Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/10860/2019 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision and Reasons Promulgated**
On 2 July 2020 remotely	**On 22 July 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

T T K K
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr C Howells, Senior Home Office Presenting Officer
For the Respondent: Ms C Pickthall instructed by Citywide Solicitors

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondent (TTKK). This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

The appellant (the respondent in the Upper Tribunal) is a citizen of Zimbabwe who was born on 13 January 1992. He came to the UK on 6 August 2000 when he was 8 years old. He accompanied his aunt to the UK following the death of his parents.

Having arrived on a six-month visit visa, the appellant was subsequently included as a dependant on a number of applications made by his aunt. The first was made on 15 February 2002 when his aunt applied for indefinite leave to remain. That application was refused on 25 June 2003 without a right of appeal. On 8 September 2003, an application for judicial review was lodged and on 15 August 2005 this was refused. The second application was made by his aunt on 6 January 2005 when she sought leave to remain under Art 3 of the ECHR. That application was refused on 4 April 2005 and, on that date, the appellant was served with a notice of his liability to be removed. The final application made by his aunt was made on 21 April 2005 when she again sought indefinite leave to remain. That application was, on that date, considered ineligible and therefore was unsuccessful.

The appellant first made his own application on 9 April 2009 when he was 17 years old. He applied for asylum but that claim was refused on 23 February 2011. He was granted discretionary leave for three years until 23 February 2014.

On 30 April 2014, the appellant submitted an out of time application for further leave to remain and subsequently an additional three-year period of discretionary leave was granted from 3 December 2014 until 3 December 2017.

On 20 November 2017, the appellant submitted a further application for leave to remain and that application remained undecided until the Secretary of State's decision on 4 June 2019 (which is the subject of this appeal) and so his leave continued by virtue of s.3C of the Immigration Act 1971. Further, by exercising his right of appeal against that decision the appellant continues to have leave under s.3 until the conclusion of these appeal proceedings.

On 8 March 2019 at the Newport Crown Court the appellant was convicted of conspiracy to supply a controlled drug, namely class A (crack cocaine). On 22 March 2019, he was sentenced to 40 months' imprisonment.

As a consequence of that conviction, on 5 April 2019, the appellant was served with a notice of a decision to deport him on the grounds that deportation was conducive to the public good.

On 3 May 2019, the appellant's legal representatives made submissions amounting to an Art 8 claim seeking to resist the decision to deport the appellant.

On 4 June 2019, the Secretary of State refused the appellant's claim under Art 8 of the ECHR and, as I have already noted, his outstanding application made on 20 November 2017.

On 30 May 2019, a deportation order was signed on behalf of the Secretary of State. The deportation order did not have the effect of invalidating his leave (see, Tirabi (Deportation: "lawfully resident": s.5(1)) [2018] UKUT 199 (IAC)).

The Appeal to the First-tier Tribunal

The appellant appealed against the refusal of his human rights claim under Art 8 to the First-tier Tribunal.

In a determination sent on 27 January 2020, Judge B Lloyd allowed the appellant's appeal under Art 8. Before the judge, the appellant relied upon the two exceptions found in s.117C(4) and (5) of the Nationality, Immigration and asylum Act 2002 as amended ("the NIA Act 2002"). In fact, he relied on the equivalent exceptions to deportation in paras 399A and 339 respectively of the Immigration Rules (HC 395 as amended). It is convenient that I should refer to the statutory provisions in s.117C(4) and (5) as was common ground before me.

As regards Exception 1 in s.117C(4), the appellant claimed that he had (a) been lawfully resident in the UK for most of his life; (b) he was socially and culturally integrated in the UK; and (c) there were very significant obstacles to his integration into Zimbabwe on return. The judge accepted that the requirements of Exception 1 were met, in particular finding that there would be "very significant obstacles" to his integration on return to Zimbabwe.

As regards Exception 2 in s.117C(5), the appellant relied upon his relationship with his British citizen partner ("Ms T") and their child ("F") who is a British citizen and had been born on 10 June 2016. Judge Lloyd accepted that the appellant had a genuine and subsisting relationship both with his partner and son. He also accepted that it would be "unduly harsh" to expect his partner and son to return to Zimbabwe with the appellant. The crucial issue was whether or not the separation of the appellant on his return to Zimbabwe leaving his partner and child in the UK would have an "unduly harsh" impact upon them. Judge Lloyd found that it would and so consequently the requirements of Exception 2 were also met.

On that basis, Judge Lloyd allowed the appellant's appeal under Art 8 of the ECHR.

The Appeal to the Upper Tribunal

The Secretary of State sought permission to appeal to the Upper Tribunal. She did so essentially on two grounds. First, the judge had failed to give adequate reasons why there were "very significant obstacles" to the appellant's integration on return to Zimbabwe. Secondly, the judge had failed to give adequate reasons why the separation of the appellant from his son and partner

would be "unduly harsh" applying the high test set out by the Supreme Court in KO (Nigeria) & Ors v SSHD [2018] UKSC 53.

On 6 March 2020, the First-tier Tribunal (Judge McClure) granted the Secretary of State permission to appeal. Judge McClure granted permission to appeal on two grounds.

First, that the judge had arguably failed properly to consider the "unduly harsh" test in s.117C(5).

Secondly, Judge McClure gave permission to appeal on a ground which the respondent had not raised in her grounds of appeal. It related to Exception 1. Judge McClure concluded that it was arguable that the judge had been wrong to find that the first requirement in Exception 1 was met, namely that the appellant had been "lawfully resident in the United Kingdom for most of [his] life". Judge McClure reasoned as follows:

> "The appellant had entered as a visitor in 2000 when he was 8, and does not appear to have had lawful leave thereafter to be in the United Kingdom until 2011 when he was granted discretionary leave which was extended initially until December 2017 and thereafter by operation of Section 3C of the 1971 Immigration Act. The appellant, at the time of the hearing, therefore had only had leave for eight years and therefore did not meet all the requirements of paragraph 399A [mirroring Exception 1 in s.117C(4)]. In allowing the appeal the judge has found that the appellant has been lawfully resident the (sic) much of his life but that is not the wording of the Immigration Rule. In the circumstances there is a Robinson obvious point that the judge has not applied the Rule as it is set out."

