



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12065/2019

THE IMMIGRATION ACTS

Heard remotely at Field House
On 24 September 2021 *via Teams*

Decision & Reasons Promulgated
On 1 November 2021

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

**BENJAMIN KERUBINO
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A. Radford, Counsel, instructed by Turpin Millar
For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

The documents that I was referred to be the original bundles from before the First-tier Tribunal, the contents of a rule 15(2A) application made by the appellant, and the appellant's skeleton updated argument, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content the proceedings had been conducted fairly in their remote form.

1. This is an appeal under section 82 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) against a decision of the respondent dated 7 May 2019 to refuse a human rights claim made by the appellant, a citizen of Kenya born on 24 July 1997. The Secretary of State’s decision was taken in the context of deciding to deport him under the UK Borders Act 2007 (“the 2007 Act”).
2. The proceedings originally commenced in this tribunal as an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Hone dated 29 June 2020. By a decision promulgated on 21 April 2021, I allowed the Secretary of State’s appeal, and directed that the appeal be reheard in this tribunal, subject to certain findings of fact reached by the judge being preserved. That decision may be found in the **Annex** to this decision. In this judgment, I refer to it as the “error of law” decision.
3. In this decision, I refer to the parties as they were before the First-tier Tribunal.

Factual background

4. The appellant was born in Kenya. His mother is Kenyan, and his father is a British citizen of Ugandan ancestry who was granted asylum in the UK before naturalising.
5. The appellant was granted indefinite leave to enter to settle here with his mother when he was three months old, in September 1997, and has lived here ever since. He continues to live with his mother, who is now separated from his father. The appellant attended primary and secondary school here. He has returned to Kenya on a single occasion, for approximately one month. He was around eleven years’ old at the time.
6. The Secretary of State has pursued the appellant’s deportation as a result of his convictions, following a plea of guilty, for an offence of robbery and the possession of a bladed article in public, on 22 September 2018, for which he was sentenced to a total of 27 months’ detention on 28 February 2019.
7. In the error of law decision, I outlined the circumstances of the appellant’s offending in these terms, at paragraph 3:

“With an accomplice, the appellant approached a lone female in Green Park in central London. It was late in the evening. The appellant and his accomplice were each armed with a pair of scissors with which they threatened to ‘shank’ their victim, which appears to have been a threat to stab or otherwise pierce their victim’s skin. They pulled the victim’s headphones from her ears. The appellant kicked the victim to the ground and forcibly took her mobile phone. It was locked using a pin code so, in an apparent attempt to ensure the robbery yielded items of value, the appellant held the victim to the ground while his accomplice robbed her of her remaining effects, including her wallet. As the victim tried to escape, the appellant ripped her upper clothing leaving her, in the words of the sentencing judge, ‘half naked... gratuitously in my view, adding to her obvious humiliation and distress.’ The victim returned to her workplace to seek refuge once the ordeal was over. The appellant was not sentenced on the basis that his offence involved any sexual conduct.”
8. The above offence triggered the automatic deportation provisions in the 2007 Act. The appellant made a human rights claim to resist deportation, based on the length of his residence here, and his likely circumstances upon return to Kenya. He claims that the

strength of his human rights claim is such that the relevant exception to the automatic deportation provisions is engaged.

9. There are a number of preserved findings of fact which provide the backdrop to this appeal, as set out in my error of law decision. The appellant has been lawfully resident here for more than half of his life and is socially and culturally integrated. For the unchallenged reasons given by Judge Hone, the appellant's mother is estranged from her own family in Kenya, and they will not support him in Kenya upon his return. Judge Hone specifically found that the appellant would not have any support from any family in Kenya (see [60] of the decision of the First-tier Tribunal), and that finding was among those I preserved (see [29] of the Annex). The appellant's father would provide up to £50 monthly by way of remitted support.

Legal framework

10. Section 117C of the 2002 Act sets out the statutory considerations relevant to whether a person's deportation would breach Article 8 of the ECHR (right to private and family life). It provides:

- '(1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
- (4) Exception 1 applies where –
- (a) C has been lawfully resident in the United Kingdom for most of C's life,
 - (b) C is socially and culturally integrated in the United Kingdom, and
 - (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
- [...]
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2.'

11. In relation to Article 8 of the ECHR, it is for the appellant to demonstrate that his prospective removal would engage the protection of the Article. It is for the respondent to establish that any interference with the rights guaranteed by Article 8(1) is justified on grounds permitted by Article 8(2). The standard of proof is the balance of probabilities standard.

