join a single parent resident in the United Kingdom and not, as arose in this matter, where the other parent was also applying to join the parent in this country.

75. The appellant complains that he was not given an opportunity, as per the agreed timetable, to reply to the respondent's submissions, and so the Judge erred in proceeding to make her decision. Unfortunately, there has been insufficient consideration of para. 104 of the decision by the appellant. The Judge expressly confirmed that she had only received the appellant's written submissions and accompanying documents. The respondent did not avail herself of the opportunity to reply; simply leaving it to the Judge to consider the issue of law before her. In such circumstances there is no meritorious challenge on the ground that the appellant was denied the opportunity to respond to the respondent's non-existent submissions.

76. Further, there is no merit to the serious allegation that the appellant was denied a fair hearing by the Judge "arguing" the respondent's case from paras. 105 to 113. The Judge undertook the legal and factual analysis that she was required to undertake and gave cogent and lawful reasons for concluding that the appellant has not lawfully resided in this country for most of his life. This issue is addressed below in greater detail. The challenge is simply a disagreement with judicial findings. It enjoys no merit and should not have been advanced.

Ground 2

77. The appellant submits that at paras. 87, 113 and 115 of her decision the Judge erred in finding that he has not lawfully lived in this country for most of his life. Consequently, it is said that the Judge erred in finding that the appellant did not enjoy the protection of paragraph 399(b) of the Rules.

78. The respondent confirmed in her decision letter that on 11 February 2003 the appellant's father, a Jamaican national with settled status, applied on behalf of the appellant for leave to remain, identifying the appellant as his dependant. The application was refused on 3 April 2003 as the appellant's father was not named on the birth certificate provided. The respondent's position is that the appellant has not enjoyed lawful leave in this country since the decision in April 2003.

79. By means of his skeleton argument Mr. Uzoechina submitted (the paragraph numbers in the skeleton are idiosyncratic, reference is made to the second para. 2 in the document):

> '2. The thrust of the appellant's argument is a valid application was submitted on 11 Feb 2003 before leave expired on 22 Feb 2003 and on 3 April 2003 the respondent rejected the application as applicant father's name was not contained in the birth certificate whereas the application was met all the mandatory requirements under Para. 34 (1-9) of the immigration rule and not in breach of Para. 34A of the rule."

80. Mr. Uzoechina developed this ground at the hearing, stating that the appellant's application for leave to remain in 2003 was made in time, was supported with all required documents including the appellant's birth certificate and so his lawful leave was extended by section 3C of the Immigration Act 1971 ('the 1971 Act') until a decision was made or the application was withdrawn. Mr. Uzoechina contended that

no decision had been made on the application "because the respondent cannot reject an application if a document is missing". He relied upon paragraph 34 of the Rules as he understood to have been in force in April 2003.

81. No copy of the relevant paragraph 34 of the Rules was provided by Mr. Uzoechina, which is unsatisfactory in light of the weight given to it in the submissions advanced and reinforces a concern raised by the Judge at para. 71 of her decision. Mr. Uzoechina initially sought to rely upon paragraph 34 in its present form but accepted that due to the relevant rule not having been filed I could properly locate the relevant rule after the hearing, the present paragraph 34 having substituted a previous version in November 2016 subject to savings that are not relevant in this matter.

82. Paragraph 34 in April 2003 provided:

> '34. Where a person whose application for variation of leave to enter or remain is being considered requests for the return of his passport for the purpose of travel outside the common travel area, the application for variation of leave shall, provided it has not already been determined, be treated as withdrawn as soon as the passport is returned in response to that request.'

83. Obviously, this paragraph of the Rules was not relevant to the appellant's application in April 2003.

84. The Tribunal understands that Mr. Uzoechina's submission is predicated upon the present paragraph 34 replicating an earlier rule existing in April 2003. As observed above, the present rule came into force in November 2016, substituting a previous version of the rule which itself substituted the unconnected rule identified above in February 2008.