Following the grant of permission, without objection from the parties, the Upper Tribunal in the light of the COVID-19 crisis, directed that a remote hearing by Skype Business should take place in order to determine whether the judge had erred in law in allowing the appellant's appeal.

The appeal was listed for such a remote hearing on 2 July 2020. The hearing took place with me based in the Cardiff Civil Justice Centre with Mr Howells, for the Secretary of State and Ms Pickthall for the appellant taking part remotely.

The Issues

The parties raised four issues before me.

Is the Secretary of State entitled to rely upon the ground of appeal, upon which Judge McClure granted permission, but which had not been raised by the Secretary of State in her grounds of appeal?

If the Secretary of State was entitled to rely on that ground, did the judge err in law in concluding that the first requirement in Exception 1 was met that the appellant had, in fact, been lawfully resident for "most" of his life in the UK?

Did the judge give adequate reasons for concluding that the third element of Exception 1 was met namely that there were "very significant obstacles" to the appellant's integration in Zimbabwe on return?

Did the judge give adequate reasons for finding that it would be "unduly harsh" upon the appellant's partner and son if the appellant were to return to Zimbabwe?

Sections 117C(4) and (5)

Section 117C of the NIA Act 2002 sets out "additional considerations" when applying Art 8 to "foreign criminals". The relevant provisions for this appeal are found in ss.117C(4) and (5). These contain Exceptions 1 and 2 respectively which, if either is met, determines for the purposes of Art 8.2 that deportation is not in the public interest where the "foreign criminal" has not been sentenced to a term of imprisonment of 4 years or more (see s.117C(3) and CI(Nigeria) v SSHD [2019] EWCA Civ 2027 at [20] citing NA(Pakistan) v SSHD [2016] EWCA Civ 662 at [23] and NE-A(Nigeria) v SSHD [2017] EWCA Civ 239).

Exception 1 in s.117C(4) provides:

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

Exception 2 in s.117(5) provides:

> "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."

The statutory phrases "qualifying partner and "qualifying child" are defined in s.117D(1). It is not in dispute that the appellant's partner and child fall within the respective definitions.

Issue 1

Ms Pickthall submitted that the Upper Tribunal could not consider the additional ground upon which Judge McClure granted permission because it was not a Robinson obvious point and it was not a ground of importance such that the Tribunal should otherwise consider it. Ms Pickthall relied upon two decisions of the Upper Tribunal.

The first is AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 245 (IAC) (Lane J, President; and UTJ Blum). In that case, the UT identified the situations in which permission to appeal to the Upper Tribunal could be granted

on a ground not advanced by the applicant for permission. The UT's decision is summarised in para (3) of the headnote as follows:

> "Permission to appeal to the Upper Tribunal should be granted on a ground that was not advanced by an applicant for permission, only if:
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> (a) the judge is satisfied that the ground he or she has identified is one which has a strong prospect of success:
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> (i) for the original appellant; or
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> (ii) for the Secretary of State, where the ground relates to a decision which, if undisturbed, would breach the United Kingdom's international treaty obligations; or
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> (b) (possibly) the ground relates to an issue of general importance, which the Upper Tribunal needs to address."

The UT's position, leaving aside the "general importance" category in para (3)(b), is based upon the identification of a Robinson obvious point. That is where a point arises which has a "strong prospect of success" which, if not taken and any error corrected, would place the UK government in breach of its treaty obligations, in particular under the Refugee Convention or the ECHR. In R v Secretary of State for the Home Department, ex parte Robinson [1998] QB 929, Lord Woolf MR put the point succinctly (at p.946):

> "…if when the Tribunal reads the Special Adjudicator's decision there is an obvious point of Convention law favourable to the asylum-seeker which does not appear in the decision, it should grant leave to appeal. If it does not do so, there will be a danger that this country will be in breach of its obligations under the Convention. When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do."

The 'point', therefore, must operate in favour of an appellant on which there is a "strong prospect" of succeeding and where the individual has been found not to be entitled to protection under the relevant Convention.

As the UT in AZ noted, in an application by the Secretary of State for permission to appeal, the Robinson approach also applies where she seeks to challenge a decision under the Refugee Convention where there is said to be an erroneous application of the Exclusion Clause in the Refugee Convention (see A (Iraq) v SSHD [2005] EWCA Civ 1438).

In this appeal, Ms Pickthall submitted that the point which the Secretary of State now seeks to rely upon, but had only been raised by Judge McClure in his grant of permission, is not a Robinson obvious point such that to leave the decision standing, namely that Exception 1 applied and the appellant's removal would breach Art 8 of the ECHR, was not a decision which would place the UK in breach of its treaty obligations. Ms Pickthall submitted that following AZ, a judge must not grant permission on an unarticulated ground of appeal, in the circumstances of this case, unless there was a Robinson obvious point. That would have to be a point in favour of the appellant who would otherwise lose the appeal.

Ms Pickthall relied in addition upon the UT's subsequent decision, applying AZ in Durueke (PTA: AZ applied, proper approach) [2019] UKUT 197 (IAC). In that case, UTJ Gill applied AZ pointing out that, if a judge were to grant permission on a ground not raised by an applicant, then the judge should indicate which of the bases set out in AZ was satisfied and should only do so if the evidence necessary to establish the point in question was apparent from the grounds of appeal to the Upper Tribunal and/or the decision of the judge who decided the appeal and/or the documents on file.

Mr Howells, on behalf of the Secretary of State accepted that the respondent had, in effect, conceded that the first two requirements in Exception 1 were met in the decision letter, having only relied on the third requirement in Exception 1, namely the "very significant obstacles" test. Nevertheless, he submitted that UT was now entitled to go behind that concession because there was a plain mistake of fact and Judge McClure was entitled to grant permission on this point.