The hearing

12. The hearing before me was listed before the relaxation of some of the restrictions arising from the Covid-19 pandemic, and as such took place remotely, although it was conducted in public from a court room in Field House. The appellant gave evidence and adopted his statements dated 22 January 2020 and 11 February 2020. The appellant's mother, Caroline Odiambo, adopted her statements dated 22 January 2020, 11 February 2020, and 13 February 2020, and was cross-examined. I do not propose to summarise the entirety of the

evidence I heard; I will outline the evidence I heard to the extent necessary to reach, and give reasons for, my findings.

13. At the conclusion of the hearing, both advocates confirmed to me that no fairness concerns had arisen from the proceedings being conducted remotely.

Discussion

14. As set out in the error of law decision at paragraph 6, the appellant's conviction triggered the automatic deportation provisions of the UK Borders Act 2007.
15. The offence itself would have been utterly terrifying for the victim. Despite his youth, the appellant received a relatively lengthy period of 27 months' detention, reflecting the seriousness with which the sentencing court approached his offending conduct. The appellant is a foreign criminal. His deportation is deemed by section 32(4) to be conducive to the public good, and, subject to the exceptions, the Secretary of State must make a deportation order in respect of him.
16. Section 33 contains the exceptions. 'Exception 1' is relevant in this case. It applies where the removal of the foreign criminal in pursuance of the deportation order would breach the person's rights under the European Convention on Human Rights ("the ECHR"). In turn, that issue is to be determined by reference to section 117C of the 2002 Act.
17. Section 117C provides that the deportation of foreign criminals is in the public interest, subject to certain exceptions. Here we meet a further 'Exception 1'. It is based on the foreign criminal's private life, for the purposes of Article 8 of the ECHR: section 117C(4). If the appellant is able to meet all three criteria, his deportation is not in the public interest, and he will satisfy the 2007 Act's 'Exception 1', on the basis that his deportation would breach the rights he enjoys under the ECHR. I have set out section 117C above, but for present purposes it will be helpful to recall the three criteria, all of which must be met:
 - a. The appellant must have been lawfully resident in the UK for most of his life (section 117C(4)(a));
 - b. He must be socially and culturally integrated in the UK (section 117C(4)(b)); and
 - c. There would be "very significant obstacles" to his integration in Kenya, the country to which he will be deported (section 117C(4)(c)).
18. Where an individual does not meet either of the statutory exceptions contained in section 117C, it is necessary to ask whether there are any very compelling circumstances, over and above those exceptions, which defeat the public interest in the deportation of the individual concerned, as a foreign criminal: section 117C(6). See *NA (Pakistan) v Secretary of State for the Home Department* [2017] 1WLR 207.
19. In light of the preserved findings of fact, the issues concerning Exception 1 in section 117C are relatively narrow, as realistically recognised by Mr Whitwell. The appellant was found by the First-tier Tribunal to have been lawfully resident in the UK for most of his life, and to have been socially and culturally integrated. As outlined in my error of law decision, the Secretary of State made a belated attempt to expand her grounds of appeal to challenge the First-tier Tribunal's findings that the first two criteria were met, but that submission was not pursued by the presenting officer at the error of law stage, and nor was there any attempt to

reopen the issue before me by Mr Whitwell. I was not taken to any evidence which called into question the earlier findings reached by the judge on those issues.

20. It follows that the essential issue for my consideration in relation to 'Exception 1' (in the 2002 Act) is whether the appellant would face "very significant obstacles" to his integration in Kenya. Pursuant to the preserved findings of fact, the appellant would not have the benefit of any assistance from his mother's family in Kenya; the family are estranged, for reasons accepted by the judge of the First-tier Tribunal which were not challenged by the Secretary of State at the error of law stage, and which I need not detail here. It suffices simply to state that he would not have the assistance of his mother's family in Kenya. His father's family, being Ugandan, do not live in Kenya and could not provide in-country assistance to the appellant. The unchallenged findings concerning the appellant's father are that he would be able to remit a maximum of £50 monthly to the appellant.
21. The concept of "very significant obstacles" to an individual's integration is not to be read as subject to any gloss, and calls for a broad evaluative judgment as to whether this appellant will be enough of an insider, in terms of understanding how life in the society in Kenya is carried on, and to have the capacity to take part in it, be accepted there, and to operate on a day to day basis which would enable him, in a reasonable period of time, to build up a variety of human relationships to give substance to his own private life: see *Kamara v Secretary of State for the Home Department* [2016] EWCA Civ 813; [2016] 4 WLR 152 at [14].
22. The appellant relies on a number of strands of evidence to establish that he would face "very significant obstacles" to his integration in Kenya. In that respect, Ms Radford submits that the appellant has only ever lived in the UK, save for a few months as a tiny baby in Kenya, and a brief return visit in 2009. He only speaks English. He attended primary and secondary school here and has a broad network of friends and family here, including his church. His cultural identity is British, submits Ms Radford. He has not been involved in criminal gangs. His detention did not interrupt his integration. By contrast, the appellant would be returning to Kenya knowing nothing of the culture, customs, traditions, or values. His mother is estranged from her family. He has no local knowledge and cannot be said to have the ability to form private life relationships of the sort that would amount to integration.
23. Ms Radford also relies on two expert reports which, in her submission, demonstrate that the appellant would face devastating bureaucratic hurdles to being able to work, obtain accommodation, access a bank account, and take other steps to establish a life framework within which his private life could develop. The first report is by Laura Young, who is said to be a country expert. As I said in the error of law decision at paragraph 24:

"Dr Young's report records that she is an attorney based in Nairobi, having obtained legal training in the United States of America. She is not qualified in Kenya. Her CV states that she works as an independent consultant on human rights in several African countries, and currently manages the East Africa office for a development consulting company, based in Nairobi. The accompanying CV describes her work in the development field as relating to conditions and services for refugees, migrants and trafficked persons in Ethiopia, Djibouti, Kenya, Somalia and Sudan."
24. The Young report is dated 7 February 2020. It was part of the appellant's case before the First-tier Tribunal. The overall thrust of the report is that the appellant would not be able to obtain a Kenyan ID card, despite being a Kenyan citizen and holding a Kenyan passport. An ID card, writes Ms Young, is essential for obtaining any government services, and to obtain accommodation, a SIM card, and a bank account. The process is fraught with discrimination

and uncertainty, and much is left to the individual (and discriminatory) discretion of the official dealing with the application. As the gateway to being able to vote, the process is highly politicised. Because the appellant is the son of a Ugandan man, writes Ms Young, he would be likely to be told he is not Kenyan, and at best he is likely to have to travel to western Kenya to attempt to obtain a card in Kisumu, or another city where his mother's family is known, given mother's Luhya and Luo heritage. Local officials would be unwilling to confer voting benefits on the appellant if he were to apply anywhere other than the west of the country. The appellant's inability to speak Swahili will compound his problems, as the examiners will view his application with enhanced suspicion. The appellant may face extortion and be pressured to pay a bribe. At best, the process will take many months, during which the appellant will be forced to live a "shadow existence". See paragraphs 6 to 15.

25. Even with an ID card, writes Ms Young, the appellant will struggle to obtain employment; an October 2017 British Council report records high levels of youth unemployment. Not being able to speak Swahili will be a major barrier. The appellant is likely to be drawn into illegal activities to survive, with little access to housing (even with an ID card), and healthcare would be difficult to obtain. Care for depression, a condition the appellant has experienced in the past, will be very difficult to obtain. There are very few psychiatrists in the country, and the majority are based in Nairobi. Returning from the UK, without funds, a job, a network, or support system, following many years' absence, will flag the appellant as a person of concern to the local community. The appellant would face significant hardship.
26. The appellant applied under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to rely on an additional report before me, namely that of Dr Bronwen Manby, an independent consultant and visiting senior fellow at the London School of Economics, dated 15 September 2021. The report was obtained in response to the criticism advanced by the Secretary of State at the error of law stage of the Young report. I granted the application. It was in the interests of justice for the appellant to be able to rely on the report. There was no objection from Mr Whitwell.
27. Dr Manby previously worked for the Africa Division of Human Rights Watch, and has authored a number of publications on citizenship law in Africa, including *Citizenship in Africa: The Law of Belonging* (Hart Publishing, 2018), which is said to feature a chapter on citizenship law, identification and statelessness in Kenya and Uganda. Dr Manby endorses the Young report (see paragraph 8). At paragraph 10, Dr Manby outlines reports from 2007, 2010, 2013 and 2015 concerning discrimination in the issuance of identity documents in Kenya. There were reforms in 2010, but the basic procedures which were established in 1947 remain in force. Government websites and publications concerning ID cards do not provide explanations of what is required to obtain ID, and there are numerous reports of the difficulties experienced by individuals attempting to obtain ID. Dr Manby included a screenshot from a social media campaign said to have been launched by respected Kenyan NGOs aimed at raising awareness of ID discrimination, particularly that experienced by those with one Kenyan parent, and a parent of another nationality. She concludes that the appellant would face very significant obstacles to his integration in Kenya.
28. I accept that the Manby report is authored by an expert in the field of Kenyan identity documents. The respondent has not sought to refute the contents of her report by reference to any specific evidence, as sometimes is the case in proceedings before this tribunal; for example, it is likely to have been relatively straightforward for research to have been commissioned within the Home Department concerning the publication of criteria to obtain

