



IAC-FH-CK/SC-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: HU/15253/2019**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On the 8<sup>th</sup> June 2022**

**Decision & Reasons Promulgated  
On the 19 July 2022**

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**MR QUADRI BANDELE OGUNKOYA  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: *Ms K McCarthy*, instructed by Duncan Lewis Solicitors

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of his human rights claim, in the context of a deportation order having been made against him as a "foreign criminal" (as defined by section 117D of the Nationality, Immigration and Asylum act 2002). The appellant had been convicted on 20<sup>th</sup> December 2013 of robbery, possession of an imitation firearm, breaching a previous suspended sentence and resisting/obstructing a constable, sentenced to 69 months in prison, with an extended licence. As recorded in the error of law decision annexed to these reasons:

*“The [Claimant] has a total of 10 convictions for 18 offences including the index offence of robbery and possession of an imitation firearm, assault occasioning actual bodily harm, wounding, assaulting a constable, resisting arrest, possessing controlled Class A drugs with intent to supply, battery, possession of a knife/bladed/sharp point article in a public place and affray. In addition to the sentence for the index offence of 69 months and an extension period of 24 months following a previous suspended sentence, the [Claimant] has also received custodial terms of imprisonment of four months on 18 August 2006, six weeks in April 2007, 42 months for possession and supply of Class A crack cocaine in September 2007, and 14 and 16 months respectively for affray in 2010 and 2011.”*

2. The appellant, a citizen of Nigeria, was born in the UK on 28<sup>th</sup> May 1989 and has never visited Nigeria. It has been suggested that the appellant has never worked, despite schooling in the UK, although the appellant recently claims to have worked for a friend in a butchers shop and in construction (although he sought to resile from the latter statement). He remains a Nigerian citizen as when he was a minor, his mother never sought to apply for British citizenship for him, and only made enquiries on his behalf when he was given notice of intention to deport him. On being so notified in 2015, the appellant discovered that he was not British (he mistakenly assumed that he was British because he was born in the UK) and when his mother made enquiries, it is said that she was informed that by virtue of his offending, any naturalisation application might be refused (although for the avoidance of doubt, none was made).
3. As recorded in my error-of-law decision annexed with these reasons, on 13<sup>th</sup> March 2020, First-tier Tribunal Judge Herlihy, dismissed the appellant’s appeal on human rights grounds, by reference to respect for his family life, but she allowed it by reference to respect for his private life, such that there were very compelling circumstances over and above Exception 1 in section 117C(4) of 2002 Act. There was an appeal and cross-appeal, both of which succeeded. The result was that I set aside Judge Herlihy’s decision, without preserving any of her findings of fact, although many of the facts were undisputed.
4. On a preliminary point, no request has been made to anonymise the appellant’s identity and Ms McCarthy accepted that there was no need to do so, provided that the appellant’s child and former partner were not named. I accept that there is no need for an anonymity direction.

#### The issues in this appeal

5. I identified and agreed with the representatives the issues in this case were as below. Because the appellant’s prison sentence is at least four years, he cannot rely on ‘Exceptions 1 or 2’ (sub-sections 117C(4) and (5) of the 2002 Act respectively) on a stand-alone basis but instead must rely upon very compelling circumstances over and above those exceptions, (section 117C(6)), although it is recognised that when considering ‘very compelling circumstances’, I might consider the factors in sections

117C(4) and (5), where they are sufficiently strong, albeit with due regard to the public policy in favour of deportation of foreign criminals.

6. The representatives agreed that it was not appropriate for me to make a free-standing article 8 analysis, in addition to section 117B and C, (see §22 of RA (s.117C: “unduly harsh”; offence: seriousness) Iraq [2019] UKUT 00123 (IAC); and it is unnecessary for me to consider §A398A to 399 in addition to section 117B and C, see: §21 of CI (Nigeria) v SSHD [2019] EWCA Civ 2027.
7. Taking the issues in respect of the appellant’s private life first, Ms Cunha accepted that the appellant has been lawfully resident in the UK for all of his life. The respondent continued to dispute that the appellant was socially and culturally integrated in the UK, notwithstanding having lived in the UK for the entirety of his life. As she explained later in her submissions, which are discussed in more detail later, the respondent relied upon: the appellant’s disrupted education; his repeated criminal offending from a young age, including the supply of drugs, violent offences and oppositional attitudes towards the police and those in positions of authority; and the lack of any social connections or contribution to UK society beyond pro-criminal peers, whom it was said were part of a gang, called the “Notoriously Minded” gang, with links to major drugs suppliers. I add at this stage that the appellant denies being a member of the gang or having any knowledge of it. The respondent also disputed that there are very significant obstacles to the appellant’s integration in Nigeria. Whilst she accepts that he has never been to that country, the respondent refers to the appellant’s medical fitness, his resourcefulness, including possible work, likely support from social and family connections in the UK, at least while he establishes himself in Nigeria, and his likely familiarity with that society because of his upbringing within a Nigerian diaspora family.
8. The issues, for the purposes of the appellant’s private life, are:
  - a. Whether he remains socially and culturally integrated in the UK, including in respect of any work (whether paid ‘cash in hand’ or otherwise), as part of volunteering, and friendships?
  - b. Whether there would be very significant obstacles to his integration in Nigeria in the sense of his being able to live in that society, after a period of adjustment, as an “insider”?
  - c. Whether there are very compelling circumstances over and above Exception ‘1’ within the context of that integration/the claimed obstacles, carrying out a balance sheet exercise and also noting relevant factors in section 117B of the 2002 Act?
9. In respect of the appellant’s life, the respondent now accepts that the appellant has a genuine and subsisting parental relationship with a qualifying son, whom it is unnecessary to name. The son was born in November 2012, is now aged nine, and is a British citizen by virtue of his mother. She, whom it is also unnecessary to name, and the appellant are

no longer in a relationship, but remain on good terms and the appellant has active parenting involvement as a non-resident father. The former partner has another child by a different father. The respondent accepts that the effect of the appellant's deportation on his son would be unduly harsh in the circumstances of the so-called 'go' scenario, namely were the son were to move with the appellant to Nigeria. This is because the son has a British citizen mother and sibling, no connections with Nigeria and his entire support network and family are in the UK. However, the respondent maintains that the effect of the appellant's deportation on his son would not be unduly harsh in the so-called 'stay' scenario, whereby the son remains in the UK and the appellant is deported.

10. The issues, for the purposes of the appellant's family life, are:
  - a. Whether effect of the appellant's deportation on his son would be unduly harsh in the 'stay' scenario?
  - b. Whether there are very compelling circumstances over and above Exception '2', also carrying out a balance-sheet exercise.

### The Law

11. I set out the relevant statutory provisions and the core principles.
12. Sections 117A to D of the Nationality, Immigration and Asylum Act 2002 provide:

*"PART 5A*

*Article 8 of the ECHR: public interest considerations*

*117A Application of this Part*

*(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—*

- (a) breaches a person's right to respect for private and family life under Article 8, and*
- (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.*

*(2) In considering the public interest question, the court or tribunal must (in particular) have regard—*

- (a) in all cases, to the considerations listed in section 117B, and*
- (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.*

*(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).*

*117B Article 8: public interest considerations applicable in all cases*

*(1) The maintenance of effective immigration controls is in the public interest.*

(2) *It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—*

- (a) are less of a burden on taxpayers, and*
- (b) are better able to integrate into society.*

(3) *It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—*

- (a) are not a burden on taxpayers, and*
- (b) are better able to integrate into society.*

(4) *Little weight should be given to—*

- (a) a private life, or*
- (b) a relationship formed with a qualifying partner,*

*that is established by a person at a time when the person is in the United Kingdom unlawfully.*

(5) *Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.....*

*117C Article 8: additional considerations in cases involving foreign criminals*

(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.*

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

(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.*

(7) *The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a*

*foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.”*

13. A person must meet an increasing scale of hurdles, to succeed in a human rights appeal, ranging from a person who is not liable to deportation at all, to the most significant hurdle for foreign criminals who have been sentenced to a period of imprisonment of four years or more (this appellant’s case).
14. Bearing in mind the cases of HA (Iraq) v SSHD [2020] EWCA Civ 1176; AA (Nigeria) v SSHD [2020] EWCA Civ 1296; and KB (Jamaica) v SSHD [2020] EWCA Civ 1385, when considering “unduly harsh”, I do not apply any notion of exceptionality or an objectively measurable baseline of the “ordinary” effects of deportation on “any” child. Every assessment of “unduly harsh” must have as its focus the effects on the appellant’s child, taking into account his best interests. The wording “unduly harsh” reflects Section 117C(1), that the deportation of foreign criminals is in the public interest, so it does not start off as a neutral evaluation, but in the context of that public interest, the focus remains on the effects on the child. Unduly harsh effects may be common place and are highly fact-specific, particularly as they centre on the effects on individual child, including (but only as examples and not as a ‘tick-list’) his age; educational and emotional needs; and the role played by the appellant.
15. In the assessment of “very compelling circumstances”, which reflects the strong public interest in deportation, such a public interest still has a moveable quality, i.e. the public interest may not have the same weight for all serious foreign criminals; “public revulsion” is too emotive a concept to be weighed in the assessment of such public interest, but the public interest in deterrence remains a relevant factor. At its heart, I have assessing “very compelling circumstances” through the “balance-sheet” approach, weighing on the one hand, the factors in the appellant’s favour, holistically, against the strong (but not immovable) public interest in deportation. Factors which can be relevant (although of varying weights and which again are examples, and not an exhaustive list) include: the nature of the offence (for example, whether it includes an element of violence), its seriousness and the appellant’s role in the offence, as often reflected in the sentencing Judge’s remarks; the extent of rehabilitation and likelihood of reoffending; the depth of the appellant’s integration in the UK and quality of his relations with his child; whether his relationship could be sustained after his removal; the need to promote his son’s welfare; and the obstacles to the appellant’s integration in Nigeria (noting that this is a broad evaluative assessment, with the concept of being “insider” meaning the appellant having enough of an understanding of how Nigeria works to be able to participate in it, be accepted within it, operate day-to-day and build up a network of relationships there). I note the guidance in the Strasbourg line of authorities such as Üner v The Netherlands (2006) 45 EHRR 14 (in particular, §[57]) and Maslov v Austria [2009] INLR 47, in terms of the factors that I might consider, including the

fact that the appellant was born in the UK and has never left the UK, let alone travelled to Nigeria.