The statement of the Upper Tribunal in AZ is both clear and strongly expressed: permission to appeal to the Upper Tribunal should not be granted by a judge on a ground not relied upon by an applicant unless either the point is a Robinson obvious point or there is a good reason why the Upper Tribunal should consider the legal issue. The latter exception was stated with some caution by the UT in AZ derived from the Court of Appeal's decision in Bulale v SSHD [2008] EWCA Civ 806 where the Court of Appeal recognised such an exception but in the context of an appeal to the Court of Appeal. The UT, tentatively, considered that also might apply to appeals to the Upper Tribunal lower down in the judicial hierarchy. It is not suggested that could be applied in the present circumstances since there is no issue of law of general importance raised by Judge Lloyd's application of Exception 1 and, in particular, the first requirement that the appellant should have spent "most" of his life in the UK with lawful residence. It is purely a factual issue and whether he was mistaken in concluding that requirement was met.

It is not wholly clear from reading the Upper Tribunal's decision in AZ whether the Tribunal was seeking to issue guidance, albeit "strong" guidance, to judges of both the First-tier Tribunal and Upper Tribunal when considering permissions to appeal or it intended to determine the jurisdiction of a judge considering a permission application and, in effect, the jurisdiction of the Upper Tribunal if permission were granted outside of the categories recognised. Certainly, when considering AZ in Durueke, UTJ Gill referred to the decision in AZ as giving

> "*guidance* on when it would be appropriate to grant permission to appeal to the Upper Tribunal on a ground that was not advanced by the applicant." (my emphasis)

When I put the jurisdictional point to Ms Pickthall, in the context of a grant of permission which was solely upon an unarticulated ground in the applicant's application and within one or more of the categories in AZ, she invited me to find that the judge granting permission and, more particularly, the Upper Tribunal, had no jurisdiction to consider the appeal on that ground and since it

would be the only ground, I suppose that must entail, that the Upper Tribunal would not have a valid appeal before it.

I should be very cautious in accepting that is the effect of such a grant of permission would deny the UT jurisdiction. However, it is unnecessary for me to determine that issue as that is not what occurred in this case. Undoubtedly, Judge McClure granted permission on a ground which he was fully entitled to grant permission upon, namely whether Judge Lloyd had failed to give adequate reasons for finding that it would be "unduly harsh" on the appellant's partner and son if he were deported. The Upper Tribunal certainly, in my judgment, has jurisdiction to hear the appeal given that ground.

In those circumstances, the better approach, in my view, is that the Upper Tribunal may consider the additional ground even though it does not fall within the Robinson category. I do not read the Upper Tribunal's decisions in AZ and Durueke as prohibiting consideration of that ground rather than issuing strong guidance to judges that permission should not be granted upon unarticulated grounds other than in the specified circumstances. The origin of the Robinson obvious point is that such points of law *must* be taken – because of their potential effect on the UK's Treaty obligations – and not that other points of law may never be taken. The UT must, in my judgment, have a discretion to consider such points where permission has been granted even if the guidance discourages judges when considering permission applications identifying non-Robinson obvious points of law.

Mr Howells accepted in his submissions that, in effect, the Secretary of State had conceded that the appellant met the requirements of Exception 1 apart from the "very significant obstacles" requirement. As Judge Lloyd noted (at para 50), it "would appear not to be disputed that the appellant had been lawfully resident in the UK for much of his life and that he is socially and culturally integrated into the UK".

However, a concession made by the respondent, may be withdrawn where there is good reason and it would be fair and reasonable to do so (see, SSHD v Davoodipanah [2004] EWCA Civ 106 at [22]; NR(Jamaiaca) v SSHD [2009] EWCA Civ 856 at [12] and AK(Sierra Leone) v SSHD [2016] EWCA Civ 999). The appellant will, if he cannot meet the requirement, be prejudiced in his Art 8 claim since Exception 1 will definitely not apply regardless of whether there are "very significant obstacles" to his integration in Zimbabwe. But, he is not prejudiced in having a full opportunity to argue its applicability on the facts. The judge's decision, nevertheless, as will be clear from consideration of "Issue 2" below, proceeds on the basis of a plain error as to the application of limb 1 in the light of the case law. I do not consider the fact that the issue has not been disputed until this point is, in itself, a good reason not to permit the respondent to take a point which, as will become clear shortly, made any concession on the first limb of Exception 1 plainly mistaken.

For these reasons, therefore, I do not accept Ms Pickthall's submission that, in effect, the Upper Tribunal has no jurisdiction to consider the unarticulated ground relied on by Judge McClure. Further, I accept that the Upper Tribunal

should allow the Secretary of State to rely on that unarticulated ground and withdraw any concession that limb 1 of Exception 1 was satisfied.

Issue 2

Ms Pickthall submitted that, in any event, the appellant did satisfy the "most" requirement in Exception 1. "Most" means more than half his life (see SSHD v SC(Jamaica) [2017] EWCA Civ 2112 at [53]). At the date of the FtT hearing, the appellant was 10 days short of being 28 years old. He had to establish, therefore, give or take a week, 14 years lawful residence.

Ms Pickthall submitted that the appellant's periods of lawful leave were (1) 6 months on his visit visa (6 months); (2) between 23 February 2011 and 23 February 2014 (3 years); and (3) 30 April 2014 until the date of the judge's hearing on 23 January 2020 (5 years and 9 months). That is a total of 9 years and 3 months of leave.

In addition, Ms Pickthall submitted, it was appropriate to take into account period when he was granted temporary admission between 9 April 2009, when he claimed asylum, and 23 February 2011 when, although his claim was refused, he was granted discretionary leave (1 year and 10 months). In addition, account could be taken of periods of "temporary admission" as a dependant on his aunt's claims between 15 February 2002 to 23 June 2003 when her application for ILR was refused (1 year and 4 months). Also on the same basis when another application under Art 3 of the ECHR was made by his aunt on 5 January 2005 until 4 April 2005 when it was refused (3 months); as well as a further unsuccessful application under the Family ILR Exercise made on 21 April 2005 but which appears to have been deemed ineligible the same day. The refusal letter records that the application was considered ineligible for the Family ILR Exercise on the date it is made. It appears that no period of "temporary admission", therefore, can be relied on arising from this application. The total period of "temporary admission" is, therefore, 3 years and 5 months.