a Kenyan ID card, information which Dr Manby says is not available online. But Mr Whitwell advanced a range of criticisms in relation to the Manby report, mainly on the basis that it features opinion which strays beyond the boundaries of Dr Manby's expertise. For example, Dr Manby concludes that the appellant would face very significant obstacles to his integration, despite (i) such matters not being within her expertise; and (ii) not addressing the legal concept of what amounts to very significant obstacles in any event. Those are valid criticisms, and those aspects of the Manby report (in particular the overall conclusions at paragraph 24) accordingly attract no weight.

29. However, other aspects of the Manby report accord with other background materials, including the respondent's *Country Background Note: Kenya*, version 2.0, May 2020 ("the CBN"). At part 6.3, the CBN highlights reports concerning the importance of national ID cards in Kenya, which accords with both the Young and the Manby reports (see paragraph 6.3.1). The role of local elders and local officials in the "semi-automated registration system" (paragraph 6.3.2) and vetting process is outlined at paragraph 6.3.3; the involvement of a broad range of individuals, some with no formal governmental role, is a feature of Kenyan ID card provision highlighted by Dr Manby at paragraph 17 of her report. There are certainly consistencies between the CBN and summary of the general position in the Manby report, and the Young report. To that extent, I accept that those aspects of the reports attract a degree weight. The Manby report features additional detail to that which features in the CBN, concerning the difficulties encountered by those seeking ID documentation. I accept that applicants for Kenyan ID can experience problems of the sort described by Dr Manby. However, both reports rely on relatively outdated evidence; the reports outlined by Dr Manby at paragraph 10 of her report are now of some vintage. Other aspects of her report would attract more weight if they had clearer evidential foundations. Fundamentally, however, I accept that the "semi-autonomous" ID card process features the potential for ambiguity and difficulties, and that the involvement of local elders in the vetting process (as accepted in the CBN at paragraph 6.3.3) injects the potential for further uncertainty, placing those with no history, community network or experience living in Kenya - such as this appellant - at a significant disadvantage when seeking to obtain ID documentation in-country.
30. Against that background, I return to the circumstances of this appellant. As an English speaking young man of working age, the appellant will have some advantages when seeking to enter the labour market. English is one of the official languages of Kenya. He will have the benefit of remittances from his father in the region of £50 each month. He may be able to secure work, in the end, once he obtains an ID card. The process is haphazard and will take time. Some people with a parent of a different nationality have experienced problems, as outlined in very high level terms by Dr Manby, but, as Mr Whitwell submits, this is an appellant who already has a Kenyan passport. The local vetting process appears to require a reputation within the community, something the appellant will not have for some time. Were he able to work, obtain accommodation, a telephone and banking services, he may well be able to establish himself in the community such that he could successfully navigate the local elders' vetting process. The invidious position the appellant finds himself in is that he needs an ID card in order to establish the structural features of his private life within which he will be able to support himself and begin to settle, such that he will be able to form relationships and develop substance to his private life, yet the evidence suggests that in order to obtain an ID card, he first needs to have established a form of private life, such that the community vetting stage of the application process may successfully be navigated. I find that at appellant will, in the end, be able to obtain an ID card, but that it is likely to take a considerable period.

