Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/16672/2019 (V)**

THE IMMIGRATION ACTS

Heard remotely from Field House	**Decision & Reasons Promulgated**
On the 29 July 2021	**On the 28 October 2021**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

HUGH TRISCELIAN TRELEVEN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

The hearing was conducted on Microsoft Teams

Representation:
For the appellant: Mr A Reza, Solicitor from Sultan Lloyd Solicitors
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the appellant's appeal following my previous decision that the First-tier Tribunal had erred in law and that its decision should be set aside. The error of law decision is annexed to this re-making decision. It provides a background to the case and an explanation as to how we have arrived at this stage in proceedings. In

brief summary, the appellant is a citizen of Jamaica. He came to the United Kingdom in February 2002, was refused entry but granted temporary admission, and then proceeded to abscond. In April of that year he approached the respondent and claimed asylum. This was refused in May 2005 and an appeal dismissed in July of that year. Meanwhile, in July 2003 he was convicted on two counts of possessing Class A drugs with intent to supply and was sentenced to 4 years' imprisonment. Deportation proceedings were initiated by the respondent, a deportation order signed on 14 October 2005, and deportation took place on 29 November 2005. The appellant has resided in Jamaica ever since.

2. Whilst in the United Kingdom, the appellant established a relationship with Ms G, a British citizen. Notwithstanding the deportation and lengthy geographical separation, it is common ground that that relationship has subsisted ever since with Ms G visiting the appellant in Jamaica whenever this was possible. In addition, in November 2007 Ms G gave birth to the couple's son, T. Although T has never resided with the appellant for any significant period of time, it is also accepted by the respondent that the latter has a genuine and subsisting parental relationship with the former. This is the basic factual matrix underpinning my consideration of the appeal.

3. The appeal arose from the respondent's decision of 13 September 2019, refusing the appellant's human rights claim. That claim was made on 10 September 2019, but included previous representations from 2017. The claim essentially sought a revocation of the deportation order made in 2005 on the basis of Article 8 ECHR.

The evidence

4. By way of documentary evidence, I have considered the respondent's original appeal bundle and the appellant's consolidated bundle, indexed and paginated 1-170, with additional photographs attached, together with a copy of the bundle provided to the First-tier Tribunal.

5. Ms G attended the hearing remotely and gave oral evidence. She adopted her latest witness statement and provided further information about her relationship with the appellant and her own circumstances in the United Kingdom. She had visited the appellant approximately seven times since the deportation, with the last visit being in 2016 when she went with T. T has been to Jamaica on four occasions, the last being the 2016 trip. Ms G did not believe that she and T could relocate to Jamaica, particularly in light of the appellant's living arrangements there. He lives on a "hand to mouth" basis, and in very poor accommodation. She confirmed that she has financially supported him from the United Kingdom.

6. In response to questions from me, Ms G confirmed that that the appellant was living in his late mother's house in a rural area in the Parish of St

James. She did not believe that she could afford to repair the dilapidated house. T will be entering Year 9 at school in September 2021.

Submissions

7. Mr Tufan submitted that whilst it would be harsh for Ms G and T to move to Jamaica, it would not be unduly so. Both of them had visited that country on a number of occasions in the past. The current accommodation could be renovated or the family unit could rent another property. Both the appellant and Ms G could find work and there was no evidence to suggest that T would not be accepted into the education system. It would also not be unduly harsh to maintain the status quo. T was doing relatively well, he was able to see his father during visits to Jamaica, and the Independent Social Worker's report did not disclose any significant problems.

8. In any event, submitted Mr Tufan, there was nothing to show the existence of very compelling circumstances, with reference to section 117C(6) of the Nationality, Immigration and Asylum Act 2002, as amended (the 2002 Act). The appellant's offending was serious and there was nothing sufficiently strong on the appellant's side of the balance sheet.

9. Mr Reza relied on his skeleton argument and made concise submissions. In essence, he submitted that it would be unduly harsh for Ms G and T to relocate to Jamaica and that this, combined with the lengthy period of time the appellant has spent outside of United Kingdom, went to show very compelling circumstances.

10. At the end of the hearing I reserved my decision.

Findings of fact

11. I have considered the evidence as a whole. As highlighted earlier, a number of basic, and important, facts are not in dispute. Further, there has been no substantive challenge to the evidence provided by the appellant in documentary form and given by Ms G at the hearing.