Adding together the periods of leave and temporary admission, the appellant still falls short of 14 years as the total is 12 years and 8 months. Ms Pickthall sought to make good any shortfall by arguing that the appellant's presence in the UK from first arrival in 2000 as a minor also meant that his residence should not be treated as anything other than "lawful residence".

Ms Pickthall relied upon the decision of the Court of Appeal in SSHD v SC(Jamaica) in which, she submitted, the Court of Appeal held that "temporary admission" as an asylum seeker counted as "lawful residence" for the purposes of Exception 1 in s.117C(4).

In SC(Jamaica), the court recognised that "lawful residence" for the purposes of Exception 1 could encompass not only period of leave but also, at least in some circumstances, periods of "temporary admission". In that case, some reliance was placed upon the definition of "lawful residence" in para 276B(b) for the

purposes of the 10-year long residence rule in para 276B. Para 276A(b)(ii) provides that "lawful residence" includes:

> "temporary admission within section 11 of the 1971 Act where leave to enter or remain is subsequently granted".

At [55]-[57], Sir Ernest Ryder, Senior President of Tribunals, said this:

> "55. The Secretary of State says that if she had intended to apply this definition [para 276A(b)] to paragraph 399A of the Rules she would have said so but that simply leaves the question unanswered. It is also unhelpful to say that the definition in paragraph 276A(b) does not include lawful residence under EU law to which an applicant is entitled. What is submitted by SC is not that paragraph 276A(b) should directly apply but that an analogous interpretation of lawful residence should be applied to the wording in paragraph 399A.
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> 56. It appears to be common ground that a person is granted temporary admission from the date of their application to be a refugee. Temporary admission for an adult is a precarious status. Such a person cannot work and by the very nature of it being precarious, social and cultural integration cannot be established. It is only once the asylum claim is granted that the person can start to build a life in the UK. On this basis, a rational basis for lawful residence would be a date from which a person has a valid right to remain. That is the submission of the Secretary of State. On the other hand, 'lawful' ordinarily has the meaning 'permitted by law' and if a person is permitted to remain by temporary leave that should be sufficient. That would at least provide internal consistency to the different usages of the same phrase in the Rules and would also reflect the fact that the concept of precarious status is not relevant to a child, and hence to SC, for part of the time under consideration on the facts of this case.
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> 57. Of the two possible interpretations put to this court, I prefer that which is internally consistent and which provides for the circumstances of both adult and children ie that lawful residence for the purposes of paragraph 399A(a) runs from the date of application for refugee status. On that basis the FtT took an appropriate date from which to determine lawful residence."

It is important to notice that the Senior President's acceptance that "temporary admission" could count was made in the context of (a) an application for asylum; and (b) an application which was ultimately successful. He does not appear to contemplate "temporary admission" counting when the application is not an asylum application – and it was not explored before me whether temporary admission is granted in the context of other applications – and, crucially, when the application is ultimately unsuccessful. Both caveats, in particular the latter one in respect of each of the aunt's unsuccessful applications, would mean the period of "temporary admission" relied upon by Ms Pickthall could not count as "lawful residence". Likewise, the appellant's own asylum application was unsuccessful even though he was granted discretionary leave in February 2011.

Davis LJ, in his judgment, also recognised that "temporary admission" could count as "lawful residence". At [71]-[73], he said this:

> "71. I find the interpretation to be given to the phrase "lawfully resident" – not defined for the purposes of paragraph 399A – altogether more difficult.
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> 72. The phrase has an appearance of some formality. Further, as Mr Malik pointed out, residence ordinarily connotes something more than presence. I see force in the argument that in the present context lawful residence at least requires the grant of leave to enter or remain. As Mr Malik pointed out, there are cases where those who are not otherwise lawfully resident – for example, an applicant whose appeal rights have all been exhausted and is potentially liable to removal – may still be granted temporary admission.
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> 73. However, for the (specific) purposes of the provisions in the Immigration Rules relating to long residence, "lawful residence" includes continuous residence pursuant to temporary admission where leave to enter or remain is subsequently granted: paragraph 276A (b). I fully accept that it does not follow that that is also necessarily then so for the purposes of paragraph 399A. But it at least shows that Parliament was accepting that temporary admission is not entirely and always to be excluded from notions of "lawful residence": although of course in many contexts it may be so excluded (cf. *R (ST (Eritrea)* v *SSHD* [2012] UKSC 12). At all events, a person is not necessarily "unlawfully" present in the United Kingdom simply because he has no vested right of residence: see cf. *Akinyemi* v *SSHD* [2017] EWCA Civ 236. Moreover, in a case such as the present the grant of leave to remain will have been on the footing of acknowledging a pre-existing status. It thus makes some sense for the lawful residence at least to relate back to the date of the application for asylum: at which date (as was accepted before us on this appeal) temporary admission was to be deemed to be granted. Overall, albeit with some hesitation, I consider that the approach taken in paragraph 276A (b) can and should be applied by analogy to the present context. If this does not represent the wishes of the Government the remedy is to provide a definition of the phrase for the specific purposes of Rule 399A."

Davis LJ, likewise, ties the relevance of "temporary admission" to "lawful residence" to cases where it is granted pending a *successful* application. It is less clear whether he would restrict it to asylum cases – where a recognition of status dates back to the application as in SC(Jamaica) itself – or whether he would apply it to other applications where leave is granted. Certainly, the "present context" would suggest it is restricted to asylum applications but the approach in para 276A(b) to which he refers with approval in [73] might suggest the same approach should apply to other successful applications where leave is granted.