31. The reality of this appellant's prospective return to Kenya is that, to all intents and purposes, he will be returning as a foreigner. His living memory of the country will be limited to his brief visit in 2009, given his age upon his sole return visit. He has no friends or family there. He will struggle to obtain official work for some time. He knows very little of the culture; he certainly has no first hand experience of it, save from a single trip when he was still a young child. He identifies as culturally British, not Kenyan: I accept his evidence in that regard. He cannot speak the language of trade, the market, or of the workplace, still less does he speak any of the local dialects. I accept the evidence of Ms Odhiambo that her income as a nanny leaves nothing of any significance to remit to her son.
32. Drawing the above analysis together, it is plain that the appellant will experience obstacles to his integration; the question for my consideration is whether they will be *very significant* obstacles.
33. In my judgment, on the evidence before me, the obstacles faced by the appellant would be *very significant*. He would return, alone, to a country which he barely knows, without speaking an African language, or the language of trade or the market. The absence of family support, combined with the remote prospect of official work until the lengthy and unpredictable ID card process has resolved means that the time taken for the appellant to establish his own private life would be considerable, and certainly much longer than the reasonable length of time to establish the same as envisaged by Sales LJ (as he then was) in *Kamara*. While I accept that he is still a relatively young man, the prospect of the appellant being able to establish a private life of his own, in Kenya, within a reasonable time, is minimal, in light of the ID difficulties outlined above and their impact on the general obstacles to integration that will be experienced by a young man who identifies as British returning to the country he left as a small baby. He has only ever known life in this country. While his father will be able to remit £50 each month, I do not consider that remittances at that level will be sufficient to alleviate the impact of returning to live in a country the appellant does not, and has never, known. He has no support networks in the country, pursuant to the unchallenged preserved findings of fact. The appellant has no ties in Kenya of the sort that could be built upon in order to alleviate the very significant obstacles he will otherwise encounter.
34. I find that it is more likely than not that the appellant will face very significant obstacles to his integration in Kenya.
35. I therefore find that, pursuant to the criteria Parliament has enacted under 'Exception 1' in section 117C(4) of the 2002 Act, the deportation of the appellant would not be in the public interest, notwithstanding the seriousness of the offence he committed. He would face very significant obstacles to his integration which, combined with the preserved findings of fact reached by the First-tier Tribunal, satisfy the requirements of Exception 1 in section 117C. Parliament has legislated to provide that the deportation of persons such as this appellant, who satisfies the requirements of one of the statutory exceptions to deportation, is not in the public interest. By the same token, it follows that the appellant's Convention rights would be breached by his deportation; if Parliament considers the deportation of a person meeting the criteria of 'Exception 1' in section 117C is not in the public interest for the purposes of the proportionality assessment under Article 8(2) of the ECHR, it follows that his deportation would breach his convention rights.
36. It is not necessary to address whether there are "very compelling circumstances" over and above the exceptions contained in section 117C, as the appellant meets Exception 1.

37. It is necessary to observe that the concept of what amounts to “very significant obstacles” is not calibrated by reference to the seriousness of the offence. That would, of course, be relevant to a broader Article 8 assessment of the sort that would be conducted under a “very compelling circumstances” over and above assessment which, by definition, is not necessary as the appellant meets Exception 1.
38. The appeal against the Secretary of State’s refusal of the appellant’s human rights claim dated 7 May 2019 is allowed.

Postscript

39. As recognised by Ms Radford at paragraph 7 of her skeleton argument dated 24 September 2021, central to the First-tier Tribunal’s finding that the appellant was “socially and culturally integrated” was the fact that he had no broader criminal history. If the appellant reoffends, that is a submission that the appellant may find difficult to advance successfully on a future occasion.

Notice of Decision

This appeal is allowed on human rights grounds.

No anonymity direction is made.

Signed *Stephen H Smith*

Date 1 October 2021

Upper Tribunal Judge Stephen Smith

Annex - Error of law decision



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12065/2019

THE IMMIGRATION ACTS

Heard remotely at Field House
On 8 March 2021 *via Skype for Business*

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR BENJAMIN KERUBINO
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr D. Clarke, Senior Home Office Presenting Officer
For the Respondent: Ms A. Radford, Counsel, instructed by Turpin Millar LLP

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to were primarily the materials that were before the First-tier Tribunal, the decision of the First-tier Tribunal, and the grounds of appeal, the contents of which I have recorded. The order made is described at the end of these reasons.

The parties said this about the process: they were content that the proceedings had been conducted fairly in their remote form.

1. This is an appeal of the Secretary of State against a decision of First-tier Tribunal Judge Hone promulgated on 29 June 2020. For convenience, I will refer to the parties as they were before the First-tier Tribunal, unless otherwise stated.

Anonymity

2. Although the judge's decision states on the front page that an anonymity order was made, at page 15 it states that no anonymity order has been made in the case, observing that there had been no application for such an order. It was plainly an error for the judge to state that an order *had* been made. I see no reason to make (or maintain) an anonymity order in this case. To the extent it is necessary for me to do so, I lift any anonymity order already in force. There is no reason why this decision needs to be anonymized and the principle of open justice requires that anonymity orders are restricted to cases where they are strictly necessary.