16. I also accept, and it is not disputed, that criminal offending does not, in a general sense, of itself, demonstrate a lack of integration (see: Tirabi (Deportation: "lawfully resident": s.5(1)) [2018] UKUT 199 (AC)). I may consider both the appellant's involvement in his local community, but not with pro-criminal peers, as well as his acceptance of the principle of the rule of law (see Binbuga (Turkey) v SSHD [2019] EWCA Civ 551).
17. Even if there are very compelling circumstances, I need to consider the wider Section 117B factors.

### Findings of fact

18. I have considered all of the evidence presented to me, whether I refer to it specifically in these findings or not. I do not recite the parties' legal submissions, except where necessary as I go along. I also do not recite the witness's evidence unless it is necessary to do so to resolve areas of factual dispute, as many of the facts are undisputed.
19. The appellant, his mother Iyabosola Ogunkoya, and his brother, Kamarudeen Ogunkoya gave oral evidence before me, adopting their written witness statements, on which they were cross-examined. There were also numerous other statements including from both family supporters and also an expert medical report from a clinical psychologist, Dr Leyla Ziyal, which I will discuss later in these reasons.
20. The appellant was born in the UK on 28<sup>th</sup> May 1989. His mother, Mrs Ogunkoya had entered the country with the appellant's brother, Kamarundeen on 29<sup>th</sup> August 1988 on a visit visa, to join her husband. They apparently overstayed and the appellant's father was deported from the UK in July 1993. Relations between the appellant's father and the UK-based relatives have broken down and the appellant's father has since died. Mrs Ogunkoya describes the context of her relationship with her husband's family as never good and they blamed her when the appellant's father was deported. Mrs Ogunkoya has not left the UK since her initial entry in 1988. The appellant does not have any contact with members of his father's family. Mrs Ogunkoya describes members of her family, which I do not recite in full, suffice it to say that he has three older adult half-siblings (a sister and two brothers) who live in Ghana and importantly would, I find for reasons later explained, provide some initial support network for the appellant, on return to Nigeria.
21. Following the appellant's father's deportation, Mrs Ogunkoya unsuccessfully claimed asylum in the UK. Her claim was refused in 1997 but she was later granted leave to remain in 2001, which expired in October 2005. She later applied for indefinite leave to remain with her

children as dependants, which was granted in 2007. As a consequence the appellant has never had more than indefinite leave to remain.

22. The appellant attended education in the UK. He attended mainstream primary school but on transition to secondary school was expelled by two successive secondary schools in a matter of months, but was then enrolled at a centre, a form of a pupil referral unit, called Boyhood To Manhood, where he was involved in normal academic classes and completed five GCSEs, including English and maths, all at grade 'C'. He remained at that centre for four to five years, where he felt they were more successful in encouraging him to learn. The appellant attributed much of his difficulty in engaging in education to his own belief that he was dyslexic. However, the assessment carried out by Dr Ziyal is that the appellant does not have dyslexia but instead that there are strong indications of autistic traits. She assesses him as having between middle average and upper borderline levels of intelligence (§1.12 at [552] of the appellant's bundle, "AB") and at §1.15 she states:

*"The results of the examination of Autistic Spectrum Disorder [ASD] indicate that Mr Ogunkoya has some of the key traits of this condition and provides evidence suggesting that ASD is a possible and fitting diagnosis."*

23. At §3.3, page [554] AB, Dr Ziyal describes the appellant's reading level as at a good average level (at the 62<sup>nd</sup> percentile of his peers), which was "entirely inconsistent with dyslexia". She describes at §1.17, page [553] AB that there is a "a strong possibility of autism or the presence of autistic traits". At §§3.29 and 3.30, page [559] AB, she refers to his experiencing little constructive and enabling guidance leading him to adopt highly "maladaptive coping mechanisms to deal with the special demands and difficulties placed on him" and that he attempted to cope with constantly being rejected and failing to meet his aspiration for recognition by "acting out", which escalated into serious criminal behaviour. The basis on which Dr Ziyal has concluded that the appellant was provided little constructive or enabling guidance is not explained, particularly where the appellant was educated in mainstream education until aged 11 and, whilst he encountered difficulties as a result of his behaviour, he suggested that he had a positive experience in the pupil referral unit. That being said, Dr Ziyal's report does at least attempt to explain the context of the appellant's escalating criminal offending, to which I now turn.

### The appellant's criminal offending

24. As indicated in the Police National Computer records at page [24] onwards of the respondent's bundle ("RB"), the appellant's offending began when he was cautioned for shop-lifting on 17<sup>th</sup> January 2001, aged 11. After a gap, his offending escalated shortly after he completed his GCSEs. He was convicted on 18<sup>th</sup> August 2006 of offences in May 2005, so when still in education, of assault occasioning actual bodily harm, for which he had a detention and training order ('DTO') of four months; and in respect of an



offence of wounding on 8<sup>th</sup> January 2006, a six month DTO. On 18<sup>th</sup> April 2007 he was given a six week DTO for failure to comply with the earlier orders and on 21<sup>st</sup> September 2007, was sentenced to 42 months in a young offender's institution for possession with intent to supply 'class A' drugs, namely crack cocaine, on 28<sup>th</sup> July 2007. The appellant was then still aged only 16. It is not clear how much of his sentence he served of the 42 months' sentence, but on 23<sup>rd</sup> April 2010, he was convicted of affray, criminal damage and two counts of assaulting a constable, on 31<sup>st</sup> January 2010, for which he was sentenced to 14 months' detention in a young offender's institution.

25. On 28<sup>th</sup> February 2011, the appellant was sentenced to a further 18 months' detention (this time in prison) for affray committed on 8<sup>th</sup> December 2008.
26. Next, following conviction on 17<sup>th</sup> April 2013 and fined for failure to surrender to custody at an appointed time on 4<sup>th</sup> March 2013, on 8<sup>th</sup> May 2013, the appellant was convicted of battery, committed on 14<sup>th</sup> October 2012 and possessing a knife or blade on the same date, for which he received suspended prison sentences. He then was convicted on 17<sup>th</sup> July 2013 of resisting or obstructing a constable (three offences committed between May and July 2012) for which he was committed to the Crown Court and sentenced to prison for one month.
27. The appellant's index offences were committed on 21<sup>st</sup> May 2013. They were robbery, possessing a firearm when committing an offence and failing to comply with the terms of his previous suspended sentence. His sentences totalled 69 months in prison and a 24 month licence. He was convicted on 31<sup>st</sup> January 2014. He continued to offend after the index offence, being convicted on 15<sup>th</sup> January 2015 of assaulting a constable on 8<sup>th</sup> August 2014.
28. Before I turn to the sentencing Judge's remarks for the index offences, the picture which emerges is of a period between when the appellant left education in or around 2005 until the index offences in 2013 when the appellant's cultural and social integration in the UK is highly questionable. There was certainly no recognition or any commitment on his part to the rule of law. The offences involved interpersonal violence and a repudiation of the authority of those seeking to uphold the rule of law, namely police constables. On the appellant's own case, he was heavily involved with pro-criminal peers. Whilst the appellant may well have had associations wider than those pro-criminal peers, the sense of any engagement with wider society, whether by way of education, employment or other activities, is scant. What followed was a lengthy period of imprisonment, which on the appellant's own account amounted to him spending the best part of six years in custody following the index offence.
29. Turning to the sentencing remarks of Mr Recorder Thacker, given on 31<sup>st</sup> January 2014, at [525] AB onwards, the Judge notes:

*"I have had the opportunity to read the presentence report, to look through your previous convictions, to look at the Kids Company letter and also to read the letter which you provided to me ...*

*... for the robbery, the starting point for a person of good character who has pleaded not guilty is four years' in custody... That starting point will have to be increased in your case because you are not a person of good character. You have a number of previous convictions which are relatively serious. I ignore the matters to do with drugs but you have offences to do with affray, wounding, assault occasioning actual bodily harm as well as possession of the knife, which I mentioned so the starting point is not four years for you ...*

*A number of aggravating features are mentioned in the guidance and I have to have regard to those. The ones which are relevant in this case, it seems to me, is that more than one person was involved and also that the offence was committed at night.*

*Reference has also been made to the offence being pre-planned and the fact a vulnerable victim is targeted. I accept the offence was pre-planned but only to a degree. I don't think it would be right of me to assume that you pre-planned the offence whilst you were at somebody else's house but I accept some element of talking whilst you were in the cab. It seems that is a reasonable basis on which to approach the matter given the victim referred to you speaking to the other individual, 'Laws', whilst you were in the back of the taxi. It was to some extent opportunistic but there was some element of preplanning.*

*A vulnerable victim being targeted; whilst I don't regard the victim as vulnerable a such I do regard them as vulnerable in the sense that it is a minicab driver performing a valuable public service at night during unsociable hours ...*

*Whilst you are doing some good work with the Kids Company, it does not seem to me that any of the matters mentioned really amount to any real mitigation but I am taking into account your family's circumstances. I am taking into account some of the work you have done and I am of course ensuring that I pass the most appropriate sentence ...*

*... having regard to the limited mitigation and your previous convictions, the appropriate sentence for robbery is five and a half years.*

*I turn then to the possession of the imitation of firearm ... I will pass a separate sentence of one year on that count too and it will run concurrently ...*

*I move then to the question of dangerousness. It has been submitted by your Counsel that I should not find you to be dangerous ... What this requires me to do is to consider a number of matters: Firstly, are you a person aged 18 or over convicted of a specified offence? Well you are, because the offence of robbery is a specified offence. Secondly, do I consider that you are a significant risk? Well, there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences ...*

*The main question for me then is this: Is there a significant risk to member of the public of serious harm occasioned or commissioned by you of further specified offences? The presentence report says this:*

*'The risk of harm has been informed by the offender assessment system as well as probation actuarial tools ...' What the probation officer goes on to say is this: 'The tools indicate that Mr Ogunkoya's likelihood of reoffending in respect of both violent and general offending is medium. That said, in my assessment the risk of serious harm in this case is high. This is based on a future risk of both physical and psychological harm, the result of which would be life-threatening or traumatic, from which recovery would be difficult. In my assessment this equates to a significant risk of serious harm ...'*

*She goes on to say she has taken into account the fact that you represent a 'high risk of physical violence of threatening behaviour with the use of weapons, both knives and a gun, and it is clear that there has been an impact on the victim psychologically.'*

*... I have read the pre-sentence report and it seems to me that your future offending or the possibility of it represents a significant risk to members of the public of serious harm as the probation officer herself says. She has referred to your previous offences. She has referred to your lifestyle and associates and referred to intelligence. I am not putting any particular emphasis on that. It is more to do with this offence and previous offences as the probation officer says, are offences of interpersonal violence. It seems to me that you do come within section 226A [of the Criminal Justice Act 2003, relating to extended sentences for certain violent offences, necessary for the purposes of protecting members of the public from serious harm of further offences] and I am going to impose an extended sentence."*

30. It was prior to the index offences and during the time when the appellant's offending was rapidly escalating, that the appellant was in a relationship with his former partner and mother of his son. The dates of when the relationship started and ended are not clear, but his son was born on 8<sup>th</sup> November 2012 and the appellant was arrested and detained in July 2013.
31. The appellant describes that his former partner suffered from postnatal depression, so that he was the primary carer for his son for around 5 or six months before he was taken into custody. The time period is consistent with his offending history, when he was convicted in May 2013 of the offences of battery and possessing a knife. The picture of integration is therefore mixed. On the one hand there is a reference by the sentencing Judge to the appellant's involvement in Kids Company where, for a period between 2012 and 2013, he was paid to redecorate houses, and was also providing a caring role for his son. On the other hand, this is the same period of the seriousness of his offending rapidly escalating.
32. Thereafter, when the appellant was in prison from July 2013 onwards, his contact with his family appears to have been relatively limited. His brother, Kamarudeen, who I found to be a particularly impressive witness, said that following the appellant's imprisonment for the index offence, he had been in substantive contact with the appellant, not because he did not

care, but he believed that the appellant needed to reflect on the consequences of his actions. The appellant's mother spoke to him frequently by the telephone and also visited him, but it was difficult to do so as he was moved around the different prisons which were far from where she lived. She also described that she had suffered from ill-health and also there were times when the appellant himself did not wish her to visit him.