85. The genesis of the present paragraph 34, as introduced in February 2008, was the bringing into the Rules a requirement to use specified application forms. It is unfortunate that Mr. Uzoechina simply assumed that such requirements as presently set out as to the practice and procedure relating to applications were applicable in the Rules as they stood in April 2003 without undertaking proper research. This is particularly so as not only did he advance an erroneous argument before the First-tier Tribunal, but he continued to advance it before this Tribunal despite having several months in which to satisfy himself that the argument advanced possessed a sound basis in law.

86. No paragraph 34A existed in the Rules in April 2003. Paragraph 34A in its original form was introduced into the Rules in February 2008 in relation to establishing the required use of specified applications forms and the present paragraph was substituted on 24 November 2016.

87. Consideration of the appellant's case on this issue has been bedevilled by a lack of consistency in its presentation. In his undated skeleton argument before the First-tier Tribunal Mr. Uzoechina asserted that the respondent 'returned' the application in April 2003 'merely' for the birth certificate to be 'amended'. In his oral submissions

before the First-tier Tribunal he relied upon the appellant's mother as being named on the birth certificate to establish that the appellant should have been considered a dependant of his mother in respect of her then outstanding application. At the hearing before the First-tier Tribunal it was submitted that when returning the application, the respondent had the 'ability' to request a DNA test or an amended birth certificate: see para. 66 of decision. The grounds of appeal to this Tribunal advance a fourth contention, "a birth certificate is prima facie evidence of a child's relationship with parents and the respondent must accept it as proof of relationship or refuse the application if not satisfied." In his skeleton argument filed with this Tribunal Mr. Uzoechina accepted that the application was refused because the appellant's father was not named on the birth certificate but then asserted at the hearing that the application was rejected because the birth certificate was missing when the application was made.

88. I am satisfied that the respondent rejected the application on 3 April 2003 because the appellant was identified as being dependant on the father in respect of the application and the appellant's father was not named on the birth certificate provided. The rejection of the application was not because the birth certificate was missing, nor has the appellant established that he was asked to provide an amended certificate. In any event, the decision was not challenged by judicial review and consequent to the decision the appellant's section 3C leave came to end.

89. Mr. Uzoechina advanced no alternative submission on this ground and did not draw my attention to any other rule, policy or judicial decision that he considered relevant. His argument was founded upon his erroneous understanding of paragraph 34 as it stood in April 2003. I am satisfied that there is no basis for asserting that the appellant continued to enjoy lawful leave under section 3C of the 1971 Act from April 2003 to the date of his removal in 2016. Such contention lacks any merit. It is entirely misconceived.

Ground 3

90. The appellant complains that the Judge erroneously imported an additional requirement that he be required to show that he cohabited with his partner, C, for two years in order to bring himself within Exception 2 to the public interest in deportation, established under section 117C(5) of the 2002 Act (and paragraph 399(b) of the Rules). This ground as drafted details:

> 'At para. [89] the FTTJ correctly found that exception under s.117C of the immigration rule [sic] does not require 2 years cohabitation, however, the FTTJ proceed to find that *'I find that the evidence before me does not show that appellant and [C] have cohabited for a period of 2 years, I find for these reasons, the appellant's partner is not a qualifying partner for the purpose of family life exception relating to partners.*
>
> a) It is submitted that the FTTJ's finding is perverse and an unlawful import of extraneous requirement into S.117C.'

91. The Judge detailed at para. 89:

'89. Neither section 117C of the Nationality, Immigration and Asylum Act 2002 nor the Immigration Rules include a requirement for there to be 2 years' cohabitation for the partner to be a qualifying partner but this is a requirement for partners under Appendix FM of the Immigration Rules and it would be unusual if the Rules relating to partners in deportation cases were less strict then those in Appendix FM. The evidence does not show that the appellant and [C] have cohabited for at least 2 years. The appellant's evidence is that, at one stage, he was living between his family home and that of [C]. There was also a period of time when the appellant was in prison and then in immigration detention when he and [C] were not cohabiting. Prior to this, the evidence is unclear. There is evidence in the respondent's bundle in the form of a letter from [C] dated 25 February 2015 which states that her relationship with the appellant had come to an end but her statement dated 13 May 2015 states that she was willing to give the appellant another chance. The appellant has a child from another relationship and it is [T] who was visiting him in Jamaica in 2017 and not [C]. I find the evidence before me does not show that the appellant and [C] have cohabited for a period of at least 2 years. I find that, for those reasons, the appellant's partner is not a qualifying partner for the purposes of the family life exception relating to partners.'