Henderson LJ agreed with both judgments.

Left there, Ms Pickthall's submission finds no traction in SC(Jamaica) except possibly for the appellant's application for asylum made on 9 February 2009 which resulted in a grant of 3 years' discretionary leave, albeit on a different basis, on 23 February 2011. That would fall within a broader view, if that it be, in Davis LJ's judgment.

Any broader view has, however, subsequently been rejected by the Court of Appeal in CI(Nigeria) v SSHD [2019] EWCA Civ 2027 (Senior President of Tribunal's; and Hickenbottom and Leggatt LJJ). I was not referred to this recent decision by the parties. Judgment was handed down on 22 November 2019 prior to the hearing before Judge Lloyd. It is directly relevant to Ms Pickthall's submissions and the scope of the reasoning in SC(Jamaica). It adopts a clear and unequivocal view.

In that case, putting the facts simply, the claimant relied up periods of temporary admission/temporary release or whilst on bail as amounting to "lawful residence" pending a successful application for ILR under the "Family ILR Exercise" for the purposes of Exception 1 in s.117C(4). The claimant relied upon SC(Jamaica) and its adoption, it was said, of the definition of "lawful residence" in para 276A(b)(ii) for the purposes of the 10-year long residence rule. The Court of Appeal unanimously rejected that argument. At [40]-[41], Leggatt LJ (as he then was) set out the approach to "lawful residence":

> "40….It makes no sense to treat someone who is present in the UK in breach of immigration laws and liable to removal – for example, because (as in the present case) they have remained in the UK after a limited leave to enter or remain has expired – as "lawfully resident" in the UK within the meaning of section 117C(4)(a) of the 2002 Act, whether or not the person has been granted temporary admission or release pending deportation or is on immigration bail. To describe such a person as "lawfully resident" in the UK is not consistent with the ordinary use of language. It is also inconsistent with the policy underlying the statutory provision. The reason for focusing on the period for which the person concerned has not merely been resident but lawfully resident in the UK must be that, as provided in section 117B(4), little weight should generally be given to a private life established at a time when a person is in the UK unlawfully. As Underhill LJ observed in *Akinyemi* at para 42, that in turn is because, as a general principle, a person cannot legitimately expect to be allowed to stay in a country on the basis of relationships formed and ties created when he or she has no right to be living there in the first place. In *Jeunesse v The Netherlands* (2014) 60 EHRR 17, para 103, the European Court made it clear that this principle is not displaced where a state 'tolerates the presence of an alien in its territory thereby allowing him or her to await a decision on an application for a residence permit, an appeal against such a decision or a fresh application for a residence permit ...'
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> 41. Furthermore, the fact that sections 117B(4) and 117C(4)(a) of the 2002 Act have a common rationale means that to treat someone who is in breach of a legal obligation by being in the UK and is legally liable to be removed as "lawfully resident" for the purpose of section 117C(4)(a) would be inconsistent with the *Akinyemi* case, which treated such a person as in the UK "unlawfully" for the purpose of section 117B(4). Although, as Underhill LJ pointed out, the opposite is not necessarily true, it would be illogical to regard someone who is in the UK "unlawfully" as nevertheless "lawfully resident" here, for the purpose of the same exercise of deciding whether the interference with private life caused by deporting the person on account of criminal offending is justified in the public interest."

At [42]-[43], Leggatt LJ identified the issue of whether a person who has successfully applied for leave should, prior to the outcome of the application, be treated as “lawfully resident”. He concluded that they should not. He said:

> “42. I recognise that it is not CI's case that anyone granted temporary admission or immigration bail is "lawfully resident" in the UK for the purpose of section 117C(4)(a). The question is, however, whether there is a good reason to treat the fact that such a person has made an application for leave to remain which is subsequently granted as bringing them within the scope of the provision.
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> 43. In general, it seems to me that there is not. The grant of leave to enter or remain to someone who does not currently have it is not ordinarily a matter of entitlement. By the same token, the Secretary of State is not ordinarily under a legal obligation to grant an application for leave to enter or remain. It is a matter of administrative discretion. A foreign national whose presence in the UK is in breach of immigration law but is tolerated while such an application is pending and who develops a private or family life during this period cannot claim to do so with a legitimate expectation of being allowed to stay, even if the application is subsequently granted.”

At [44]-[48], Leggatt LJ considered the case of SC(Jamaica) and what it decided. He concluded that it did not adopt the definition in para 276A(b) of “lawful residence” and was limited to situations where an individual asylum-seeker was granted temporary admission and was then successful in establishing their refugee status. He said this:

> “44. I do not accept that *SC (Jamaica)* is authority for the proposition that "lawful residence" means the same in section 117C(4)(a) of the 2002 Act as it does in paragraph 276A of the Immigration Rules. The definition in paragraph 276A showed only, as Davis LJ observed in *SC (Jamaica)* at para 73, that "Parliament was accepting that temporary admission is not entirely and always to be excluded from notions of 'lawful residence': although of course in many contexts it may be so excluded…" What was actually decided by the Court of Appeal in *SC (Jamaica)* was that an asylum seeker was lawfully resident pending the outcome of their successful application for asylum. As Davis LJ observed, and as Mr Irwin for the Secretary of State on this appeal submitted, this is explicable on the basis that upholding an asylum claim involves acknowledging a pre-existing status rather than exercising a discretion to grant permission to stay in the country. As stated in the guidelines issued by the United Nations High Commissioner for Refugees:
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> > "A person is a refugee within the meaning of the [Refugee] Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee."
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> See UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992) at para 28. The special position of asylum-seekers is also reflected in section 77(1) of the 2002 Act, which provides that, while a person's claim for asylum is pending, he may