12. I find the body of evidence before me to be reliable on the basis of its consistency (internal and external) and its overall plausibility, when set against the appropriate standard of proof.

13. I find that the appellant has not been involved in any criminal conduct whilst residing in Jamaica since his deportation in 2005, as confirmed by the letter from the Jamaica Constabulary Force. I accept that he has been admitted to the United States and has returned to Jamaica. Whilst there may be a question mark over what was said to the authorities there, I do not have any clear evidence on the issue and am not prepared to speculate that the appellant engaged in any deception.

14. I find that the appellant has been, and is, living in very difficult economic conditions in Jamaica. I accept his witness statement evidence and that from Ms G to the effect that he lives on a "hand to mouth" basis, essentially buying produce from markets in urban areas and re-selling it in or around his home district. I accept that it is Ms G who has provided the bulk of his financial support. As to his accommodation, I accept that the photographs contained in the appellant's bundle are genuine and reliable. I also accept what the appellant and Ms G has said about the state of the property. The images show what is, on any view, a dilapidated construction, comprising breezeblock, what appears to be plywood, and some internal concrete screed on the walls. Some parts of the property are open to the elements. I accept that there is no running water and it is unclear whether there is a sound (and safe) electricity supply. Whilst levels of accommodation are relative to the circumstances of the country in which they exist, and without intending any disrespect to the appellant, to my mind the state of the accommodation is extremely poor and residence there would involve living at or below what would reasonably be described as the poverty line.

15. I find that Ms G's finances have not been sufficient to renovate/improve the property over time. Not only has she made this clear in her oral evidence, but it is apparent to me that if she could have afforded it then she would have done so by now.

16. On the evidence as a whole, I accept that the appellant has no relatives in Jamaica and does not receive support from any of his siblings living overseas.

17. I accept that Ms G has strong familial links in the United Kingdom. I accept that she plays a significant role in the support of her sister, NG, who suffers from a number of medical conditions. NG's daughter suffers from epilepsy. The letter from NG sets out the ways in which Ms G supports her, including going to appointments, help with housework, and cooking. I find that Ms G also has the role of carer for her grandmother, Ms CD, who suffers from a number of age-related conditions, as well as type 2 diabetes. Finally, I find that Ms G has a close and supportive relationship with her own mother and her maternal grandmother, Ms MG, whom she assists with attending appointments, and other such matters.

18. Ms G is employed in the leisure industry. Her income appears to be reasonable, but I accept that she has no material savings. In light of this, I find it to be unlikely that Ms G would be in a position to either improve, or buy or rent different accommodation in Jamaica.

19. As to potential employment opportunities in Jamaica, the appellant has, as I have already noted, survived at a fairly basic level. It would be unrealistic for me to speculate as to an ability to suddenly find more stable, better-paid work simply because Ms G moved to Jamaica. For her part, I accept that she is a motivated person with a good employment record. According to the respondent's CPIN of September 2019, the Jamaican economy was

in a relatively good state, although I do not have up-to-date evidence on this (taking into account, for example, the effects of Covid-19). It is reasonably foreseeable that Ms G would be able to find work of one sort or another I find that it is more likely than not that this would be at a lower level of renumeration, relatively speaking, than that she has enjoyed in the United Kingdom.

20. I find that Jamaica does have a functioning secondary education system. There is no evidence to suggest that a British citizen child relocating to Jamaica would be precluded from entering that system.

21. In terms of her health, I accept that Ms G suffers from stress and hair loss. It is unclear whether the two are related. I accept that she feels anxious and depressed about her situation, although there is no evidence of a formal diagnosis of these conditions.

22. I turn to T. I find that he is healthy and is essentially doing well at school. I have considered the letter from his school, dated April 2021, written by its Behaviour Manager. I accept that he was well-placed to provide an insight into T's feelings concerning his circumstances, particularly with reference to the absence of the appellant from his life. The letter states that T is "emotionally unhappy", that he "cannot bear" the thought of having to live elsewhere (i.e. Jamaica), and that it is now "more apparent" that the family needs the additional support of a male role model (i.e. the appellant). The school letter is entirely in keeping with the letter written by T himself in support of his father's case. He speaks of his wishes to be reunited with his father on a permanent basis and how he feels left out and sad when he sees his friends with their fathers. T provides a description of the appellant's accommodation in Jamaica which is consistent with what his parents have said. Finally, he expresses the desire to live with his father in this country and states that he does not want to live in Jamaica.