33. The appellant's former partner confirms in her witness statement, at §4, page [64] AB, that the appellant's son was in regular contact with his father during imprisonment, although the nature of the contact was unspecified. The appellant said that his son had visited him "at least ten times" and that they had frequent contact via telephone calls during his period of imprisonment. The overall picture, during a period of over six years' detention, before his release on immigration bail on 7<sup>th</sup> October 2019 (he was subject to immigration detention between June and October 2019) is of no visits from his brother; some visits from his mother and some visits from his son, although, as his brother makes clear, by the time of his release, the appellant and his son did not really know one another. He was then recalled to prison, after his licence was revoked, on 20<sup>th</sup> December 2019, so just over two months later.

34. In anticipation of his release from prison on licence in June 2019, before his recall, a later OASys assessment at page [297] AB, §R 7.1 records:

*"Previous OM [offender manager] had a conversation with [appellant's partner] on 29/05/2019. She advised that she is happy for Quadri to have contact with their son following his release from prison but she does not want this to be unsupervised contact. She said that the contact would be supervised either by herself or Mr Ogunkoya's mother or brother. [Appellant's former partner] advised that [child] stayed with his paternal grandmother every other weekend in [London Borough - location omitted]. She particularly does not want Quadri to take their son out in public unsupervised. [Former partner] says that she is concerned that [child] does not really know Quadri as he has been in prison for 5 years so she is concerned [child] will initially be uncomfortable around his dad. She is also concerned about Quadri's offending history and violence and although she does not think he would purposefully put [child] at direct risk, she would be concerned that [child] could be caught up in conflict or witness something should anyone approach Quadri out in public e.g. in the street, on the bus etc."*

35. While I find that there was been some contact between the appellant and his son during his imprisonment, the nature of that contact was not such that the child, who was an infant when the appellant was imprisoned, really knew his father until he was released in October 2019. The son was then aged nearly seven.

36. In terms of other aspects of the appellant's integration in the UK, the OASys report also sheds light on the appellant's lifestyle before his imprisonment, and also his behaviour whilst in prison. In relation to the

latter, the appellant had numerous adjudications including in relation to serious matters. The OASys report states at page [280] AB:

*“Behaviours in custody remain indicative of negative attitudes. He has received a high level of adjudications in custody. Those below are from 2019-2016, please see previous OASys for further adjudications”.*

37. For the sake of brevity, I do not recite them all (and indeed there are earlier adjudications before 2016) but for the period from 2016 to 2019, they include administering a controlled drug to himself or failing to prevent the administration of a controlled drug to others; possession of an unauthorised article; possession of a large amount of medication; fighting; refusing to give a sample for a mandatory drugs test; and possession of cannabis. The report goes on to state that while there had been a reduction in the appellant’s violence since he had attended a ‘self change programme’, he continued to use violence when in conflict, challenging authority and there was continued non-compliance, as well as ongoing substance misuse. The potential for positive change was caveated by concerns over whether improvements would be sustained. The offender manager also noted concerns that the appellant’s attitude towards his licence and supervision had become worrying, with him breaching his supervision terms several times within a very short period. Ultimately, this resulted in the appellant being recalled to prison in December 2019, only two months after his release from immigration detention.
38. In terms of the wider picture, the OASys report records the appellant’s GCSEs and also records his assertion of never having secured paid employment, but having completed a catering course through the prison service scheme as well as working as a prison cleaner. The report made clear that the appellant was not the subject of any immigration bail conditions which prevented him from working but despite this, he had not apparently engaged in any purposeful activity in the community. Since recall he had told prison staff that he did not wish to engage with prison education or training activities and had never worked. He asserted that he did not have income or employment and implied that his family were supporting him, which those supervising him regarded as questionable. They were concerned about the level of financial support that the appellant might in fact have. The report continues at page [266] AB:

*“Previous records indicate significant concerns with Mr Ogunkoya’s finances due to his aspirations for a wealthy lifestyle without working towards it in a coherent manner. These concerns have been prevalent in assessments undertaken by various agencies including the Youth Offending Service where he has previously admitted to ‘having his own way of getting money’ which was recorded in 2007. The question remains whether Mr Ogunkoya will seek to fund a luxurious lifestyle through offending if he finds it difficult to use legitimate channels. Mr Ogunkoya’s presentation, in relation to his expensive clothing continued to raise concerns about the suspected illegal earnings as a source of income. Concerns around finances were seen as a concern. Also noted during the commissioning of this offence and previous offending behaviours, bottles of expensive spirits are usually purchased*

*(Jack Daniels and Courvoisier) in addition to cab fares, none of which would have affordable on declared income ...*

*At the point of recall, Mr Ogunkoya had failed to claim universal credit or remain on top of his service charge at the AP [accommodation], but was consuming expensive alcohol regularly and claiming to be travelling across London to see his son on a daily basis. At the point of recall, his AP key worker had noticed him wearing an expensive looking pair of trainers which he said cost £700. Questions were therefore raised over his access to funds. He faced no immigration bail restrictions in his ability to work or claim benefits but was unmotivated to do either. Based on the index offence as well as the concern surrounding his behaviour following release, finances are assessed as linked to a potential risk for future harm and offending."*

39. In terms of other aspects of his lifestyle, at page [400] AB, §R6.2 of the OASys report, the offender manager considered not only the appellant's convictions but also his arrests and charges, albeit some years previously between 2005 to 2007. He had been charged with possession of an offensive weapon, witness intimidation, robbery, wounding with intent, ABH and a racially aggravated public order offence. The manager also noted that the appellant was shown as an active member of the "Notoriously Minded Gang", with links to major drug suppliers. The group were known for aggressive behaviour towards the police and other authorities, as well as violent offences. I note that the appellant disputes any knowledge, let alone any membership of that gang but I am not persuaded that his assertion is a reliable one. The OASys assessor has concerns about the appellant's candour and honesty. The source of money for the appellant's lifestyle has already been referred to. The report also refers to his honesty in the context of his alcohol consumption. At page [260] AB, the report notes the background of alcohol use:

*"Mr Ogunkoya has a history of interpersonal violence and has previously been known to carry weapons, this behaviour has been displayed both in the community and whilst in custody.*

*His extensive criminal history clearly demonstrates a pattern of an expressive [sic] use of violence, with the majority of such behaviours occurring within the group context. However, these behaviours appear to be catalysed through the use of alcohol, which remains a consistent and recurring feature within his offending profile, with the violence at times being disproportionate to the originating issue. Further exploration of this behaviour ... demonstrates a distorted use of his emotional management, which has led to a propensity to resort to violence. This behaviour may likely be a way of securing respect from his peer group and as a means of attracting attention to enhance his credibility with known others. ... Mr Ogunkoya had been recalled to prison on 21/12/19 for non-compliance with his licence due to several incidents of him consuming alcohol excessively and not accessing support. In addition, his alcohol was linked to the index offence."*

40. The offender manager noted at page [278] AB, that despite attending alcohol and substance dependency courses in 2016 with positive feedback, he had failed to implement any of the tools or the learning

secured, “contrary to his assertion, as was evident through his behaviours in custody following the programme.” He went on:

*“it remains clear that there has been a reduction in the number of violent incidents, there is continued use of violence when in conflict to challenging authority and continued non-compliance, as well as ongoing substance misuse ...could suggest that he [was] struggling to implement learning from previous offender behaviour programmes. This remained the same at re-release... Since re-release Mr Ogunkoya has shown a poor ability to recognise problems....he has repeated similar...behaviours that led to his recall in 2019, including alcohol and (suspected) cannabis misuse and breaching his curfews. ....This behaviour is worrying especially as he has such a short period of supervision in the community. “*

41. Returning to the issue of the appellant’s honesty, on at least two occasions, in the context of alcohol consumption, this issue was raised. Following his release in October 2019, the OASys report states:

*“... on 10/10/19, only 3 days after his release, Mr Ogunkoya returned to the AP 1 hour and 15 minutes late for his curfew, in a highly intoxicated state. He was not wearing any clothes on his top half, he was very unstable and he failed to comply with an alcohol test. ... Staff were so concerned that they placed him on hourly monitoring. Since this time, Mr Ogunkoya has continually returned to the AP under the influence of alcohol. ... On the day of re-release (3/3/21) Mr Ogunkoya had missed his afternoon sign on time of 2pm (despite having enough time) and returned to the AP that night heavily under the influence of alcohol ... and smelt strongly of cannabis. He explained that this was a one off and his alcohol tolerance had lowered since being in custody. He received a manger’s warning...”.*

42. On 14<sup>th</sup> November 2019, as recorded at page [316] AB, the appellant received a warning from his probation officer on 14th November 2019 following “dishonesty” around attendance at a dependency programme. This was explained further in a “recall” report (separate from the OASys report) at page [439] AB. The appellant had probation appointment on 6th November 2019, but had failed to attend. He made contact the following day to state that he had an appointment with the alcohol agency, WDP which he had attended instead. However, it came to the assessor’s attention that he had not attended WDP. On the same page, the author highlighted suspicions that the appellant was being dishonest about the level of contact with his son. He claimed to be unable to afford to attend agency appointments, but was also claimed to be dropping off and picking up his son every day from school, without an explanation of how he could afford this.
43. On 18th December 2019, he had had a further appointment with WDP but called them on that day to say he was attending his son’s nativity play. Queries were raised given he was likely to have had notice of his nativity play and had not rearranged his appointment. On the same day he returned to the accommodation and gave a reading of 34/100 on the alcohol test, as confirmed in the OASys report. for him. It added at page [268] AB:

“For example on 18/12/2019, Mr Ogunkoya had an appointment with the alcohol agency but called on the day to say he was attending his son’s nativity play. On the same day he returned to the AP and gave a reading of 34/100 on the alcohol test. ... The risk is in relation to lifestyle and associates as well as his alcohol consumption and indirect impact on children. “

44. The recall report concludes:

*“Overall, it is felt that Mr Ogunkoya’s level of engagement has been superficial and at times dishonest, with a lack of motivation to engage with any work designed to address his offending behaviour and support him in his resettlement.”*

Assessed risk of reoffending

45. In the OASys report of 7<sup>th</sup> July 2021, (but completed on 3<sup>rd</sup> April 2021), it assesses the risk of serious recidivism, namely serious reoffending the next two years, as of April 2021, as high (page [254] AB). At page [308] AB, the report assesses the appellant as presenting a high risk of serious harm to members of the public in the community and a medium risk of causing serious harm to known adults. The Parole Board decision of 12<sup>th</sup> November 2020, which was to recommend the appellant’s re-release, nevertheless referred to the appellant appearing to “*minimise the number of occasions and the amount of alcohol that [he] had consumed*” ([329] AB) and whilst in recall custody, he had shown mixed behaviour, both positive and negative. He had helped to stop fighting on a prison wing and had engaged with the substance misuse agency whilst in prison. While it noted his attempts to curb his violent behaviour, the Board was concerned that there remained the risk of harm, but this could be managed though licence conditions. The Parole Board panel referred to the medium risk of general non-violent reoffending.

Circumstances since re-release in March 2021

46. Since the appellant’s re-release from prison and then immigration detention on 3<sup>rd</sup> March 2021. Mrs Ogunkoya conceded, when she gave oral evidence, that he frequently leaves home, to be with friends and she does not know precisely what they are doing or who the friends are. She asserts that the appellant has matured and has changed his lifestyle and no longer associates with pro-criminal peers. However, I note that in her witness statement dated 30<sup>th</sup> September 2019, before his later recall to prison for repeatedly breaching the terms of his licence only a few days after her statement, Mrs Ogunkoya had also asserted that he had matured, that she had seen a change in him and he was ready to integrate into UK society. She explained that her current, renewed view that he has changed is because he has promised her that he has. Similarly, whilst Kamarudeen, the appellant’s brother, is aware of part of the appellant’s circle of friends because of common acquaintances, he said in oral evidence (and I accept) that he is not aware of any friends who may be gang members or pro-criminal peers. Neither was able to comment on how the appellant may be able to fund a lifestyle that he could not afford,



except that Kamarudeen commented that he has lent his brother clothes in the past, which have some bearing in relation to expensive trainers (although he did not comment directly on that). Kamarudeen accepted that while the appellant and he have some friends in common, they do not regularly socialise together. Kamarudeen does not live all of the time at his mother's home, but also has a separate address with his own children.

47. While the appellant sees his son every other weekend when that son comes to stay with Mrs Ogunkoya and at various points, for example to pick up the son from school, I am not satisfied there is evidence that the appellant drops off and picks up his son every day. I have already referred to the recall report, which doubted the veracity of this claim. Moreover, there is correspondence from the son's school, whom it is unnecessary to name, at page [74] AB, dated 21<sup>st</sup> June 2021, which does not suggest a regular drop-off or pickup, but instead stated that on one specific date in June 2021, months after the appellant's release in March 2021, the appellant picked up the child from the school and had permission to collect him from school in the future. If the appellant regularly dropped off and collected his son, there is no reason why the letter would not have stated this.

48. The appellant claimed, at least initially, that he had never carried out paid work. However, on the appellant's own case, the facts appear to be more nuanced. Dr Ziyal records at §4.4, [562] AB:

"I asked him if he ever worked, and he said he had not; he had been in and out of prison. I asked if he was working now. He said 'yes, I am working at my friend's butcher's shop. I cut meat for customers, I do cleaning, it is not my ideal job but I appreciate it. It is my first ever job.' I asked him what kind of job he would really like. He said: 'I would like to be a manager, managing artists and musicians. I love music. I don't play any instrument but I would like to learn to guitar. I am good at making connections, I have connected with people in this country and in other countries ...'."

At §4.7, Dr Ziyal continues,

"I asked him if he was on benefits and if yes, how it fitted with him working at his friend's butcher's shop. He said he was on benefits and the butcher's shop was not a real job, it was only part-time."

49. The appellant confirmed in oral evidence that in fact he worked a couple of days each week in the friend's shop, 'cash in hand'. I note, the appellant also stated in his most recent witness statement of 7<sup>th</sup> July 2021 at page [10] AB:

*"10. Since my release from prison I have been to the Job Centre to look for work. I applied for and am now in Universal Credit. It has however been hard to get work because of my criminal record and lack of education. Also, employers want proof of ID so it has been difficult to secure a job through the Job Centre as I do not have this. The Job Centre basically told me that because I am on licence, it will take them longer to assist me in resolving this issue, as ordinarily if you are still on licence the probation service would assist and quicken things up. So I do still not have an ID.*

11. *I have however managed to get a job in bricklaying and construction, however due to lack of an ID this work is cash in hand, not a formal job. I am happy I am working now as I want to work. I work as an industrial bricklayer. I have been doing this since April 2021. The Job Centre is still trying to help with ID but they seem to be struggling."*

50. In oral evidence, the appellant sought to resile from these comments, saying that there had been a confusion between this and the butcher's shop job. He said that he had in fact obtained a construction industry ID card or 'CSCS card', with which this Tribunal is familiar, but was unable to work, he believed, because of his bail conditions. In contrast, he told Dr Ziyal in interviews with her in November and December 2021, as recorded at §4.8 of her report at [562]:

"I asked him what his work plans were in realistic terms. He said, 'I want to get into construction or railways. But I have no qualifications. There are some online courses and I am planning to definitely do them and take the tests'."

51. I do not accept the appellant's contention that he was confused as to his evidence in his written witness statement that he has worked 'cash in hand' in construction. This is consistent with him working 'cash in hand' at the butcher's shop, and allows him to claim benefits, without declaring his income. The appellant's claim that he has not worked because he did not have the right to do so is not consistent with what he told Dr Ziyal, which relates to a lack of qualifications. I find that he juggles two 'cash in hand' jobs and claims Universal Credit as someone without work. This is part of a consistent pattern of his unwillingness to disclose fully his financial means and the financial support available to him.

52. The existence of the second role in construction is also important when considered with the job at the butcher's shop, it undermines Dr Ziyal's conclusions in relation to the appellant's ability to obtain jobs.

### Dr Ziyal's Report

53. I turn to Dr Ziyal's report, about which I make a number of general observations. Whilst she is a clinical psychologist dealing with trauma and PTSD and her credentials have not been attacked, Ms Cunha was clear that as per the recent authority of HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC), she disputed material aspects of the analysis and conclusions reached. .

54. First, whilst Dr Ziyal has made a diagnosis of autistic spectrum disorder, or 'ASD', (she discounted the appellant's concern that he was dyslexic) Dr Ziyal does not explain any specific background experience in educational psychology or anything of that directly pertains to ASD, although she has experience of general clinical psychology. Instead, her expertise appears to relate to matters relating to trauma, brain injury and PTSD. I canvassed two questions with Ms McCarthy. The first was Dr Ziyal's comment on the risk of suicide, if the appellant were deported to Nigeria. The second was her discussion of obstacles to his living there. Dealing with the first issue,

Dr Ziyal carried out an assessment in respect of the appellant's self-reported depression and anxiety at page [552] AB onwards. At §1.16 (page [552] AB) she made clear that this was a self-assessment by the appellant. At §1.18, she continued:

"1.18 The three psychological difficulties [characteristics of personal history, background and socio-cultural heritage; a strong possibility of autism or the presence of autistic traits; and an 'inability' [sic] of mood, with current markers of moderately severe levels of depression and anxiety] would certainly disrupt his ability to adapt to and integrate into the culture, norms and customs of a country he does not know and has never been in. They will prevent him from belonging, participating and feeling part of the context into which he will be deported.

1.19 Indeed, deportation may cause these three psychological [sic] to immerse Mr Ogunkoya in a severe grief reaction, exacerbate his autistic propensities, active his anger and aggression, destroy any adaptive capability which he is currently attempting to develop, and increase to severe his risk of relapse into criminal activity to self-harm and/or suicide."

55. The conclusion in relation to the latter is significant, but is also surprising in the context that not only are there no medical records, but Dr Ziyal did not consider the absence of any medical records as important. The appellant's oral evidence is that he has never sought or received any treatment for any mental health issues. As Dr Ziyal makes clear at §3.17, page [557] AB, the comments about anxiety, depression and worsening of those conditions is based on standardised methodologies, the 'patient health questionnaire' or 'PHQ 9' and 'General Anxiety Disorder' scale or 'GAD-7'. The limitations of such methodologies were made clear in the reported case of HA (expert evidence; mental health) Sri Lanka. In particular, HA confirms at §136 that a reader of the appellant's relevant 'scores' in that case, based on PHQ-9 and GAD-7 would think them to be diagnostically significant. The respondent's expert's evidence, which this Tribunal accepted in HA, was that these tests were not diagnostic. Even in purely clinical settings, these tests could only provide an indication of whether someone might be suffering from a mental health problem. In medico-legal settings, the expert said that it was he says that it is "*wholly possible to provide whatever answers someone wants to in order to appear as ill, or as well, as the person wants to.*" (§137).

56. §139 of HA continues:

"139. Overall, we considered that Professor Greenberg to be an impressive witness. Apart from one inconsistency in respect of the issue of hallucinations, Professor Greenberg's written and oral evidence was cogent, detailed, consistent and balanced. On the issue of the significance of the PHQ-9 and GAD-7 tests, we prefer the evidence of Professor Greenberg. The reservations he expresses regarding those tests coincide with the assumption which a layperson could make about them; namely, that it is possible for a person deliberately to score themselves higher or lower than they honestly feel at the time of taking the test."