> not be removed from or required to leave the UK in accordance with a provision of the Immigration Acts.
>
> 45. Ms Dubinsky pointed out that in *R (ST) v Secretary of State for the Home Department* [2012] UKSC 12; [2012] 2 AC 135, the Supreme Court held that a refugee is not "lawfully in [the] territory" of a contracting state within the meaning of article 32 of the Refugee Convention unless their presence is lawful under the domestic law of the contracting state; and that under UK domestic law a refugee who has been temporarily admitted to the UK while their application for asylum is determined but who has not yet been granted leave to remain in the UK is not lawfully present for this purpose.
>
> 46. In the *ST* case, however, although the claimant had been recognised to be a refugee from Eritrea, the Secretary of State was contending that she could safely be removed to Ethiopia, and this issue had not yet been resolved. Under article 33(1) of the Refugee Convention, contracting states have an obligation not to expel or return a refugee to territories where their life or freedom may be threatened on account of a reason which qualifies the person for refugee status. However, that does not prevent a contracting state from expelling a refugee who is not lawfully present in its territory and who can be removed to a safe country. This is reflected in paragraph 334 of the Immigration Rules, under which an application for asylum will only be granted if its refusal would result in the applicant being required to go, in breach of the Refugee Convention, to a country in which their life or freedom would be threatened.
>
> 47. In these circumstances it can be said that being a refugee within the meaning of the Refugee Convention does not, by itself, give rise to a legitimate expectation of being permitted to stay in the UK (and establish a private and family life here): it is only where the individual concerned satisfies the conditions for being granted leave to remain as a refugee – including the condition that there is no safe country to which they can be removed – that such a legitimate expectation arises. The subsequent grant of leave to remain shows that this condition was met and that it would, in consequence, have been a breach of the UK's obligations in international law to expel such an individual from the UK. This provides a justification for treating an applicant for asylum who has been temporarily admitted to the UK while their application is determined and who is subsequently granted leave to remain as a refugee as "lawfully resident" in the UK during this period for the purposes of section 117C(4)(a) of the 2002 Act.
>
> 48. It is not necessary or pertinent to pursue this question further, however, as the decision in *SC (Jamaica)* is a binding precedent. What matters for present purposes is that there is no warrant for extending the *ratio* of that case to overstayers whose claim for asylum has been rejected but who later apply on the basis of their continued presence in the UK for a legal right to remain."

Sir Ernest Ryder, the Senior President of Tribunals and Hickinbottom LJ agreed with Leggatt LJ's judgment. Sir Ernest Ryder, of course, gave the leading judgment in SC(Jamaica).

It is now clear, following CI(Nigeria), that periods of temporary admission only counts towards "lawful residence" under Exception 1 if granted pending an asylum application which is ultimately successful. Periods of temporary

admission prior to any other application for leave (even if successful) do not count nor do periods of temporary leave granted pending an asylum application which is unsuccessful. As regards the latter point, the Court of Appeal did not demur from the claimant's concession that the UT had been wrong to count a period of temporary admission pending the determination of his unsuccessful asylum claim (see [34] and [54]). As regards the former point, on the facts of the case, the claimant could not rely upon any temporary admission/ release/ or whilst on bail following an application under the Family ILR Exercise even though that application was successful (see [37] and [54]).

For all these reasons, the appellant cannot rely upon any period of temporary admission (if that was indeed granted to him) prior to any of his aunt's unsuccessful (though that is not crucial) applications for leave or ILR and on which he was a dependent. Likewise, he cannot rely upon any temporary admission granted pending his unsuccessful asylum application made on 9 April 2009 and refused on 23 February 2011.

What, then, of the appellant's residence as a minor which Ms Pickthall also relied upon? In the light of CI(Nigeria), and in particular Leggatt LJ's reasoning at [40], residence without any legal status following overstaying cannot be characterised as "lawful residence" even if that residence is by a minor.

The one case that might be said to provide any support for Ms Pickthall's submission is Akinyemi v SSHD [2017] EWCA Civ 236. In the context of s.117B(4) of the NIA Act 2002, the Court of Appeal accepted a minor's presence in the UK would not be unlawful, despite the absence of any leave, where that child was born in the UK and therefore had never entered illegally or overstayed leave and also, importantly was not removeable. But that is an unusual, and specific, instance which cannot be applied by analogy to the appellant (see the reasoning of Underhill LJ especially at [41]-[42]; and CI(Nigeria) at [29]-[31] per Leggatt LJ). Here, the appellant required leave to remain after his leave expired with his entry visa. He was then here unlawfully. He would have been removable under s.10 of the Immigration and Asylum Act 1999 thereafter until he was granted leave to remain in 2009. Whether he was at fault or not, without leave, or temporary admission, it cannot be said as a matter of ordinary language that his residence in the UK was lawful.

I do not think anything untoward should read into the judge's use of the word "much" rather than "most" in para 50 of his determination when referring to Exception 1. I am unpersuaded that this experienced Immigration Judge did not have in mind the requirement that the appellant must show "most" of his life (i.e. more than half) has been spent lawfully in the UK. The judge was, of course, led to believe it was not in issue before him. However, in my judgment, the judge erred in law in accepting that the appellant had been "lawfully resident" for "most" of his life. His periods of leave came nowhere near establishing the necessary 14 years "lawful residence". On the facts, the judge could not be properly satisfied that the appellant met the requirement in limb 1 of Exception 1 in s.117C(4).

Issue 3

Issue 3 concerns the judge's conclusion that the third element in Exception 1 was met, namely that there were "very significant obstacles" to the appellant's "integration" in Zimbabwe on return. Ms Pickthall did, initially, seek to persuade me that permission had not been granted on this ground set out in the Secretary of State's grounds of appeal. The basis for that submission is that Judge McClure made no reference to this ground. In my view, that is not a proper understanding of the grant of permission in a case such as this. Unless Judge McClure excluded or refused permission on a ground, the fact that he only specifically referred to some of the grounds (here one of the grounds plus the unarticulated one), did not exclude there being a grant of permission generally on all the grounds set out in the application for permission (see e.g. Safi and others (permission to appeal decisions) [2018] UKUT 00388 (IAC)). That is the natural and, in my judgment, proper understanding of a generalised grant of permission where only some of the grounds are referred to.