23. The Independent Social Worker's report is dated January 2020. There has been no challenge to the credentials of the author and I place relatively significant weight upon what is said in the document. In general terms, it confirms the family's circumstances, including the various relationships described above. It specifically states that T misses his father "immensely", that he is "desperate" to be with him, and that continuing to reside in this country is in his best interests.

24. There is no suggestion that the appellant has been involved in any criminal activity since the offences for which he was convicted in 2003. Specifically, I find that he has not engaged in any misconduct in Jamaica since the deportation in 2005.

25. As a matter of fact, and for the avoidance of any doubt, it is clear that there is family life between the appellant, Ms G, and T. The respondent has not sought to argue the contrary.

The relevant legal framework

26. I do not propose to set out the applicable legal framework and accompanying case-law in any great detail here. There is, perhaps, a tendency to overload decisions with voluminous extracts from legislation and multiple passages from authorities.

27. In the present case, the length of the appellant's sentence means that he is precluded from relying on the exceptions set out in section 117C(4) and (5) of the 2002 Act. This does not mean that he is unable to rely on factors relevant to those exceptions when consideration is given to the overall proportionality exercise, as delineated by section 117C(6) of the 2002 Act. The wider exercise can of course take into account factors which do not relate to either of the two exceptions.

28. Ultimately, the question is whether the respondent's refusal of the human rights claim strikes a fair balance between on the one hand the significant public interest in maintaining the exclusion of foreign criminals from the United Kingdom, and on the other the right to respect for family life protected under Article 8. Given the length of the sentence and the corresponding effect of this on the public interest, in order to succeed the appellant has to show that his continuing exclusion from the United Kingdom is disproportionate by virtue of the existence of very compelling circumstances.

29. I have taken account of relevant authorities, including, but not limited to, NA (Pakistan) [2016] EWCA Civ 662; [2017] Imm AR 1, HA (Iraq) [2020] EWCA Civ 1176; [2020] INLR 639, and KO (Nigeria) [2018] Imm AR 400.

30. I have also had regard to what was said in Binaku (s.11 TCEA; s.117C NIAA; para 399D) [2021] UKUT 00034 (IAC) as regards the overarching importance of the legislative provisions set out in the 2002 Act and the "deportation regime" which covers persons to be deported, those that have already been deported and remain overseas, and those who have been deported and then re-enter the United Kingdom in breach of a deportation order. Thus, whilst I acknowledge what is said in paragraphs 390-391A of the Immigration Rules, it is the 2002 Act which sets the relevant parameters.

Factors on the respondent's side of the balance sheet

31. First and foremost there is the general, and powerful, public interest in giving effect to the "deportation regime, in all its facets. Thus, whilst a primary objective of actually deporting a foreign criminal such as the appellant, has been met, there remains a strong public interest in maintaining exclusion. This is not simply on the basis of any risk of further offending were the individual to come back to the United Kingdom, but

also because it represents a means of deterring others and underpinning public confidence in the system.

32. Second, the nature of the appellant's relatively brief residence in the United Kingdom between 2002 and 2005 to a large extent speaks for itself. He had been here unlawfully throughout and had committed the offences for which he was convicted only just over a year after arrival. Whilst there is no evidence to suggest that he came to this country with the intention to sell drugs, in my judgment the short period of time between arrival and offending counts against him.

33. Third, the offending was itself serious in nature. The supply of Class A drugs has an impact not simply on users, but on wider society as well. The sentence of four years imprisonment presumably reflected this (although I have not been provided with any Sentencing Remarks).

34. Fourth, I have concluded that it would not be unduly harsh for the current separation of the family unit to continue. Although this would be contrary to T's best interests (in respect of which, see below for further elaboration), the evidence as a whole does not disclose sufficiently serious consequences, at least in the short to medium term, for both Ms G and T if the appellant were to remain in Jamaica. It is true that the last visit they made was in 2016, but that is not to say that further trips cannot take place. Whilst I certainly appreciate the distress caused to them by the ongoing separation, the evidence from, for example, the school and the Independent Social Worker does not indicate that significant health or developmental problems are likely to occur. Ms G is clearly a very capable individual who has managed to combine employment with the care of her son, in addition to providing important assistance to other family members.