57. At §§159 and 161, 162 and 165, HA also states:

*“159. It is trite that a psychiatrist possesses expertise that a general practitioner may not have. A psychiatrist may well be in a position to diagnose a variety of mental illnesses, including PTSD, following face-to-face consultation with the individual concerned. In the case of human rights and protection appeals, however, it would be naïve to discount the possibility that an individual facing removal from the United Kingdom might wish to fabricate or exaggerate symptoms of mental illness, in order to defeat the respondent’s attempts at removal.”*

*161. Accordingly, as a general matter, GP records are likely to be regarded by the Tribunal as directly relevant to the assessment of the individual’s mental health and should be engaged with by the expert in their report. Where the expert’s opinion differs from (or might appear, to a layperson, to differ from) the GP records, the expert will be expected to say so in the report, as part of their obligations as an expert witness. The Tribunal is unlikely to be satisfied by a report which merely attempts to brush aside the GP records.*

*162. In all cases in which expert evidence is adduced, the Tribunal should be scrupulous in ensuring that the expert has not merely recited their obligations, at the beginning or end of their report, but has actually complied with them in substance. Where there has been significant non-compliance, the Tribunal should say so in terms, in its decision. Furthermore, those giving expert evidence should be aware that the Tribunal is likely to pursue the matter with the relevant regulatory body, in the absence of a satisfactory explanation for the failure.*

*165. If the Secretary of State does not agree the contents of the expert report, she should promptly inform the appellant and the Tribunal. In such an event, the appellant will need to make arrangements for the expert to give oral evidence and be cross-examined by the Secretary of State’s representative. The availability of technology to facilitate the giving of expert evidence by video should enable even busy professionals, such as consultant psychiatrists, to give evidence from their offices, without significantly delaying the holding of the hearing.”*

58. I asked Ms McCarthy whether there it was necessary to call Dr Ziyal to give evidence and she confirmed that it was not.

59. The weakness in Dr Ziyal’s analysis and conclusion on anxiety, depression and the risk of suicide is two-fold. First, her analysis heavily relies on the PHQ-9 and GAD-7 scores, to reach the conclusion on suicide risk, when these are not diagnostic methodologies. Second, they are made without considering the absence of medical records, which was only explained when the appellant was asked in oral evidence. The absence of medical records is because he has never sought or received medical treatment in respect of his mental health, let alone a risk to health as severe as suicide. Dr Ziyal refers to the appellant as possibly having a chronic emotional state, but does not explain why this never manifested, or was previously described, in the turbulent circumstances of the appellant’s offending and lengthy detention. The only medical treatment the appellant has sought and received appears to be a common-place skin ointment.

60. There are two other aspects of Dr Ziyal's report which are, in my view, wholly inadequately reasoned. The first is the discussion around how the appellant would integrate in Nigeria. In the context of the diagnosis of ASD, Dr Ziyal says that this feature, as well as his anxiety/depression and difficult personal background would prevent him from belonging, participating or feeling part of the context in his country of origin. At §3.36, page [560] AB, Dr Ziyal states: "*[these psychological difficulties] will prevent him from belonging, participating in and feeling part of the context into which he will be deported. He is unlikely to be accepted because he will be viewed as having abandoned or betrayed his country of origin.*" [My emphasis].
61. The meaning is clear. The obstacles to integration are not only the appellant's mental health issues, but how Nigerian society would perceive him as an outsider. Dr Ziyal provides no basis or explanation for this conclusion. Nowhere in her CV is there any indication of her knowledge of Nigerian society and how it views returnees. This is, in my view, a clear indication of Dr Ziyal's comments crossing the line from giving expert evidence as an independent expert, to assuming the role of an advocate on the appellant's behalf, precisely the trap into which the expert in HA fell.
62. I am also satisfied that in fairness to Dr Ziyal, the appellant has not provided her with the full picture of his circumstances. She was aware, through probing, of the appellant working in a butcher's shop but not, as I have found, in construction work. She has suggested at §3.32 and 3.33 (pages [559] and 560] AB) that by virtue of his presentation at interview he would be unable to formulate and follow an effective job search. She puts that in the context (as recorded at §3.8, page [555] AB) of him not amassing a "*capital of knowledge or affording him the opportunity of developing problem-solving or logical thinking/reasoning skills.*" However, this would not explain the appellant's ability to get his CSCS card, get a job and work cash in hand in the construction industry. Whilst I am just about prepared to accept the diagnosis of traits of autism, I place no weight at all on the self-diagnosis of anxiety and depression and in particular, Dr Ziyal's unexplained comments as to how Nigerian society would perceive the appellant or, in the context of that anxiety and depression, that there would be any risk of a worsening of either condition, up to and including a risk of attempts at suicide; or the impact of ASD on the appellant's ability to obtain work. These are in my view overstated and without proper diagnostic foundation.
63. I return to the appellant's circumstances following his most recent release from immigration detention. He is living at home now with his mother. She is not aware of his whereabouts every day with his friends and whilst he has not offended since March 2021, I do not see that the lack of offending for such a short period casts into doubt the OASys risk assessment. The risk, if it crystallises, is of violence, including weapons, on one occasion, an imitation firearm and on a number of occasions, knives. Whilst I accept that the appellant now appears to accept the

consequences of his actions on his victim in the index offence, and those risks are being managed with licence conditions, the concerns that the Probation Service identified of his minimising his use of alcohol and his lack of addressing this, remain. His alcohol misuse was an important risk factor identified by offender managers. The other core risk was around association with pro-criminal peers and neither Kamarudeen or Mrs Ogunkoya have any detailed insight into the people with whom the appellant spends his days currently.

64. I have no doubt that the appellant does spend every other weekend with his son and that they have a genuine and developing relationship. As Kamarudeen also described, the son has no special educational needs, is healthy and progressing well. Kamarudeen expressed the view that whilst he has a close relationship with the appellant's former partner and the appellant's son, he has his own partner and children and he could not be a replacement father to the appellant's son. He explains that in his view, the appellant's removal would have an important and damaging effect on the appellant's son, who since the appellant's release in March 2021 has got to know his father once again. This is also consistent with the witness statements of the appellant's former partner. She confirms the genuineness of the parental relationship and the importance of the emotional support provided by the appellant to his son. It is not suggested that he provides any substantive financial support or anything by way of practical day-to-day assistance but he is nevertheless there in person, at an important stage of the child's upbringing. However, it is important to note that the child has lived and has been brought up by his mother, largely in the appellant's absence, in his mother's accommodation and with visits to Mrs Ogunkoya. He has a stable and wider support network with Mrs Ogunkoya, Kamarudeen and the son's maternal family. Whilst I do not minimise the importance of the appellant's role as a father, the entirety of the practical arrangements for the child's upbringing and the majority of his support network remains focused away from the appellant who, whilst carrying out an important role, has only recently developed that role. Before the appellant's release in October 2019, his son did not really know him (in the son's mother's words).
65. For the majority of the period when the appellant was in prison it appears that the appellant maintained contact with his son via telecommunication needs. I accept Ms McCarthy's submission that were the appellant deported, the practical impact would be that the appellant's son would not travel to visit the appellant in Nigeria. The appellant's mother has no connections there and, at least in the short term, the appellant will need to re-establish himself through whatever support network he is able to develop there in a country that is also largely unfamiliar to him. At the very best, any continuation of the parental relationship will only be able to be by means of modern social communications and also no doubt with an ongoing connection via Mrs Ogunkoya. The impact on the relationship between the appellant and his son, such as it has developed since his initial release in 2019 and then subsequently upon recall and rerelease from March 2021 will therefore be highly significant. His role will be as

limited, if not more so, when he was detained for over six years and in the context where that child was at a very, very young age, at least for the first part of the appellant's imprisonment. Given the duration of the appellant being barred because of a deportation order (ten years) the appellant will unquestionably be absent during a critical period in his son's upbringing. I also accept Ms McCarthy's submission that Kamarudeen cannot, in that sense, be a replacement for the appellant, although I have no doubt that Kamarudeen, as both an impressive witness and as a person of significant community responsibility, will do his utmost to ensure the appropriate upbringing of the appellant's son.

66. In terms of the appellant's connections to Nigeria, I first of all accept that the appellant himself has very limited knowledge of Nigeria. He has never visited there and on his own account, was only contact with an uncle who lived in Nigeria, until that uncle died in 2017. However, I also find that by virtue of Mrs Ogunkoya having ongoing, regular communications and good relations with the appellant's three adult half-siblings, of Nigerian origin, who live in Ghana, the appellant will have a sense of Nigerian society although this will inevitably be through the lens of his mother, who herself has not returned to Nigeria since 1988. I do not accept the contention that the fact of the appellant only being able to speak English will necessarily be a bar to him. I do accept that the appellant's return to Nigeria will be to a largely unfamiliar society, where both a network of support and the appellant's own resourcefulness in establishing himself in that country will be critical. As I have already indicated, I do not accept that the appellant is without practical work experience. He has worked in a butcher's shop, in construction and has a food qualification. He is literate and numerate, with five GCSEs including Maths and English. As the OASys report also reflects, I do not regard him as somebody who is candid about the extent of his financial means. In that regard I do not suggest that Kamarudeen and the appellant's mother are untruthful as to their limited financial means but I am satisfied that the appellant has both worked and has also a network of friends and associates, who may not all include pro-criminal peers, who would be willing to provide him with significant financial support, at least initially upon establishing himself in Nigeria. I do not accept Dr Ziyal's assessment that the appellant's return would prompt an exacerbation of any anxiety or depression or any risk of suicide. As I have indicated, I am prepared to accept that the appellant has autistic traits but I also take into account the appellant's resourcefulness and the ability to have worked previously.

### Applying the law to the facts

#### Private life

67. In respect of the appellant's private life, of significant weight is the fact that he has only ever lived in the UK and his connections with Nigeria are, at their highest, tenuous via relatives who are currently living in Ghana. Until certainly secondary school, he appellant was socially and culturally integrated into the UK and continued to be so whilst he was at pupil

referral unit, not withstanding his initial caution for shoplifting. Notwithstanding also the rapidly escalating serious criminal offending from when he was 16 until quite recently with a small period of gaps, and in periods where the appellant clearly had oppositional attitudes towards both the law and in relation to those in authority (noting numerous offences regarding police officers), I am just about prepared to accept that the repeat offending has not severed the social and cultural integration between the appellant and the UK. In doing so, I reflect on Kamarudeen's evidence that not all of the appellant's friends are pro-criminal peers and they have common friends who are not. The appellant, whilst still offending, also, for example, worked for the Kids Company project and was least willing to engage in various courses whilst in prison, despite the repeated and quite serious adjudications against him. As the OASys report comments, the picture with regard to the appellant is mixed. On the one hand, there is the serious offending from the ages of 16 until the index offence; his adjudications in prison, his breach of licence and recall to prison, the continuing risk he poses to members of the general public and his alcohol misuse. On the other hand, he has lived in the UK for the entirety of his life, has non-criminal friendships, has attended courses while in prison and has worked. Weighing all of the factors, I am just about to prepare to accept that he remains socially and culturally integrated into the UK.