Mr Howells referred me to the case law of Treebhawon [2017] UKUT 13 (IAC) and the Court of Appeal's decision in Parveen v SSHD [2018] EWCA Civ 932. He submitted that there was a "high test" to be satisfied and that Judge Lloyd in his decision had failed to give adequate reasons why that high test was met.

In response, Ms Pickthall accepted that the test was a "high" one and referred me to the Court of Appeal's decision in Kamara v SSHD [2016] EWCA Civ 813 that the issue of "integration" had to be looked at broadly, she submitted, Judge Lloyd had done so at paras 52–54 of his decision in reaching a factual conclusion in the appellant's favour.

In Parveen, the Court of Appeal accepted, following Treebhawon, that the phrase "very significant" connoted an "elevated" threshold and accepted the UT's view that the test was not met by "mere inconvenience or upheaval" (see [9] per Underhill LJ). The court went on, however, not to accept all that had been said in Treebhawon ([9]:

> "But I am not sure that saying that 'mere' hardship or difficulty or hurdles, even if multiplied, will not 'generally' suffice adds anything of substance. The task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as 'very significant'."

As regards the notion of "integration", the Court of Appeal in Parveen adopted with approval what had been previously said by the Court of Appeal in the case of Kamara to which Ms Pickthall referred me. There, Sales LJ (as he then was) said (at [14]):

> "In my view, the concept of a foreign criminal's 'integration' into the country to which it is proposed that he be deported … 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."

Judge Lloyd dealt with the issue of "very significant obstacles" at paras 52–54 of his determination as follows:

> "52. Having regard to the totality of evidence I cannot as such dispute that the Appellant is culturally and socially integrated in the UK. Also against such a background and after such elapse of time, I do believe that there would be very significant obstacles to his return to Zimbabwe. Moreover, in the analysis it would be unduly harsh for [F] and [Ms T] to live in Zimbabwe. They have no direct experience of life there. It would be a wholly unknown environment and culture for them. Despite her depth of feeling for the Appellant, [Ms T] makes it abundantly clear that she and her son will not relocate there in any circumstances.
>
> 53. In 2011, the Respondent accepted that the Appellant had lost contact with his family. He has no family in Zimbabwe except for a 90-year-old grandmother who is frail. The Appellant's mother died on 3rd July 1993 when the Appellant was only 15 months old. The death certificate is at page 98 of the Appellant's bundle. The Appellant never knew his father.
>
> 54. In all the circumstances presented by the evidence I find it impossible to conclude that the Appellant can reasonably face re-integration into his home country some twenty years after he came to the UK as a young child."

The judge's reasons are brief but, of course, it is necessary to read his judgment as a whole. Nowhere does the judge set out the "elevated" requirements of the test of "very significant obstacles". Indeed, at para 54 the judge concludes that it would not be "reasonable" for the appellant to integrate in Zimbabwe. That is not the elevated test of "very significant obstacles". Of course, the judge was not required to 'gloss' the statutory words, indeed that might well have been inappropriate. However, I am unable to read the judge's brief reasons as engaging with the "elevated" test of "very significant obstacles". It may well be that the appellant faces real difficulties in reintegrating but the reasons given by the judge do not make clear why those difficulties reached the "elevated" threshold required by Exception 1. The only obstacles identified by the judge are that he has lost contact with his family in Zimbabwe. He is, of course, 28 years old and the judge does not engage with the issue of his prospects, in particular financial prospects on return to Zimbabwe. The judge makes no findings on whether the appellant, despite his social and cultural integration in the UK, has lost his social and cultural background, given he lived with an aunt in the UK, concerning Zimbabwe. The judge simply observes that he has no family contacts except with his 90-year-old grandmother.

Consequently, I accept the Secretary of State's submission that the judge erred in law by failing to give adequate reasons as to why the appellant met the third requirement in Exception 1.

Issue 4

This issue concerns the requirement in Exception 2 in s.117C(5) that the impact of the appellant's deportation would be "unduly harsh" upon his partner and son.

It is accepted that the judge set out the correct law following the Supreme Court's decision in KO (Nigeria) at paras 40 and 42 of his determination. In particular, referring to the Court of Appeal's decision in PG (Jamaica) v SSHD [2019] EWCA Civ 1213, the judge noted that a degree of harshness affecting a partner or child necessarily goes with the deportation of a foreign criminal. That, in itself, is not sufficient to satisfy Exception 2 on the basis that the impact is "unduly" harsh.

Mr Howells contended that the judge had failed to give adequate reasons, particularly in paras 46–49, why the impact upon the appellant's partner and son went beyond what would have been inevitable as a result of the appellant's deportation. He submitted that the judge had speculated in para 48 when he had concluded that the separation of the appellant from his son and partner would be permanent and that they would not see each other again. Mr Howells submitted that the test requires more than this as that might well be the inevitable consequence of a foreign criminal being deported. He submitted that although the judge took into account that Ms T could not currently afford to visit Zimbabwe, he should not have assumed that that would necessarily always be the case.

Ms Pickthall submitted that the judge had correctly directed himself and had accepted that it was a high test to satisfy in Exception 2. She submitted that at paras 46–49 of his determination, the judge set out adequate reasons and had relied upon the independent social worker's report at paras 53–56 as to the impact upon the appellant's partner and family. She submitted, following the Court of Appeal's decision in AD Lee [2011] EWCA Civ 348 that the judge had not erred in law, he had made findings of facts on the evidence and had reached a proper and sustainable conclusion.