Factual background

3. The judge allowed an appeal by the appellant, a citizen of Kenya born on 24 July 1997, against a decision of the Secretary of State dated 7 May 2019 to refuse his human rights claim dated 15 April 2019 and deport him to Kenya. The Secretary of State pursued the appellant's deportation as a result of his conviction, following a plea of guilty, to robbery and the possession of a bladed article in public, for which he was sentenced to a total of 27 months' detention on 28 February 2019.
4. The appellant has resided in the UK since he was three months old and held indefinite leave to remain.
5. The circumstances of the offence were as follows. With an accomplice, the appellant approached a lone female in Green Park in central London. It was late in the evening. The appellant and his accomplice were each armed with a pair of scissors with which they threatened to 'shank' their victim, which appears to have been a threat to stab or otherwise pierce their victim's skin. They pulled the victim's headphones from her ears. The appellant kicked the victim to the ground and forcibly took her mobile phone. It was locked using a pin code so, in an apparent attempt to ensure the robbery yielded items of value, the appellant held the victim to the ground while his accomplice robbed her of her remaining effects, including her wallet. As the victim tried to escape, the appellant ripped her upper clothing leaving her, in the words of the sentencing judge, 'half naked... gratuitously in my view, adding to her obvious humiliation and distress.' The victim returned to her workplace to seek refuge once the ordeal was over. The appellant was not sentenced on the basis that his offence involved any sexual conduct.
6. The appellant's conviction and detention triggered the automatic deportation provisions of the UK Borders Act 2007. The judge correctly identified that the appellant would be able to resist deportation if he could establish that it would be contrary to the rights he enjoyed under the European Convention on Human Rights ('the ECHR'). In turn, that was an issue informed by Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act'), in particular section 117C. The judge found that the appellant met the requirements of 'Exception 1', contained in section 117C(4) of the 2002 Act. In unchallenged findings of fact, the judge found that the appellant had been lawfully resident in the UK for most of his life, and that he was socially and culturally integrated.

7. The judge's pivotal finding in favour of the appellant was that he would face 'very significant obstacles' to his integration in Kenya upon his return. There were sensitive reasons why his Kenyan mother, with whom the appellant has lived in this country since his arrival, was estranged from her parents who, as a result, would be unable to assist the appellant upon his return. There has been no challenge to the judge's acceptance of that aspect of the appellant's case at [60] and [61] of his decision and I need say no more about it. Those reasons, held the judge, meant there was a 'very significant barrier for the appellant to get assistance from his maternal grandparents in Kenya. They are also old and I am satisfied could not assist him materially or psychological [*sic*].'
8. The judge also accepted the appellant's case that he did not speak Swahili and that he spoke only English. The appellant's British-Ugandan father had given evidence. The judge found him to be a credible witness and accepted his evidence that he would try to provide his son with £50 each month and would do what he could to assist his integration in Kenya, but that there were limits to the assistance he could provide as he is from Uganda and has no family in Kenya.
9. At [63] the judge said the following, in a passage which lies at the heart of the Secretary of State's appeal:

'I rely upon the expert report of Dr Young. Her report or credentials have not been challenged by the [Home Office Presenting Officer] in any way. I find that [the appellant] would be ineligible for the vast majority of jobs in Kenya because he does not speak, let alone is not fluent in Kiswahili. This is her finding at paragraph 16 to 19 of her report. I find that she is right that he would struggle to be accommodated as he does not have any family support network and would be identified as an outsider as she has set out at paragraph 20 to 29 of her report. I am also assisted in this finding by the C PIN that has been handed up to me.'
10. The judge concluded his operative reasoning in these terms:

'64. Therefore, after considering all of these factors in the round, it is my finding that all of these factors will combine to make very significant obstacles for the appellant to integrate into society in Kenya. I therefore find that the exceptions [*sic*] in s.117C(4) is made out.'
11. The judge allowed the appeal.

Grounds of appeal

12. The Secretary of State's grounds of appeal accept that the appellant had resided here lawfully for most of his life, and that he was socially and culturally integrated. They contend that the judge erred when stating that the report of Dr Young was 'unchallenged'. Not only did the presenting officer before the First-tier Tribunal seek to challenge Dr Young's credentials, but he or she also invited the judge to place little weight on it. It was an error, contend the grounds, for the judge to treat her report as unchallenged and ascribed corresponding weight to it in circumstances when the opposite was true. The grounds also contend that the judge failed to apply Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 415 (IAC), in which this tribunal found that the appellant in those proceedings would not face very significant obstacles to his integration in the Democratic Republic of Congo.
13. Permission was granted by Resident Judge Zucker, who observed that the Bossade point was arguable.

Submissions

14. The appellant submitted written submissions dated 17 September 2020. The Secretary of State submitted supplementary written submissions dated 24 September 2020, drafted by Mr I. Jarvis, who did not appear before me.