35. Fifth, the appellant's relationship with Ms G was established at a time when he was unlawfully in the United Kingdom. It would appear as though by the time the relationship began, the appellant had already committed the drugs offences and therefore his position in this country was even more precarious.

Factors on the appellant's side of the balance sheet

36. First, I conclude that the best interests of T clearly include being reunited (or, to put it in a more realistic context, united) with his father. Despite the obvious challenges represented by the geographical separation, T has maintained a genuine relationship with the appellant, through regular communication and four visits to Jamaica. It is plain from the evidence that T loves his father very much and holds a strong desire to be part of what he regards as a "normal" family unit comprising himself and both parents.

37. Further, I conclude that it is also strongly in T's best interests for him to remain in the United Kingdom. I say this having regard to: his age (he is now almost 14 years old); his stage of education (being well-settled at school and about to enter the pre-GCSE course year of his secondary education); his British nationality; his friendships and familial ties with relatives in this country; the impoverished circumstances in which it is likely he will have to live in Jamaica, at least in the short-term. Those circumstances will include having to live in the very poor accommodation, which I have described earlier in this decision.

38. I take T's best interests as a primary consideration attracting significant weight.

39. Second, and connected to the foregoing, I conclude that it would be unduly harsh for T and Ms G to relocate to Jamaica. The bar is set high and I take this fully into account. The factors which have fed into my best interests assessment, above, are clearly relevant to the issue of undue harshness and relocation. I recognise that T has visited Jamaica on four occasions and, to that limited extent, would not be a complete stranger to the country. He would also have the support of both of his parents there. However, the cumulative effect of the factors set out in paragraph 37 is powerful. It is supplemented by the impact of relocation on Ms G herself. Not only would she be having to deal with the uprooting of her son from all he knows and seeing him reside in harsh conditions, but she would have to place herself into a position of coping with very straitened circumstances, at least until she could find employment sufficiently well paid in order to move to better and also to be able to provide a reasonable level of income for the whole family unit. Given that the place of residence initially would be in a rural area, it seems to me all the more difficult for her to be able to seek employment in an urban area (specifically, Kingston or Montego Bay). I note also that both these cities suffer from high levels of violent crime. Indeed, a State of Emergency and Zones of Special Operations were imposed on several parishes, one of which being St James. The United States Embassy has advised visitors to avoid some areas of Kingston and Montego Bay (see paragraphs 3.1.1-3.2.9 of the respondent's CPIN on "Fear of organised criminal groups", version 3.0, dated August 2019). Ms G would also be separated from her relatives in this country, including her sister and grandmothers, in respect of whom she provides important practical assistance. In this regard, I take into account the impact on Ms G that a severing of these ties would have.

40. My conclusion on undue harshness does not of course permit the appellant to succeed in his appeal.

41. Third, and most importantly in my judgment, I have regard to the passage of time since the appellant's offending and subsequent deportation to Jamaica. It has now been 18 years since the offences themselves and almost 16 years since the deportation. On any view, that is a very significant period of time.

42. This period has additional context to it. The appellant did not first seek re-entry to the United Kingdom (and by extension, a revocation of the deportation order) until the expiration of almost 12 years following deportation. I accept that he and Ms G received (misplaced) advice that after 10 years revocation might be possible. Nonetheless, they did wait and they maintained their relationship over time.

43. The next contextual matter relates to the Immigration Rules. Although the predominant legal framework is represented by the 2002 Act, it is of note that they provide for revocation of a deportation order. The inference is that the making of such an order and consequent removal of the individual concerned does not, of itself, represent a permanent bar to re-entry: the continuation of a deportation order is subject to an assessment under Article 8 (see paragraph 391). It is also relevant that paragraph 391A provides that the "passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order." In my judgment, this recognition cannot simply be confined to some residual discretion outside the context of Article 8, as might be suggested by the wording of paragraph 391A, but is instead a factor capable of relevance to the proportionality of a decision to maintain a deportation order (which is, in effect, the consequence of the refusal of the appellant's human rights claim). In this regard, I take into account what I regard as a basic tenet of the proportionality exercise, namely that all relevant factors should be accounted for and real caution should be exercised in excluding matters from that exercise. Here, the particularly lengthy period since the offences and the deportation cannot be anything other than relevant.