92. Section 117C(5):

'(5). Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.'

93. In respect of the interpretation of 'qualifying partner', section 117D(1) states:

''qualifying partner' means a partner who -

(a) is a British citizen, or …'

94. Part 5A of the 2002 Act does not define 'partner'.

95. Paragraph 399 of the Rules:

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

…

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling

circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.'

96. It is implicit that the Judge was considering the definition of 'partner' in GEN 1.2 of Appendix FM:

'GEN.1.2. For the purposes of this Appendix "partner" means-

(i) the applicant's spouse;

(ii) the applicant's civil partner;

(iii) the applicant's fiance(e) or proposed civil partner; or

(iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, unless a different meaning of partner applies elsewhere in this Appendix.'

97. Mr. Kotas relies not upon the definition of 'partner' in GEN.1.2 but upon the definition of 'partner' established in paragraph 2 of the Rules:

'"Partner" means a person's:

(a) spouse; or

(b) civil partner; or

(c) unmarried partner, where the couple have been living together in a relationship similar to marriage or a civil partnership for at least two years.'

98. The Judge's reasoning falls foul of the Upper Tribunal's confirmation in *Buci (Part 5A: "partner")* [2020] UKUT 87 (IAC), [2020] Imm. A.R. 881 that the definition of 'partner' in GEN 1.2 does not govern the way in which 'partner' is to be interpreted in Part 5A.

99. As to Mr. Kotas' reliance upon paragraph 2 of the Rules, it is implicit that he relies upon the Court of Appeal confirmation in *El Gazzaz v Secretary of State for the Home Department* [2018] EWCA Civ 532, at [25], that the statutory provisions in Part 5A of the 2002 Act mirror the Rules in relation to foreign criminals: paras. 398 to 399A of the Rules. However, as confirmed by the Tribunal in *Buci*, at [12], as a matter of law a definition in subordinate legislation or the Rules cannot govern the interpretation of an expression found in primary legislation.

100. The Upper Tribunal addressed the interpretation of 'partner' and Part 5A of the 2002 Act in *Buci*, at [13]-[19]. I note paras. 15 and 18:

> '15. Although the paradigm of family life, as enjoyed by partners, whether or married or in civil partnerships, or not, is cohabitation, we are not aware that the Strasbourg caselaw on Article 8 is so confined. It is possible for a couple, who are not married, in a civil partnership or formally intending to be so, to enjoy protected family life, even though they do not cohabit. Individuals may commit to each other, in a genuine and meaningful way, without full-time cohabitation.
>
> …
>
> 18. Nevertheless, Mr Lindsay's basic point remains a good one. The expression "partner" means a person to whom one has a genuine emotional commitment, of the same basic kind as one sees between spouses and civil partners, albeit not necessarily characterised by present cohabitation. A "partner" is not the same as a friend, however strong the friendship may be. Nor is an adolescent's or other young person's boyfriend or girlfriend necessarily a "partner". The position may, however, change if the relationship becomes sufficiently serious and committed.'

101. The decision in *Buci* was reported a matter of days before the Judge signed her decision and does not appear to have been brought to her attention. In its absence, the Judge sought to address the substance of the relationship at para. 89, but by means of her conclusion to the paragraph it is apparent that significant, and erroneous, weight was placed upon the finding that the appellant and C had not cohabited for two years. This was an error of law.

102. However, despite having concluded that C was not a 'qualifying partner' the Judge proceeded to consider Exception 2 at paras. 96, 97 and 102. The only reasonable conclusion to be drawn is that the Judge considered the matter in the alternative, namely that C was a qualifying partner. Whilst a clearer identification that such approach was being adopted at paras.96 and 97 may well have aided the appellant's understanding of this aspect of the decision, that such assessment was undertaken is clearly identified at para. 102. I find below that the Judge did not err in law in her consideration of Exception 2 at paras 96, 97 and 102 of her decision. In the circumstances, whilst the Judge erred in law in her reasoning at para. 89 of her decision, such error was not material.