Legal framework

15. Section 117C of the 2002 Act sets out the statutory considerations relevant to whether a person's deportation would breach Article 8 of the ECHR (right to private and family life). It provides:

- '(1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
- (4) Exception 1 applies where –
- (a) C has been lawfully resident in the United Kingdom for most of C's life,
 - (b) C is socially and culturally integrated in the United Kingdom, and
 - (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
- [...]
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2.'

Discussion

16. It is necessary to deal first with a preliminary issue. In the grounds of appeal, the Secretary of State accepts that sub-paragraphs (a) and (b) of section 117C(4) are met. In his subsequent written submissions, Mr Jarvis seeks to resile from that approach. Mr Clarke quite properly did not seek to press the point before me. The Secretary of State had not sought permission to appeal on the basis that the judge reached findings on those sub-paragraphs that were not open to him or were otherwise infected by legal error. My analysis will therefore proceed on the basis that the judge's findings under sub-paragraphs (a) and (b) are unchallenged, in accordance with the Secretary of State's grounds of appeal and the basis upon which she secured permission to appeal. It follows that the judge's findings that the appellant had been lawfully resident for most of his life, and was socially and culturally integrated, are unchallenged.
17. The central issue in these proceedings is, therefore, whether the judge erred when concluding the appellant would face 'very significant obstacles' to his integration in Kenya. That is primarily a question of fact. Appeals lie to this tribunal on points of law, not disagreements of fact. Appellate courts and tribunals should be slow to interfere with the findings of fact reached by trial judges. A trial is not a dress rehearsal; it is the first and last night of the show. Trial judges have the benefit of seeing and hearing the whole sea of

evidence, whereas appellate judges can engage only in island hopping (see Fage UK Ltd. v Chobani UK Ltd [2014] EWCA Civ 5 at [114]).

18. There are, of course, certain findings of fact which can amount to an error of law. These were notably summarised by the Court of Appeal in R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982 at [9]. Sub-paragraph (vii) is relevant to these proceedings; an error of law may arise in relation to a finding of fact which involves:

‘Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made.’
19. The mistake of fact in these proceedings is the judge’s assertion at [63] that Dr Young’s report was unchallenged and had not been criticised by the presenting officer ‘in any way’. Ms Radford realistically accepts that it was an error for the judge to record the Secretary of State’s position in that way. The judge’s own record of proceedings records critical submissions being made in relation to the report by the Secretary of State. The minute of the presenting officer who appeared below, which was appended to the Secretary of State’s grounds of appeal, features a number of specific critical points that were advanced to the judge, in terms wholly consistent with the judge’s own record of proceedings. The presenting officer’s minute states the following, repeated here in its original shorthand form:

‘Expert nothing to indicate that she is one or that she is recognised by the UK courts as one. Report speculative. Invited the IJ to place no weight on report.’
20. In R (Iran) terms, the judge plainly made a mistake as to a material fact: the report *was* challenged. The mistake may be established by objective and uncontentious evidence, namely the presenting officer’s note of the proceedings, as accepted by Ms Radford. As the note records, submissions were made before the First-tier Tribunal challenging the expertise and authority of Dr Young to address the matters outlined in her report: so much is clear from the words ‘[there is] nothing to indicate that she is [an expert].’
21. The judge’s error was not the responsibility of the Secretary of State’s representatives.
22. The sole question is whether ‘unfairness resulted from the fact a mistake was made.’
23. In this respect, Ms Radford submits that the error was immaterial. It mattered not that Dr Young had not been accepted as an expert by the courts in this jurisdiction in previous cases, and the presenting officer’s submissions in relation to it before the First-tier Tribunal were limited, such that it could not be said that there were significant points which the judge failed to consider, and which were capable of impacting the outcome of the proceedings.
24. It is clear that the Secretary of State had made submissions challenging the authority of Dr Young, and whether her stated areas of expertise entitled her to address the matters upon which her report focusses, which included central issues such as whether the appellant would be able to obtain an ID card or employment in Kenya. Dr Young’s report records that she is an attorney based in Nairobi, having obtained legal training in the United States of America. She is not qualified in Kenya. Her CV states that she works as an independent consultant on human rights in several African countries, and currently manages the East Africa office for a development consulting company, based in Nairobi. The accompanying CV describes her work in the development field as relating to conditions and services for refugees, migrants and trafficked persons in Ethiopia, Djibouti, Kenya, Somalia, and Sudan.