44. The passage of time has a link with the risk of re-offending. The appellant has not offended since 2003. There is no evidence to indicate that he is, despite this, an individual who is likely to re-offend serious harm if admitted to the United Kingdom. The question of rehabilitation is, I fully accept, one which is in all but a few cases fairly limited in scope. Having regard to relevant case-law, I do not place great weight on this factor, but the absence of any offending over the last 18 years bears some relevance to the overall assessment.

45. Finally, the context requires consideration of T and Ms G. It would be unduly harsh for them to join the appellant and although this is insufficient to tip the balance in his favour, it feeds into question of whether it is, at this stage, still proportionate to maintain the exclusion of the appellant from the United Kingdom.

46. There will undoubtedly be cases in which the nature of an individual's offending is so serious that exclusion from the United Kingdom on a permanent or near-permanent basis will be fully justified. Having said that, I do not regard the appellant's offending as falling into this category. The respondent has not put forward any case-specific reasons why the 2003 offences should be deemed so serious as to warrant particularly lengthy exclusion. I pose the rhetorical question: how long it would be

proportionate to preclude the appellant from enjoying family life in the United Kingdom? Close to 16 years have elapsed thus far. This has prevented the appellant from living with his son during the entirety of the latter's life. Would 20 years still be justified? Or 30 years? In the end, I am tasked with determining the issue now.

Conclusion

47. Bringing all of the above together, I have concluded that on the particular facts of this case the appellant can show very compelling circumstances such that the refusal of his human rights claim is disproportionate under Article 8 and is therefore unlawful by virtue of section 6 of the Human Rights Act 1998.

48. For the reasons set out earlier, the factors weighing in the respondent's favour are certainly very strong, both in their generality and on the specific facts of the case.

49. However, I regard the very lengthy passage of time since both the offences and the deportation, when taken in the round with the contextual matters set out above and all other matters, as constituting a very compelling circumstance in this Article 8 claim. In my judgment, and again on the particular facts of this case, the time has arrived when what was clearly proportionate in the past and for many years has now become unjustifiable. Whether one describes the passage of time as a factor reducing the public interest or one which has significantly enhanced the appellant's Article 8 claim, the result is the same: the ongoing interference with the protected right to respect of family life is now disproportionate.

50. It follows that the appellant's appeal must be allowed on Article 8 grounds.

51. I make it clear that the appellant remains a foreign criminal. I cannot say what form of leave the respondent would grant to him as result of my decision. That is not a matter with which I am able to be concerned.

Anonymity

52. No direction has been made in these proceedings thus far and there is no good reason for one to be made at this stage. I make no direction.

Notice of Decision

53. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

54. I re-make the decision by <u>allowing</u> the appeal on Article 8 grounds.

Signed: H Norton-Taylor Date: 1 September 2021

Upper Tribunal Judge Norton-Taylor

<u>TO THE RESPONDENT</u>
<u>FEE AWARD</u>

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award, all the circumstances of the case.

Signed: H Norton-Taylor Date: 1 September 2021

Upper Tribunal Judge Norton-Taylor

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16672/2019

THE IMMIGRATION ACTS

Heard at Field House
On 11 March 2021

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR HUGH TRISCELIAN TRELEVEN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr A Reza, Solicitor from Sultan Lloyd Solicitors

DECISION AND REASONS

Introduction

1. I shall refer to the parties as they were before the First-tier Tribunal. Therefore, the Secretary of State is once more the Respondent and Mr Trelevan is the Appellant.

2. This is an appeal by the Respondent with permission against the decision of First-tier Tribunal Judge O'Brien ("the judge"), promulgated on 20 July 2020, by which he allowed the Appellant's appeal against the Respondent's refusal of his human rights claim. That claim was made in the context of an application to revoke a deportation order made on 14 October 2005.

3. The Appellant, a citizen of Jamaica, was deported to that country on 29 November 2005 and has resided there ever since. Notwithstanding the geographical separation, the Appellant maintained a genuine and subsisting relationship with Ms Glover, a British citizen. The couple also have a child, T, born in 2007 with whom the Appellant has maintained a genuine and subsisting parental relationship. This much was common ground.

The decision of the First-tier Tribunal

4. The judge made reference to a number of cases relating to Article 8, to the Immigration Rules (in particular paragraphs 391 and 398 to 399), together with the provisions of sections 117A-D of the Nationality, Immigration and Asylum Act 2002 as amended ("the 2002 Act").

5. The judge found that the Appellant had come to the United Kingdom in February 2002. By June the following year he had been convicted on two counts of possession of Class A drugs with intent to supply for which he was sentenced to four years' imprisonment.