Ground 4

103. Mr. Uzoechina submitted that the Judge entirely failed to consider the 'best interests' duty established under section 55 of the 2009 Act. This is clearly not the case on the face of the decision. The Judge assessed the best interests of the children at para. 99 and there is detailed consideration of the children's position at paras. 99 to 101. The Judge detailed at para. 99:

> '99. However, there has always been regular contact between the appellant and his two [children with C] and it is more likely than not that it would be in the children's best interests for the appellant to be present in the UK for contact to take place rather than simply having Facetime contact. However,

> the best interests of the children do not mean that it would be unduly harsh for them to remain in the UK without the appellant. It is a factor but not the only factor to be considered.'

104. The self-direction is unimpeachable: *ZH (Tanzania) v. Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 A.C. 166.

105. Despite his attention being drawn to para. 99, Mr. Uzoechina was resilient in his contention that the Judge had entirely failed to consider the best interests of the children.

106. This ground is advanced upon the Judge having failed to consider the children's best interests. It is clear to me that she did. This ground is misconceived. It should not have been advanced.

Ground 5

107. This ground is fatally flawed for the reason addressed at ground 2 above. The appellant was only lawfully in this country from his date of entry in August 2002 to the rejection of his in-time application for leave to remain on 3 April 2003, a period of less than a year. He did not enjoy section 3C leave after the April 2003 decision. Consequently, he fails to meet the requirement of paragraph 399A(a) of the Rules, namely that he has been lawfully resident in this country of most of his life.

108. This ground is entirely misconceived and enjoys no merit.

Grounds 6 and 7

109. Mr. Uzoechina informed me that these grounds should properly be considered together.

110. The complaint advanced in ground 6 is that the Judge erred in concluding that C, who has no Jamaican heritage, and her children could relocate to Jamaica to be with the appellant. Ground 7 raises several diverse challenges, primarily focusing upon the Judge having been 'adversely selective' as to the evidence of a witness, Ms. Brown, when concluding that it would not be unduly harsh for C and the children to remain in this country without the appellant.

Ground 6:

111. This challenge targets the Judge's finding that it would not be unduly harsh for C and their two children to relocate with the appellant to Jamaica: section 117C(5) of the 2002 Act and paragraph 399(a) and (b) of the Rules. It is properly to be observed that this finding was made on the basis that C remained in a relationship with the appellant: para. 97. On an alternative consideration that the relationship was not ongoing, it was found that it would be unduly harsh to require C and the children to relocate: para. 98

112. The appellant seeks by his written ground of appeal to make three interrelated points:

i)There is a contradiction in the Judge's finding at para. 97 that it would not be unduly harsh for C and the children to move to Jamaica, when it is suggested in para. 98 that the relationship is not subsisting.

ii)The finding that it would not be unduly harsh for C and the children to relocate to Jamaica is perverse because of advice given by the Foreign and Commonwealth Office that the standard of medical facilities, both private and government operated, can vary throughout Jamaica and may not meet United Kingdom standards. It is also noted that the advice details that securing access to medication can be challenging, and that medical treatment is very expensive.

iii)The Judge erred in reversing the burden of proof and erred in law in not permitting the appellant the opportunity to respond to points of concern.

113. This ground is more succinctly identified by Mr. Uzoechina in his skeleton argument as being founded upon the Judge's decision being unsupported by any ascertainable evidence.

114. I observe that it is trite that an appellate Tribunal is to consider the lawfulness of a decision reached by a first instance judge and not impermissibly substitute its own views. Appellate courts are to exercise caution when interfering with evaluative decisions of first instance judges: *Biogen Inc. v. Medeva plc* [1997] RPC 1; *Piglowska v. Piglowski* [1999] 1 W.L.R. 1360; *McGraddie v. McGraddie* [2013] UKSC 58, [2013] 1 W.L.R. 2477; *Fage UK Ltd v. Chobani UK Ltd* [2014] EWCA Civ 5; and *Lowe v. Secretary of State for the Home Department* [2021] EWCA Civ 62.