As I have said, it is accepted that the judge correctly directed himself as to the approach to the "unduly harsh" issue under Exception 2 at [40]-[42]. The judge's reasoning which is challenged by the Secretary of State is set out at paras 46–49 as follows:

> "46. However, Ms Pickthall, for the Appellant has invited the Tribunal to conclude that it *would be* unduly harsh for [F] and [Ms T] to remain in the UK without the Appellant. In her evidence, by way of written statement and also her live evidence at this appeal hearing, [Ms T] explained the nature of the bond and relationship between the Appellant and [F]. She did emphasise that even at barely 4 years old, [F's] behaviour has been noticeably affected by his father's absence. I believe that she is honest and credible in making that

statement. She has given her evidence to this appeal in a demonstrably sincere but acutely emotional manner. I believe that she is telling the truth about the difficulties for [F] in being [Ms T] in being separated from his father. I acknowledge that there must inevitably be a risk that to be forcibly separated from his father (probably with permanence) at such a young age will inevitably emotionally scar him, for his whole life. It cannot be unexpected that he will encounter significant emotional and behavioural problems in later life because of such an event. [Ms T] herself leads quite a harsh life, working in a low-paid job in Cardiff to support herself and her son, and to provide him with nursery schooling. It would I find be a heavy burden upon her to have to look after her son in the long term alone. If he is returned to Zimbabwe the costs of keeping physically in touch would be unmanageable for her. The most that she and her young son could expect would be sporadic 'face time' contact with the Appellant, which is hardly satisfactory for a development of a father-son relationship let alone [Ms T's] relationship with her chosen partner.

47. It was suggested in the Reasons for Refusal Letter that [Ms T] 'has a family network that she can call upon for support'. The family network is situated in London; [Ms T] lives in Cardiff. That is where the family had settled before the Appellant's imprisonment. That is where [F] is receiving his early years schooling. What is clear is that given the circumstances, any support of the partner and child by the maternal family is undoubtedly limited. [Ms T] would not be able to afford to live in London as a single parent or afford childcare there. I have no reason to dispute that [F] has settled into his nursery in Cardiff. He has already experienced disruption in his very tender years; and further upheaval would inevitably lead to behavioural difficulties either immediately or as he develops into adolescence and adulthood. That is not a disadvantage which should be heaped upon him by virtue of misdemeanour of his father.

48. I have considered the independent social worker's report of [SP] (A68 – 93). The report highlights the very real difficulties that will be faced by [F] and his mother if the Appellant were deported. She emphasises that if the Appellant is removed to Zimbabwe there will be no opportunity for direct contact between him, his son and his partner. It cannot be expected that the Appellant will garner sufficient funds in Zimbabwe to facilitate visits by his partner and his child. The harsh reality is that [F] would never see his father in person again. I do not dispute that that would be an unduly harsh outcome. Moreover, it was evident from the behaviour of [Ms T] at the appeal, that the removal of her partner of some eight years will be devastating for her.

49. In financial terms, if the Appellant is deported, [Ms T] would inevitably have to resort to support by the State in all aspects of her life, housing, school meals, and all conceivable family benefits available under the state system."

Ms Pickthall drew my attention to paras 53-56 of the independent social worker's report in support of the judge's reasons and conclusion. There, the independent social worker refers to the importance of attachment between children and their carers particularly in a child's formative years and that interference with that can "potentially be harmful to their development and

functioning as children and later as adults" (para 53). At para 54, the independent social worker states that the appellant's removal to Zimbabwe means that the attachment that his son has for him "will be disrupted". It has been shown, the report goes on, that disruptive attachments "can therefore be detrimental to children and young people, particularly their mental health and social development". At para 56, the independent social worker concludes that it is not a viable option for the appellant's family to go with him to Zimbabwe. The latter, of course, is accepted by the Secretary of State and on her behalf by Mr Howells before me.

In my judgment, these passages to which I was referred do no more than identify the inevitable consequences upon a parent and child relationship, and also upon a relationship between partners. if the parent/partner is deported.

Mr Howells referred me to paras 50, 54 and 62 of the independent social worker's report. Para 50, which must have featured in the judge's mind, states that if deported then the appellant and his family would be "separated indefinitely" as it would not be "financial viable" to facilitate direct contact between them. At para 54 he deals with the disruption to the attachment relationship between the appellant and his son. Para 62 states that the son's maintaining a "secure attachment" with the appellant will be "conducive for his identity, emotional and behavioural development".

Reading these provisions together, I do not accept that Judge Lloyd's reasons properly found a conclusion that the impact upon the appellant's son and partner would be "unduly harsh" in that they would go beyond the inevitable consequence of separation between parent and child and partners affected by an individual's deportation. The reasons are inadequate, in my judgment, to sustain a finding that Exception 2 is met. The judge's reliance upon the financial impact upon the appellant's partner is, with respect, not an unusual consequence (however unfortunate) upon a single mother who is separated from her partner as a result of his deportation. The financial consequences identified by the judge, and Ms T's need to rely upon state support, are not adequate reasons, in my view, to sustain a finding that the consequences to her (and through her their son) would be unduly harsh. The issue of separation and interference with the "attachment" between the appellant and his son reflects no more than would inevitably be caused by an individual's deportation leaving behind in the UK a son with the appellant's partner. The judge was speculating that the separation would be permanent which, in any event, might be a usual incidence of deportation and not something that equates to "undue harshness". For these reasons, therefore, I accept Mr Howells' submission that the judge erred in law by failing to give adequate reasons why Exception 2 was met.

Decision

Accordingly, the decision of the First-tier Tribunal to allow the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.

Following some discussion as to the potential disposal of the appeal, both representatives accepted that the appeal should be remitted to the First-tier Tribunal in order for the decision to be remade. On remaking the decision, the judge will need to make fresh findings in relation to Exceptions 1 and 2 in s.117C(4) and (5) – although the appellant cannot, for the reasons I have given, establish the first limb of Exception 1. However, to the extent that neither Exception is found to be met, the judge will need to make relevant findings in relation to s.117C(6) and whether there are "very compelling circumstances" over and above Exceptions 1 and 2.

For these reasons, and given the nature and extent of fact-finding required and having regard to para 7.2 of the Senior President's Practice Statement, the appeal is remitted to the First-tier Tribunal for a *de novo* rehearing by a judge other than Judge B Lloyd.

Signed

Andrew Grubb

Judge of the Upper Tribunal
10 July 2020