68. What I do not accept is that there are, even in that context, very significant obstacles to the appellant's integration in Nigeria. To reiterate, I am acutely conscious that the appellant has never been to Nigeria. I also bear in mind the 2021 US Overseas Security Advisory Council (OSAC), Nigeria, starting at page [576] AB, to which Ms McCarthy referred me, the prevalence of crime and at page [586] AB, that westerners and foreigners in general are susceptible to kidnapping, injury, or death in locations prone to targeting by Boko Haram, ISIS-WA, Ansaru, and other armed groups. There are pressures on housing and infrastructure (page [591] AB) and the appellant would not be assisted as a lone male by the government and NGOs, targeted at other vulnerable groups. He would not be able to access personal connections or ethnic clan group support within Nigeria, which is relevant to his ability to find work in an economy with high levels of unemployment.
69. I am conscious that as a result of the diagnosed autistic traits he may have a marginally greater difficulty in adapting than for those without such traits. There is also a suggestion that he has been institutionalised whilst he is in prison and lacks of maturity.
70. Against all that, I note that the appellant is a person of significant fortitude. By that, I contextualise the appellant as someone who, whilst in prison, has been able to gain some work experience and qualifications, despite the challenging environment in which he has lived. I am also not satisfied that he has been candid about his financial means and I believe that they are substantially greater than he is willing to disclose. In summary, he would be returning to Nigeria as, very broadly speaking, a fit,



healthy person, albeit with some personality traits that present risks including his use of alcohol and his pro-criminal proclivities, but also as somebody with work experience and at least initially, a significant degree of financial and emotional support, at least from UK supporters, who would be willing to help him establish himself in Nigeria. Whilst the appellant's mother discounted any possibility of support via the appellant's half-siblings in Ghana, she maintains regular support with them and whilst I accept Ms McCarthy's proposition that they owe the appellant nothing, I am not satisfied that they would be unwilling at least to guide the appellant as to how to establish himself in Nigeria, nor would they lack of knowledge of Nigerian society, however long they may have left that country. There is therefore a basis for the appellant to learn how Nigeria works, as an insider, with the financial and practical means to do so. Whilst I have no doubt there would be obstacles, they are ones that I do not categorise as coming close to being very significant.

71. However, I am conscious that that is not the end of the matter for the purposes of very compelling circumstances in relation to private life. The starting point is that the deportation of foreign criminals is in the public interest. I am conscious, as Ms McCarthy urged me to consider, the weight attached to the public interest is not fixed. The fact that the appellant has resided in the UK for the entirety of his life must be a significant matter, as is the appellant's mother's previous ability to have applied for naturalisation when the appellant was a minor in circumstances where his mother did not pursue that option, and for which the appellant cannot be criticised. The appellant has not reoffended since re-release in March 2021 and he has a circle of friends which is broader than pro-criminal peers. He has also some work experience and I have no doubt that if he chose to do so, the appellant would be able to obtain lawful work in the UK, although he has demonstrated limited inclination to do so where he has the financial support and the apparently ready access to lucrative criminal activities in the UK. The quality of that private life in the UK is such that, as already indicated, he remains socially and culturally integrated in the UK. He was born here, schooled here and, despite his significant periods of imprisonment, has reintegrated into UK society. Weighed against that are a number of weighty factors. The first is the index offence in question which, involving the use of an imitation firearm, is significant. While he has not committed such a serious offence since, he has also been in prison or detention for most of the period since. His adjudications are also serious, having been involved in rioting, possession of various banned substances and assault. His risk profile remains as one of posing a continuing risk of serious harm to the public. He has limited insight into a number of the risk factors, in particular his association with pro-criminal peers and his use of alcohol, with him reasserting even in evidence to me that he has never had an alcohol problem. His offences repeatedly involve violence, including knives and an imitation firearm. He has not, in my view, as reflected in the review of both the OASys assessment and the Parole Board report, substantively addressed his offending. The offending is over a very lengthy period of escalating

seriousness, despite having a partner and young child at the time. He repeatedly breached his licence terms despite his expressed desire to forge a new relationship with his son. There would not be very significant obstacles to his integration in Nigeria.

72. I am satisfied that notwithstanding his having lived in the UK for the entirety of his life, given the particular circumstances of this case, there are not very compelling circumstances over and above 'Exception 1' in respect of the appellant's private life, such that refusal of leave to remain would breach his right to respect for his private life.

### Family life

73. Turning to the appellant's family life, the starting point is that the appellant has a genuine and subsisting parental relationship with his son. I take into account that son's best interests for the purposes of Section 55 of the Borders, Citizenship and Immigration Act 2009 and that these are for the appellant to remain in the UK, as he is not a risk to his son. I am also conscious that the effect of deportation would affect not only the appellant's son but also indirectly the son's mother who will need to deal with the day-to-day circumstances following the appellant's removal. I am conscious that there is "no norm" for any child and that a child in ordinary circumstances may nevertheless be affected in a way that is unduly harsh as a result of a person's deportation. I have no doubt that the effect of removal on the appellant's child will be deeply distressing. They have a genuine and close relationship, developed albeit with the appellant as a non-resident father in a relatively brief period, interrupted by the appellant's recall to prison. I am also conscious that whilst the appellant and his son remained in contact whilst in prison, this was always in the context that there would be some eventual resolution of that and the appellant would see his son in person, if they both wished. In contrast, for the duration of any bar on re-entry to the UK, the appellant's son will be substantially deprived of in-person contact with his father and Kamarudeen's example and involvement, however commendable, cannot replace the appellant. Nevertheless, I do not accept the effect on the appellant's son will be unduly harsh. Once again I take as a starting point that deportation of foreign criminals is in the public interest. I also take into account the paucity of evidence in relation to that son. I have heard evidence in relation to regular visits to Ms Ogunkoya every other weekend and also Kamarudeen's no doubt genuine belief that the appellant's son has blossomed since developing a relationship with the appellant. However, there is no social worker report (there is not always a need for social worker report) nor any comment from the child's school on the impact or involvement that the appellant has had in his son's life. There was a statement from the formal partner which supports the appellant, but nevertheless from an educational and welfare perspective I am not persuaded that the appellant's removal would have such effect as would have an impact on the appellant's son, in terms of causing him, for example, a detrimental engagement with school or welfare issues. Put simply, it would be significantly distressing for him but it is one with which

it would be a return to a setting that he has lived in for the vast majority of his life with his mother and with a wider, stable support network in the UK. The important qualitative difference will be the change from the immediate circumstances of face to face contact to social media only, and the fact that the appellant's son will be prevented from seeing his father during important years in his development. That does not, however, in my view amount to unduly harsh consequences. I have no doubt that the appellant's son will continue to thrive without his father in the UK, with the guidance and support of his wider UK family.

74. Turning finally to the question of very compelling circumstances in the context of the appellant's family life, I consider the "balance sheet" approach to assessing it. I am conscious of the appellant's son's best interests. The effect of the appellant's removal will be distressing for the son and would be against those best interests. He is unlikely to see his son in person for many years. The appellant has never left the UK and has been lawfully resident and could have naturalised many years ago in the UK. He has no family in Nigeria and will need substantial support to set himself up in Nigeria. Weighed against this, I bear in mind the seriousness of the appellant's offending, in the context of a long history of violence, including the possession of knives and the continued risk that he presents to members of the general public. The public interest in the appellant's deportation is significant. While the appellant has made some very recent efforts to curb his violent behaviour, the message on rehabilitation is, at best, mixed and limited. He continues to pose a risk of serious harm, as already outlined. He will also continue to be able to contact his UK family (including Mrs Ogunkoya, Kamarudeen and his son) via social media.
75. In summary, there is nothing qualitatively in the factors I have already set out, which I have considered in the context of "very compelling circumstances", which meet the high threshold for this test.
76. Accordingly, the refusal of leave to remain would not breach the appellant's right to respect for his family life for the purpose of Article 8 ECHR.
77. For completeness, I have also considered whether holistically, the family and private life issues together would amount to "very compelling circumstances". I do not recite all of the factors again, which I have considered holistically. Notwithstanding his period of residence and social integration in the UK, his relative lack of familiarity with Nigeria, relations with UK family members, including his son, I conclude that the public interest in deporting the appellant remains overwhelming, given the violent nature of his offending and the risk that he continues to pose to the wider community of serious harm.

## Decision

78. The appellant's appeal on human rights grounds is dismissed.

Signed: J Keith

**Upper Tribunal Judge Keith**

Dated: 27<sup>th</sup> June 2022

## **ANNEX: ERROR OF LAW DECISION**



IAC-FH-CK-V1

**Upper Tribunal  
(Immigration and Asylum Chamber)** Appeal Number: HU/15253/2019 ('V')

### **THE IMMIGRATION ACTS**

**Heard at Field House  
On 21<sup>st</sup> October 2020**

**Decision & Reasons Promulgated  
On**

**Before**

**UPPER TRIBUNAL JUDGE KEITH**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant/Respondent

**And**

**MR QUADRI BANDELE OGUNKOYA  
(ANONYMITY DIRECTION NOT MADE)**

Respondent/Appellant

#### **Representation:**

For the appellant/respondent: Mr A McVeety, Senior Home Office Presenting Officer

For the respondent/appellant: Ms K McCarthy, Counsel, instructed by Duncan Lewis Solicitors

### **DECISION AND REASONS**

#### **Introduction**

1. These are the approved record of the decision and reasons which were given orally at the hearing on 21st October 2020.

2. Both representatives attended the hearing via Skype, and I attended the hearing in-person at Field House. The parties did not object to the hearing being via Skype and I was satisfied that the representatives were able to participate in the hearing.
3. The Secretary of State was the respondent before the First-tier Tribunal, while Mr Ogunkoya resisted his deportation on the basis of a claim of respect for his family and private life in the UK. To avoid confusion, I will refer to the Secretary of State by that name and Mr Ogunkoya as the Claimant in this appeal.
4. This initially was only an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Herlihy (the 'FtT'), promulgated on 13th March 2020, by which she dismissed the Claimant's appeal on human rights grounds, by reference to respect for his family life, but she allowed it by reference to respect for his private life, such that there were very compelling circumstances over and above Exceptions 1 and 2 in section 117C of the Nationality, Immigration and Asylum Act 2002.