115. In respect of ground 6(i) above, the submission as to the supposed contradiction is misconceived.

116. The Judge detailed at para. 97:

> '97. The appellant and [C] both stated that their children were doing well at school, in particular the eldest child. The children are still at a relatively young stage of their education and could adapt to a new education system. There would be no language difficulties for the children. They would have the practical and emotional support of their parents to help them to adjust. [C] has never lived in Jamaica and would be moving to another country. She would not have the support of her friends and family in the same way as in the UK although she could maintain contact with them. The appellant would also be able to provide support to [C] who acknowledges that she has been struggling in the UK because of the difficulties of being a single parent and attempting to improve her life at the same time. There would be challenges for [C] if she relocated to Jamaica but she is clearly a strong individual who has coped with a number of challenges in the UK; some of which, it must be noted, were caused by the appellant. I find that the

> evidence before me does not show that it would be unduly harsh for the children and [C] to relocate to Jamaica.'

117. It is made clear at the outset of para. 98 that the Judge considers matters in the alternative:

> '98. If [C's] relationship with the appellant is not an ongoing relationship and has really been simply for the benefit of the children, then she could not, of course, be expected to relocate to Jamaica with the children. In those circumstances, I find that it would be unduly harsh for the children to relocate to Jamaica to live with the appellant …'

118. The challenge advanced is entirely misconceived. There is no contradiction. The Judge was considering matters in the alternative, namely whether C was in a relationship with the appellant or was not. This challenge should not have been advanced or pursued.

119. As for ground 6(ii), again this challenge is misconceived. The Foreign and Commonwealth Office advice was not placed before the Judge, nor was it addressed in submissions. There is no merit to this challenge.

120. I detail ground 6(iii) as advanced by the grounds of appeal:

> 'Consequently, it is submitted that the FFFJ erred by applying negative or reverse burden of proof that she was not provided no evidence that the children cannot access free medical and educational benefits in Jamaica whereas it is in **public domain** that such access is not available, further, the FTTJ erred by raising such issue only in her determination without giving appellant an opportunity to provide evidence or challenge the FTTJ's assertions.' [Emphasis added]

121. The Judge observed at para. 96:

> '96. … [C] and her children would be giving up the benefits associated with British Citizenships but there was no evidence before me to show that the children could not access free education in Jamaica nor that C or the children would not be able to access healthcare as and when required. …'

122. The issue of children accessing free education in Jamaica was not raised at the hearing by either party or the Judge, nor in the respondent's decision letter. It is unfortunate that the Judge did not address this matter with the parties at the hearing. However, it is clearly apparent that the Judge's observation constituted one of several reasons for finding that it would not be unduly harsh for C and the children to relocate to Jamaica, and so the Judge's failing cannot properly be considered to be a material error of law.

123. It is appropriate to observe that a general submission that a fact or facts about the general situation existing in a country are "in the public domain" with no documentary evidence being filed and served to establish such fact or fact is simply not sufficient. There may be situations in which certain matters such as significant political developments in a country may be uncontroversial and can properly be said

to be apparent from information 'in the public domain'. However, though the Tribunal is an expert one, a contention that a child cannot access free education or healthcare in Jamaica requires the filing of specific evidence to support it. Simply to state that the submission can be made good by reference to unidentified information in the public domain is inapposite in challenges mounted to the Upper Tribunal. This Tribunal would expect representatives to give very careful consideration to whether such points should be included in grounds of appeal.

124. As to the general submission made on behalf of the appellant that the Judge's decision was unsupported by any ascertainable evidence, the Judge took into account the fact that the children were British and would lose the benefits of citizenship. She considered the relevant circumstances and gave cogent, lawful reasons for her decision. Whilst another judge may have reached a different conclusion, it cannot properly be said that no judge, properly directed, could have reached the same decision.