6. The judge's assessment and conclusions begin at [59] of his decision. On account of the offences and sentences passed, the judge concluded that the offending history was "very serious" and that the public interest in both deporting and maintaining that deportation was "very strong." With regard to the length and passage of time since the offences and in light of a clean criminal record before those offences and following deportation to Jamaica, the judge concluded that there was a "very low" risk of reoffending and a "very low" risk to the public. It is worth setting out what is said in [61]-[64] in full:

> "61. It is clear from all of the evidence that the Appellant has a close, loving relationship with both Ms Glover and T. Whilst it might be argued that the status quo could continue, I accept that to do so is becoming increasingly difficult and expensive, and that T is reaching the age where a male role model physically present in his life is increasingly important. The family's reunification in the United Kingdom would manifestly be in teas best interests.
>
> 62. I take into account also that this family have bided their time before making this application, and made it in line with a forgivable yet out-of-date understanding of the Immigration Rules. They have not sought to exploit T's birth, accepted by the Respondent as a material change of circumstances, but instead have made the best of their circumstances in the interim. Throughout that time, has worked hard to support herself and T, and to pay for their visits to Jamaica, with the minimum if any burden on the state.
>
> 63. Also of relevance, I find, is the Respondent's tardy approach to the Appellant's case. He first applied to return to the United Kingdom on 8 May 2017. His appeal against the Respondent's refusal 10 August 2017 was treated as withdrawn at the Respondent's request on 24

> August 2018 so that the matter could be reconsidered. However, it then took until 13 September 2019 for the refusal to be maintained, resulting in an unnecessary delay overall of 2 years or so.
>
> 64. All in all, the Appellant's deportation order should be revoked. Furthermore, they are factors which together outweigh the public interest in maintaining the deportation order, notwithstanding the seriousness of the index offences."

The grounds of appeal and other written submissions

7. The Respondent's grounds of appeal assert that the judge failed to provide adequate reasons for the conclusions reached, particularly given the high threshold imposed by virtue of the sentence. It is said that various elements of the Appellant's Article 8 claim did not disclose undue harshness in respect of a continuing separation of the Appellant from Ms Glover and T. The various factors relied on by the judge in [61]-[63] are said not to constitute "exceptional circumstances amounting to compelling reasons." The judge's decision was, in part, irrational. The risk of reoffending factor should, it is said, not have been given any material weight.

8. Permission to appeal was granted by Upper Tribunal Judge Frances on 23 September 2020. Further written submissions from the Respondent, dated 12 October 2020 were filed and served and these were followed by a Rule 24 response from the Appellant, undated but seemingly received by the Upper Tribunal on 28 October 2020.

The hearing

9. Mr Melvin expanded on the grounds of appeal and written submissions. He confirmed that the challenge was based in part on a lack of adequate reasons and also on the assertion that elements of the judge's conclusions were irrational.

10. I drew the parties' attention to the case of Binaku (s.11 TCEA; s.117C NIAA; para. 399D) [2021] UKUT 00034 (IAC), in which amongst other things the Upper Tribunal stated that cases concerning foreign criminals were to be assessed by a tribunal in the context of section 117C of the 2002 Act and not with reference to the Immigration Rules. Mr Melvin responded by submitting that the judge had not expressly applied the test under section 117C(6) and what he had said was unsustainable.

11. For the Appellant, Mr Reza submitted that the judge had properly directed himself to the relevant legal framework and that the factors set out in [61]-[63] should be viewed cumulatively. In respect of T, a report from an independent social worker had been before the judge and this confirmed that the child's best interests were to have the Appellant back in his life on

a day-to-day basis. Reference to matters becoming "more expensive and difficult" in [61] related in part to visiting Jamaica, but also to the cost of childcare whilst the Appellant was outside of the United Kingdom. The delay committed by the Respondent in this case was, submitted Mr Reza, "inordinate". Mr Reza submitted that the judge had in effect applied the correct test under section 117C(6) of the 2002 Act.

12. At the end of the hearing I reserved my decision.

Decision on error of law

13. I have concluded that the judge materially erred in law when allowing the Appellant's appeal. I say this for the following reasons.