It is not clear, therefore, how her expertise is relevant to the prospects of a returning Kenyan citizen, to Kenya. That is not to say that it is *not* relevant, but simply that there are a number of matters which the judge was required to consider, which he did not address.

25. To treat these omissions as immaterial would result in unfairness to the Secretary of State; the Secretary of State is entitled to know the reasons why her objections to the report were rejected. It would be unfair to the Secretary of State to dismiss her appeal to this tribunal on the basis that unreasoned aspects of the judge's decision, which were premised on a mistake of fact, would not have made a difference, had they been considered.
26. I also accept Mr Clarke's submission that it is not clear to the reader of the judge's decision the basis upon which the judge concluded at [63] that, 'I am also assisted in this finding by the CPIN that has been handed up to me.' The 'CPIN' must be a reference to the respondent's *Country Policy and Information Note* concerning Kenya, but other than that, this sentence is enigmatic: it is not clear which parts of the CPIN the judge relied upon to reach that conclusion, nor the basis upon which the judge did so.
27. For these reasons, I reject the submissions advanced by Ms Radford that the judge's error of fact was immaterial. Fairness requires that the points relied upon by the Secretary of State receive proper consideration. The matters in Dr Young's report are at the heart of the appellant's prospective integration in Kenya; in light of the limited family and financial support the judge found the appellant will enjoy in Kenya, his ability to secure access to the labour market and engage with other aspects of civil life with an ID card are central to the issue of whether he will face 'very significant obstacles' upon his return.
28. In light of the above conclusion, it is not necessary to engage in an in-depth analysis of the Secretary of State's Bossade-based submissions, other than to observe that they are without merit. The basis upon which Bossade was reported is set out in the Headnote to the decision. It concerns the interaction between the then new deportation provisions of the Immigration Rules and Part 5A of the 2002 Act. It does not seek to calibrate what amounts to 'very significant obstacles', other than to highlight the emphasis of the concept on 'integration.' The extracts of the decision upon which the Secretary of State has relied fall under the case-specific application of the broader principles outlined in the Headnote. So much is clear from the sub-heading which precedes the discussion at [52] and following: '*Application of the new rule to the claimant's circumstances.*' That the panel in Bossade found that the appellant would not face very significant obstacles upon his return to the Democratic Republic of Congo does not mandate other tribunals to reach the same conclusion on similar facts. In R (oao MM (Lebanon)) v Secretary of State for the Home Department [2017] UKSC 10 at [107], Lady Hale endorsed the following extract from judgment of Carnwath LJ, as he then was, in Mukarkar v Secretary of State for the Home Department [2006] EWCA Civ 1045 at [40]:

'... It is of the nature of such judgments that different tribunals, without illegality or irrationality, may reach different conclusions on the same case... The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law... Nor does it create any precedent, so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case, the decision of the specialist tribunal should be respected.'

Conclusion

29. Drawing the above analysis together, the judge fell into error by making a mistake of fact on a material issue, in the category identified at [9.vii] of R (Iran). The decision must be set aside on that account. There was no challenge to his findings that the appellant does not speak Swahili, nor that his mother is estranged from her own parents in Kenya, and that he has no support from other family in Kenya. Similarly, the judge's findings that the appellant's father would assist by remitting up to £50 monthly were not challenged. I preserve those findings insofar as they represented the position at the time of the hearing before the First-tier Tribunal, on 13 February 2020.
30. There was a challenge, which is yet to be resolved, to the expert report relied upon by the Appellant. That issue, combined with a revised global assessment of whether the appellant would face 'very significant obstacles' to his integration in Kenya, along with any other human rights considerations of relevance, will be considered at a resumed hearing in this tribunal.
31. If either party wishes to apply under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to rely on additional evidence at the resumed hearing, it must make that application **within 21 days** of being sent this decision.

Notice of Decision

The decision of Judge Hone involved the making of an error of law and is set aside, subject to the savings outlined in paragraph 29, above.

The decision will be remade in the Upper Tribunal, with a time estimate of three hours.

The hearing will be conducted remotely, subject to either party making reasoned objections to that proposal **within 7 days** of being sent this decision.

No interpreter required.

If either party wishes to apply under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to rely on additional evidence at the resumed hearing, it must make that application **within 21 days** of being sent this decision. (To the extent that either party wishes to rely on a relevant *Country Policy and Information Note* concerning Kenya, an application under rule 15(2A) will not be required, although the link should be provided to the Upper Tribunal at least **7 days** before the resumed hearing.)

No anonymity direction is made.

Signed *Stephen H Smith*

Date 13 April 2021

Upper Tribunal Judge Stephen Smith