Ground 7:

125. In *Patel (British citizen child – deportation)* [2020] UKUT 00045 (IAC) the Upper Tribunal confirmed that section 117C(5) of the 2002 Act imposes the same two requirements as are specified in paragraph 399(a)(ii) of the Rules; namely, that it would be unduly harsh for the child to leave the United Kingdom and for the child to remain. What judicial decision-makers are required to assess is a hypothetical question, namely whether going or staying would be unduly harsh. They are not being asked to undertake a predictive factual analysis as to whether the qualifying child would in fact go or stay.

126. The appellant is therefore required to establish undue harshness in respect of both limbs established by paragraph 399(a)(ii) and section 117C(5) of the 2002 Act. As the appellant was unsuccessful in respect of ground 6 – and so the Judge's finding as to it not being unduly harsh for C and the children to relocate to Jamaica was lawful – there is no requirement for ground 7 to be considered. However, I do so for completeness.

127. I observe that there is no duty placed upon a judge, in giving her reasons, to deal with every argument presented by a party in support of their case. Nor is she required to detail all elements of a witness' evidence. Her function is to reach conclusions and give reasons to support her view, not to spell out every matter as if summing up to a jury. It is sufficient if what she says shows the basis on which she has acted: *Customs and Excise Commissioners v. A* [2002] EWCA Civ 1039; [2003] 2 W.L.R. 210; *Bekoe v. Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318.

128. Ms. Brown was a nursery worker engaged with a child of the appellant and C. Her email is detailed below in its entirety:

> 'Dear Sir/Madam In the case of [the appellant], I believe his presence would be beneficial to his children. I have seen first hand how his absence has affected his

> youngest child as I was previously [their] key person at preschool. On more than one occasion [they] have been tearful and explained it was because [they] missed [their] father, [they] spoke of wanting [their] father to pick [them and their sibling] up from school and take them to the park. I also noticed on some occasions [they] appeared to be withdrawn and anti social. When other children played games which included acting out family customs for example 'mummies and daddies' [they] would say "I don't have a daddy: and walk away from the game with [their] head down. It would appear that [the appellant] had a wonderful, loving father/[child] relationship with his children and it would be damaging to keep them apart. Ms J Brown.'

129. In respect of this evidence, the Judge observed, at para. 101:

> '101. … C provided an email from a Ms J Brown whom she stated was her youngest [child's] nursery keyworker. The date when that email was written is not known (there is a date of 5 February 2020 at the top but it is not clear whether this was the date it was first received and the appellant's youngest child is now in Year 1). That email states that the appellant's youngest child sometimes became withdrawn and would say that [they] did not have a father when other children played games involving family customs. However, there is no evidence from the school or other professionals to suggest that the youngest child's emotional wellbeing has been adversely affected by the absence of [their] father or that [they] require additional support or assistance. The evidence is that [they miss] having a father present in the UK and actively involved in [their] life (as would be expected with many children with absent fathers). This is a sad consequence of offending behaviour and deportation resulting from that offending behaviour but it is not enough to show that the effects of deportation are unduly harsh.'

130. There is no substance to the assertion that the Judge was 'adversely selective' as to Ms. Brown's evidence. She identified the core of the evidence and gave cogent, lawful reasons as to why it was not sufficient, when taken in the round with other available evidence, to establish that it was unduly harsh for the youngest child to be separated from their father.

131. Mr. Uzoechina developed this ground to challenge the approach of the Judge to the consideration of C's personal circumstances under paragraph 399(b)(iii) and section 117C(5). I am satisfied that this challenge was advanced in the absence of any real examination of para 102 of the decision where the Judge engaged with C's evidence and her personal situation in considerable detail:

> '102. Leaving aside, for the present, the issue of whether the appellant's relationship with [C] meets the requirements of Paragraph 399(b) in respect of when the relationship was entered into, I have also considered whether it would be unduly harsh for [C] remain in the UK without the appellant. [C] has spent a number of years as the primary care of the children. She spoke of the appellant taking the eldest child to and from nursery but his actual physical presence in his youngest child's lifestyle has been minimal given that he was convicted and sentenced to a custodial sentence shortly after his