### **Background**

5. As recorded in the FtT's decision, the Claimant was born in the UK in 1989 to Nigerian national parents who were present without settled leave to remain. He was granted exceptional leave to remain in 2001 and indefinite leave to remain in 2007, in line with his mother. The Claimant then went on to commit a serious of offences, including the use of violence, as the FtT recorded at §[45]:

*"The [Claimant] has a total of 10 convictions for 18 offences including the index offence of robbery and possession of an imitation firearm, assault occasioning actual bodily harm, wounding, assaulting a constable, resisting arrest, possessing controlled Class A drugs with intent to supply, battery, possession of a knife/bladed/sharp point article in a public place and affray. In addition to the sentence for the index offence of 69 months and an extension period of 24 months following a previous suspended sentence, the [Claimant] has also received custodial terms of imprisonment of four months on 18 August 2006, six weeks in April 2007, 42 months for possession and supply of Class A crack cocaine in September 2007, and 14 and 16 months respectively for affray in 2010 and 2011."*

### **The Secretary of State's decision**

6. As a result of the index offence, for which the Claimant was convicted on 20th December 2013, the Secretary of State made a deportation order against the Claimant on 18<sup>th</sup> July 2017 pursuant to section 32 of the UK Borders Act 2007 and refused his human rights claim in a decision dated 27<sup>th</sup> August 2019. In doing so, the Secretary of State considered the sentencing remarks of the Judge in January 2014 as highlighting the 'significant risk posed by the [Claimant]', specifically a 'high risk of physical violence, of threatening behaviour with the use of weapons, both knives and a gun'. The Claimant had committed multiple infringements of prison rules whilst serving his sentence and the Secretary of State

concluded that the Claimant had made no effort to rehabilitate himself. Whilst he had a British national son, born in 2012, the Secretary of State noted that the Claimant was no longer in a relationship with his son's mother. The Secretary of State did not accept that the Claimant had a genuine and subsisting parental relationship with his son. Even if he had such a relationship, the Secretary of State did not accept that it would be unduly harsh for the Claimant's son to remain in the UK in the event of the Claimant's deportation. Whilst the Claimant had family ties in the UK with his mother, brother and other close family members, the Secretary of State did not accept that the Claimant had a family life in the UK with them for the purposes of article 8 ECHR.

7. The Secretary of State concluded that while the Claimant was born in the UK; had spent his whole life here; and he 'may' be socially and culturally integrated in the UK, the Claimant, now aged 30, had never worked and there was limited evidence of his integration in terms of any contribution to his local community or the wider UK society, and there would not be very significant obstacles to his integration into Nigeria. He would have been raised within a Nigerian diaspora household in the UK and it was inevitable that he would have extended family members living in Nigeria. The Secretary of State concluded that there were not very compelling circumstances over and above Exceptions 1 and 2 in respect of the Claimant's case.

### **The FtT's decision**

8. The FtT accepted the Secretary of State's case that the Claimant did not have a genuine and subsisting parental relationship with his son at §[38] to [41] of her decision. This was based on the lack of evidence about how often the Claimant had had any contact with his son during the extended period of time that he had been (and remains) in prison, i.e. since 2013. The FtT considered the appeal in the alternative so that even had there been such a genuine and subsisting parental relationship, the FtT concluded that it would not be unduly harsh for the Claimant's son to remain in the UK without the Claimant and live with his mother, who had been his primary carer for the last 7 years, without the Claimant. At §[43], the FtT concluded that there were not very compelling circumstances in respect of the Claimant's family life.
9. In respect of the Claimant's private life, the FtT noted that the Claimant had lived for the entirety of his life in the UK and had never visited Nigeria. He had been lawfully present for most of his life in the UK. The FtT concluded that the Claimant remained socially and culturally integrated in the UK and that integration had not been disrupted by virtue of his offending and it could not be said that he was integrated anywhere else (§[55]). She concluded that he remained integrated, notwithstanding her view that there was an absence of evidence of integration (§[49]).
10. The FtT was not satisfied that the Claimant had any family links to Nigeria, nor was there any evidence that if he had such links, that family members

would be willing to assist the Claimant (§[57]). The evidence before the FtT was that the Claimant had never secured paid employment, had limited emotional maturity and was, to an extent, now institutionalised, with a troubled upbringing. The FtT concluded at §[58] that there were truly exceptional circumstances outweighing the public interest in deporting the Claimant. She therefore allowed the appeal on the basis of the Claimant's human rights in respect of his private life.

### **The grounds of appeal and grant of permission**

11. The Secretary of State appealed on the basis that the FtT had erred in assessing the Claimant's integration by relying on his education in the UK, family ties and residency in the UK since birth. The Claimant had been excluded from school for disruptive behaviour at an early stage and his contact with UK relatives was limited. His lack of integration was demonstrated by his offending almost immediately after his release from prison, while remaining liable to being recalled (he was recalled in December 2019) and an OASys report which assessed him as a medium risk offender with the potential to commit serious harm due to his use of weapons. The Claimant had never been employed despite being 30 years old and had demonstrated no desire to rehabilitate. Even while incarcerated he had attracted a number of prison adjudications.
12. In terms of obstacles to his integration in Nigeria, the FtT had failed to analyse and apply the test of very compelling circumstances. Any difficulties in integrating establishing himself in a completely different environment were not sufficient. The Claimant spoke English and had completed a building course, and the FtT had found that the Claimant would have some knowledge of Nigeria (§[55]).
13. First-tier Tribunal Judge Saffer granted permission, regarding all of the grounds as arguable, on 20th April 2020.

### **The hearing before me**

#### **The Secretary of State's appeal - submissions**

14. The Secretary of State submitted that the Claimant posed a serious threat to the public, with a history of violence, including use of weapons. The OASys report had referred to at least a medium risk of offending with a high risk of harm, and the Claimant had no insight into his crimes. The FtT had recognised this.
15. Where the FtT had erred was first, in relation to integration. It was not enough that the Claimant had lived in the UK for the entirety of his life. He had been excluded from school at an early stage and his connections with the UK, both with friendship groups and family, were very weak. It was on that basis that the FtT had concluded that none of the facts in relation to private life were assessed as being in the Claimant's favour, in relation to



integration. The FtT had also erred in concluding, in the absence of integration in the UK, that he must nevertheless have remained integrated in the UK as he was not integrated anywhere else (§[55]). This was not the correct test to apply.

16. Second, in relation to difficulties and obstacles to the Claimant's integration in Nigeria, the FtT had erred in comparing the weakness of the links to family members in the UK with the absence of family links in Nigeria. If, on the one hand, there were an absence of family links or support network to overcome obstacles in the UK, it was no different in Nigeria. On the other hand, if the Claimant had a support network, there was no analysis of why that support could not continue in the event of the Claimant's removal to Nigeria.
17. I was also referred to the authority of Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 00415 (IAC), where the fact that the individual in that case had never lived in the Democratic Republic of Congo, was not sufficient to meet the test of very significant obstacles to integration in that country.

### **The Claimant's submissions**

18. The Claimant submitted that the appeal was a mere disagreement with the FtT's findings. As identified in his Rule 24 response of 23<sup>rd</sup> July 2020, the FtT had considered all of the relevant factors at §[38] to [43], the Claimant's relationship with his son; at §[44], the relationship with his closest family members, (his mother and brother and son); at §[45] his offending history; at §[46] the reoffending risk; at §[47] his troubled upbringing including being taken into care; at §[49] his lack of formal education; at §[50] his behaviour in prison; at §[52] his residence since birth; and at §[55], the extent of his family life. The FtT had carefully considered, and had not ignored, the evidence.
19. In relation to the Secretary of State's second ground of appeal, specifically the FtT's analysis of obstacles to integration in Nigeria, once again, the FtT had correctly referred herself to the law, including, but not limited to, the case of Akinyemi v SSHD [2019] EWCA Civ 2098; and had considered at §[54] the fact that the Claimant was not entirely estranged from his Nigerian cultural background. She correctly reminded herself at §[56] and [57] of the test for integration as set out in SSHD v Kamara [2016] EWCA Civ 813, and was entitled to consider that the Claimant and his family had no close links to Nigeria and that the Claimant had struggled with life skills in the UK. The FtT's findings were adequately reasoned and disclosed no arguable error of law.

### **Discussion and conclusions**

20. On the one hand, the FtT's decision is well-structured and includes a detailed analysis of the factors set out by Ms McCarthy. On the other hand, it is clear from the FtT's assessment at §[49] that the absence of

evidence of integration “is very stark for someone of the appellant’s age”, with limited evidence in support of the Claimant. In the context of that assessment, I accept the criticism of the FtT’s conclusion at §[55], as erring in law, when she stated that there must nevertheless be integration in the UK, as the Claimant has not integrated anywhere else:

*“... The respondent [Secretary of State] says the appellant [the Claimant] is not integrated into the United Kingdom and describes integration as being more than mere existence in a country. However the fact that the appellant’s offending by itself does not mean that he is not integrated into UK society, he has lived here his entire life, been educated here and has family here it cannot be said that he is integrated anywhere else.”*

21. The FtT further erred in adequately explaining why, if her conclusion about integration was only explained by reference to factors which had been assessed as weighing against the existence of family or private life (family life within an article 8 sense was found not to exist, given the Claimant’s weak links to family members; the Claimant’s own evidence was of being kicked out of school at a young age; he had never worked; and his associations and friendships related to gang membership), she reached the conclusion on continuing integration. Bearing in mind that her analysis of integration in the UK was crucial to her conclusions on the Claimant’s private life, I further accept the criticism that this undermined the analysis of obstacles to integration in Nigeria. The nature and quality of connections in the UK affected the FtT’s analysis of the extent to which the Claimant could expect support, or could cope without support, in Nigeria. In these circumstances I regarded the FtT’s conclusions, in allowing the Claimant’s appeal on the basis of right to respect for his private life, as unsafe, and they cannot stand. I do so without preservation of any findings of fact.

### **Preliminary issue of the Claimant’s cross-appeal**

22. A separate issue arose of a cross-appeal brought by the Claimant. Ms McCarthy, on behalf of the Claimant, accepted that the Claimant had not applied for permission to cross-appeal the FtT’s decision that he did not have a family life in the UK, respect for which would engage article 8 ECHR. Nevertheless, the Claimant had referred in his Rule 24 response, submitted on 3<sup>rd</sup> July 2020 to this Tribunal, to a cross-appeal about the FtT’s finding that the Claimant did not have a genuine and subsisting parental relationship with his son.
23. Mr McVeety submitted that I should not consider the cross-appeal, in the absence of a proper application for permission. He referred me to the authority of EG and NG (UT rule 17: withdrawal; rule 24: scope) Ethiopia [2013] UKUT 00143 (IAC), which suggested that a cross-appeal could not be raised in a Rule 24 response. In response to this, Ms McCarthy referred me the more recent decision of Smith (appealable decisions; PTA

requirements; anonymity) [2019] UKUT 00216 (IAC), a Presidential decision, and in particular, the following headnotes:

*“(2) If an appellant's appeal before the First-tier Tribunal succeeds on some grounds and fails on other grounds, the appellant will not be required to apply for permission to appeal to the Upper Tribunal in respect of any ground on which he or she failed, so long as a determination of that ground in the appellant's favour would not have conferred on the appellant any material (i.e. tangible) benefit, compared with the benefit flowing from the ground or grounds on which the appellant was successful in the First-tier Tribunal.*

...