14. The judge did not apply what was, as a matter of law, the correct legal provision, namely section 117C(6) of the 2002 Act (and see Binaku). This has not been expressly pleaded in the grounds or the subject of any amendment thereto. Even if the failure to apply the "very compelling circumstances" threshold does not, in light of this, constitute a material error of law, the test under paragraph 391 of the Rules is broadly similar in nature (the need to show "exceptional circumstances amounting to compelling reasons"). With this in mind, the judge has in my judgment failed to provide adequate reasons for the conclusions reached.

15. He failed to explain what in fact was becoming increasingly expensive and difficult for Ms Glover and why this was the case (with reference to [61]).

16. The judge failed to explain the evidential basis for his conclusion that T was at an age where a male role model was becoming "increasingly important" (with reference to [61]). In this regard I note that no reference is made to the independent social worker's report contained in the Appellant's bundle. It is not simply a question of the judge having read this report and bearing it in mind; there needed to be an explanation as to why this amounted to a matter of real significance, either alone or considered on a cumulative basis.

17. The judge failed to explain why the matters set out in [62] were of particular relevance to the overall assessment of the relevant (very high) threshold.

18. In respect of the Respondent's delay, the judge has provided a degree of reasoning as to why he regarded it as being "of relevance". However, of itself or in combination with other factors, this point could not rationally have gone to show that the Appellant's case met the relevant threshold.

19. Stepping back and viewing the judge's decision holistically, there is an inadequacy of reasoning as to why, even on a cumulative basis, the factors set out in [60]-[63] amounted to either "very compelling

circumstances" or "exceptional circumstances amounting to compelling reasons".

20. The lack of adequate reasons is material to the outcome and means that the judge's decision must be set aside.

21. I do not need to address the Respondent's assertion that the judge's decision was simply irrational and that the Appellant's claim had to fail on any view.

22. There is also merit in another aspect of the Respondent's challenge. As part of the overall exercise of considering whether "very compelling circumstances" or "exceptional circumstances amounting to compelling reasons" existed, a consideration of whether it would be unduly harsh for Ms Glover and/or T either to go to Jamaica to reside there, or to be separated from the Appellant, was an important element. Unfortunately, the judge makes no reference to an unduly harsh assessment at all. If, for example, continuing separation was not deemed to be unduly harsh (the judge has made no finding one way or the other) it is, in the absence of additional reasons, difficult to see how the very high threshold could have been met.

23. There is a further material error of law here.

Disposal

24. I disagree with Mr Melvin's suggestion that I should simply re-make the decision on the basis of evidence before me and dismiss the Appellant's appeal. This is a case that has been ongoing for some time and although the Appellant's legal representatives have not made an application under Rule 15(2A) of the Upper Tribunal's Procedure Rules to adduce further reference (as they should have done), it is in all the circumstances appropriate to give the Appellant a further opportunity to provide up-to-date information on all relevant issues. In the absence of any good reason to remit this case to the First-tier Tribunal I will retain it in the Upper Tribunal for a resumed hearing in due course and will issue directions to the parties, below.

25. At this stage I make a further observation. It appears from the Respondent's decision letter that the question of whether Ms Glover and T could go and live in Jamaica was raised, yet this issue was not addressed by the judge. It may be that this is a matter which requires canvassing at the next hearing.

26. My provisional view is that the resumed hearing can be fairly conducted on a remote basis.

Anonymity

27. No direction was made by the First-tier Tribunal and I see no sound to make one at this stage.

Notice of decision

28. The decision of the First-tier Tribunal contains errors of law and is set aside.

29. This appeal is adjourned for a resumed hearing in the Upper Tribunal.

Directions to the parties

1) **No later than 7 days** from the date this decision is sent out, the parties may file and serve any objections to the resumed hearing being conducted on a remote basis;

2) **At the same time**, the Appellant shall confirm whether he intends to call any oral evidence at the resumed hearing, and, if so, who will give such evidence;

3) **No later than 21 days** from the date this decision is sent out, the Appellant shall file and serve a consolidated bundle of all evidence relied on. Any evidence that was not before the First-tier Tribunal must be the subject of a notice under rule 15(2A) of the Upper Tribunal's Procedure Rules;

4) **No later than 14 days** before the resumed hearing, the Appellant shall file and serve a skeleton argument;

5) **No later than 7 days** before the resumed hearing, the Respondent shall file and serve a skeleton argument;

6) With liberty to apply.

Signed: H Norton-Taylor Date: 18 March 2021

Upper Tribunal Judge Norton-Taylor