> youngest child was born and was then in immigration detention before being removed from the UK. Even with the eldest child, the appellant was not living as part of the family unit for significant periods of time though he had regular contact with her. [C] has, therefore, being the main and primary carer for both children since birth. She has coped admirably with her role as a parent and also sought to improve her life by studying or finding work; neither of which are easy as a single parent. [C] provided her medical records which confirmed that she had been diagnosed with anxiety and depression. She had attended counseling, but this is currently put on hold because she was finding it difficult to fully commit. It is clear that [C] knows that there is support available to her and that she can access it when she requires it. It is also clear that she has a supportive system of friends and family around her. She spoke of her friend being the one to tell her that she needed to see her doctor about depression and of seeing both her own family and that of the appellant. [C] would no doubt benefit some extra help to be able to access studies or work but equally she knows that there are professionals whom she can contact or help as is evidenced by her attending a number of courses organised by the Jobcentre. If the appellant were in the UK, he may be able to assist with childcare but the permanence of this is unclear given the history of the relationship. The need for assistance to enable a person to find employment or to study is not sufficient to show that the effects of deportation are unduly harsh. As noted previously, the term 'unduly harsh' implies that there is a due level of hardship expected in deportation cases and sadly, the circumstances of [C] are not sufficient to amount being unduly harsh (harsh though they may be in terms all her own economic and social development).'

132. The appellant's complaint is that the Judge erred in failing to place sufficient weight on C's personal circumstances so as to tip the weight of the assessment in her failure. I find that the Judge had clearly in mind C's personal circumstances, such as her mental health concerns and the impact bringing up two children on her own has had upon her personal life and her ability to develop herself. The Judge gave cogent and lawful reasons for her conclusions. I am satisfied that this challenge simply amounts to a disagreement with the findings made by the Judge.

133. Consequently, as the Judge did not materially err in her assessment that it would not be unduly harsh for C and the children to remain in this country whilst the appellant resides in Jamaica, the appellant cannot succeed under paragraph 399(a),(b) and section 117C(5).

Ground 8

134. This ground, in part, relies upon the erroneous assertion that the appellant enjoyed section 3C leave from 2003 until he left the country in 2016.

135. The appellant complains that the Judge's findings at paras. 115 and 124 of her decision were erroneous and against the weight of evidence. The Judge found:

> '115. The appellant cannot meet the requirements of the private life exception in s.117C(4) of the Nationality, Immigration and Asylum Act 2002 because I

> have found that he has not lived lawfully in the UK for most of his life. Nevertheless, I take account of the length of his residence, his social and cultural integration in the UK and whether there are very significant obstacles to his reintegration to Jamaica when assessing whether there are very compelling circumstances which outweigh the public interest in deportation. I also take into account his relationship with his children and [C] as well as his other family in the UK when making this assessment.'
>
> '124. The appellant has not had an easy life and has made the wrong decisions at times which have had a far-ranging impact on him. It was not his fault that his parents chose not to pursue their applications in 2003 or to leave and make the appropriate entry clearance applications which may well have bene successful at the time. However, it is also true that the appellant has not had lawful status in the UK since 2004 [sic], he has committed a number of offences and does not fit within the exceptions set out in Section 117C(4) and (5) of the Nationality, Immigration and Asylum Act 2002.'

136. For the reasons addressed above in respect of grounds 2 and 5 above, the appellant cannot satisfy the requirement of section 117C(4)(a) of the 2002 Act and paragraph 399A(a) of the Rules because he enjoyed less than 12 months lawful leave in this country. Consequently, there is no requirement to proceed to consider the Judge's assessment as to whether there would be very significant obstacles to the appellant's integration in Jamaica. There is no merit in this ground.

Notice of Decision

137. The making of a decision by the First-tier Tribunal sent to the parties on 24 March 2020 did not involve the making of a material error on a point of law.

138. The decision of the First-tier Tribunal is upheld, and the appeal is dismissed.

139. The anonymity order issued by the First-tier Tribunal is confirmed.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Date: 23 November 2021