*(4) If permission to appeal is required, any application for permission should be made to the First-tier Tribunal in accordance with rule 33 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, within the time limits there set out. This includes cases where the appellant has succeeded on some grounds but failed on others, in respect of which a material benefit would flow (see (2) above).*

*(5) There is, however, no jurisdictional fetter on the Upper Tribunal entertaining an application for permission to appeal, even though the condition contained in rule 21(2)(b) of the 2008 Rules has not been met, in that the First-tier Tribunal has not refused (wholly or partly), or has not refused to admit, an application for permission to appeal made to that Tribunal. Rule 7(2)(a) of the 2008 Rules permits the Upper Tribunal to waive any failure to comply with a requirement of the Rules. The guidance in EG and NG (UT rule 17: withdrawal; rule 24: Scope) Ethiopia [2013] UKUT 00143 (IAC) is otherwise confirmed.*

*(6) The Upper Tribunal is, nevertheless, very unlikely to be sympathetic to a request that it should invoke rule 7(2)(a), where a party (A), who could and should have applied for permission to appeal to the First-tier Tribunal against an adverse decision of that Tribunal, seeks to challenge that decision only after the other party has been given permission to appeal against a decision in the same proceedings which was in favour of A.”*

24. Referring to headnote (2), Ms McCarthy submitted that an appeal by reference to family life, as opposed to private life, would not result in any tangible benefit, which Mr McVeety accepted. The Claimant would have obtained no additional or different type of leave to remain. This explained the lack of application for permission prior to the Rule 24 response and the Claimant was not relying on any issue which had not been before the FtT.

### **Decision on preliminary issue**

25. I accept Ms McCarthy's submission that this is a case where no different benefit would otherwise have accrued to the Claimant prior to the Secretary of State's appeal and this is not a case where he seeks to argue a case that was not before the FtT. I considered §[56] of Smith in particular:

*“56. There is, we find, considerable force in Mr Amunwa's submission that, in the case of the claimant, there was no material benefit to him in applying for permission to appeal against the decision of the First-tier Tribunal judge (as we find it to be) not to determine his human rights appeal, given that, on the face of the judge's decision, the claimant had succeeded in resisting removal by reference to the 2016 Regulations. As a general matter, it would be undesirable if individuals were encouraged to seek permission to appeal against adverse decisions which, if decided differently, would confer upon them no tangible benefit, given the decision in their favour. The litigation of what in most circumstances would be academic issues is not in the interests of the overriding objective.”*

26. That is an analysis which I regarded as applying precisely to the Claimant's cross-appeal and therefore, in the circumstances, I concluded that it was appropriate to invoke Rule 7 of the Upper Tribunal Rules, and permit the cross-appeal to proceed. In doing so, I canvassed with Mr McVeety whether he needed an adjournment in order to deal with the cross-appeal. He confirmed that he was able to deal with the cross-appeal at the Hearing and I was grateful for his willingness to do so.

## **The Claimant's cross-appeal**

### **The Claimant's submissions**

27. Ms McCarthy referred to the grounds of the cross-appeal in the Rule 24 response. The FtT had erred in concluding that the Claimant had no genuine and subsisting parental relationship with his son, which might otherwise engage Exception 2 of 117C(5) of the 2002 Act. The FtT's analysis was at §[38] to [43] of her decision. The impact of the Claimant's incarceration was not incompatible with the Claimant having such a genuine and subsisting parental relationship and indeed at the time that the Claimant had committed the index offence the evidence was that he was a primary carer, albeit in response Mr McVeety had noted that this was a number of years ago. Crucially however, the Claimant's mother and family members supported the Claimant's evidence that he had had contact with his son in October/November 2019 and had seen his son regularly when he was briefly released from prison, before being recalled in December 2019.
28. I was referred to the case of SSHD v AB (Jamaica) & Anor [2019] EWCA Civ 661, which rejected the proposition that for there to be a genuine and subsisting parental relationship, there needed to be direct parental care. In this case, there was written evidence from the Claimant's son's mother, which supported the existence of a genuine and subsisting parental relationship and as the Claimant's son's mother had another child by a different father, it was clearly not appropriate for the family to relocate to Nigeria.
29. Similarly, the Claimant's son was a British citizen child whose entire schooling and socialisation was in the UK and he knew nothing of Nigeria. Even though the Claimant's contact with his son was limited there was nevertheless evidence of their continuing relationship and in particular the Claimant's brother had given evidence as to the very negative impact that the absence of a father could have, particularly on young black boys, in the context of the Claimant and his brother having a similarly absent father during their childhood.
30. Ms McCarthy referred to §[25] of the FtT's decision, which states:
- "The witness confirmed that the appellant saw his son (A) after his release from prison on A's birthday. He was asked how the Appellant's deportation would affect A and he said that statistically he thought it would affect A as a young black boy and that the Appellant had lost his father when he was young and that people had not considered the impact on him and that this would be tough for A and it would affect his development."*
31. I was also referred to a witness statement from the Claimant's son's mother, a copy of which was at [26] of the Claimant's bundle before the FtT (albeit she did not attend the FtT to give oral evidence), at §[7]:

*“(A) and his father are in regular contact and have a good relationship together. I believe that there would be a negative impact on (A) if his father was returned to Nigeria.”*

### **The Secretary of State’s response**

32. Mr McVeety accepted that there was evidence before the FtT, but not all of it had been accepted. As analysed by the FtT at §[41], the fact that the Claimant had initially been a carer for his prior to his subsequent imprisonment needed to be considered in the context of his subsequent lengthy period of imprisonment, during which there was limited contact. It could hardly be said in the context of the Claimant’s brother’s witness evidence of the absence of a role model that the Claimant himself could be seen, in any way, as a role model, noting his repeat criminal offending, including acts of violence.
33. Mr McVeety urged on me that the FtT had clearly considered the alternative that if there were such a parental relationship, that nevertheless it would not be unduly harsh for the Claimant to be separated from his son, with his son remaining in the United Kingdom (§[43]).

### **Discussion and conclusions**

34. Whilst on the one hand I accept Mr McVeety’s submission that the FtT did not accept all of the evidence before her, nevertheless I accept that there is a material confusion in the analysis of the parental relationship between the Claimant and his son. At §[41], the FtT states:

*“I am not satisfied that the appellant in light of what A’s mother stated to the probation officer is having unsupervised access to his son. Although I accept a parental relationship can exist even where a parent is absent and does not have parental responsibility I do not find that the appellant has established that he has a genuine parental relationship with his son and that he is seeing him on a regular basis in an unsupervised setting.”*

35. The practical difficulty with that analysis, as Ms McCarthy correctly identifies, is that it confuses the fact of a genuine and subsisting parental relationship with that of direct, unsupervised, parental contact. While the FtT correctly reminded herself of that potential trap, the following part of that sentence conflates a genuine parental relationship with a requirement that the Claimant sees his son on a regular basis, in an unsupervised setting. By reference to SSH D v AB (Jamaica) & Anor [2019] EWCA Civ 661, there can still be a genuine and subsisting parental relationship, even if it may be limited, and without direct care or access by the parent. If it were found that there were such a parental relationship, that could have a material bearing on whether the Claimant then met Exception 2 of Section 117C of the 2002 Act, as a lens through which the FtT then considered whether there were very compelling circumstances over and above that exception. I do regard the FtT’s analysis of whether there was a genuine

and subsisting parental relationship as flawed, for the reason set out above.

36. Mr McVeety challenged whether such a finding would be material, in light of the FtT's alternative conclusion at §[43] that the Claimant had played a very insignificant role in his son's life to date and had not established that it would be unduly harsh for his son to remain in the UK without him. However, the FtT in the prior sentence of §[43] stated:

*"However, there was a total absence of evidence as to the extent and degree of relationship between the appellant and his son or how this would affect his son."*

37. That sentence was then followed by the conclusion about unduly harsh effects. The error in the FtT's statement above was that there was not, in fact, a total absence of evidence. The Claimant's son's mother had produced a witness statement, which was before the FtT, and which had referred to regular contact and the extent to which the Claimant's removal would have an impact on their son. Where the FtT has referred to a total absence of evidence, instead of assessing and potentially discounting that evidence as unreliable, that must, in my view, amount to a material error in relation to the FtT's conclusion on Exception 2 and consequently also in relation to any analysis of whether there were very compelling circumstances which the Claimant meets by virtue of respect for any family life.
38. In summary, whilst she gave detailed and well-structured reasons, I conclude that the FtT did err in law in her conclusion that the respondent's decision did not engage respect for the Claimant's family life, specifically that he did not have a genuine and subsisting parental relationship with his son; and that error is material. That conclusion is unsafe and cannot stand. The Claimant's cross-appeal therefore succeeds.

### **Decision on error of law**

39. The First-tier Tribunal's decision contains errors of law, both in respect of the Secretary of State's appeal and the Claimant's cross-appeal, such that it is unsafe and cannot stand. I set the decision aside, without preservation of findings of fact.

### **Disposal**

40. With reference to §7.2 of the Senior President's Practice Statement, while there are no preserved findings, many of the facts are undisputed and while serious, the issues are limited. In these circumstances, I concluded that it is appropriate that the Upper Tribunal remakes the FtT's decision. Directions for the remaking are set out below.

### **Directions**

41. The following directions shall apply to the future conduct of this appeal:

42. The Resumed Hearing will be listed before Upper Tribunal Judge Keith, if possible, or another Upper Tribunal Judge, and if the Claimant remains in criminal detention, the hearing shall be heard at the Royal Courts of Justice, on the first available, time estimate one day, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.
43. The Claimant shall no later than **two weeks** prior to the Hearing, file with the Upper Tribunal and serve upon the respondent's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which he intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only.
44. The Secretary of State shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the Claimant's evidence; provided the same is filed no later than **one week** prior to the Hearing.

### **Notice of Decision**

**The decision of the First-tier Tribunal contains material errors of law and I set it aside, with no preserved findings.**

No anonymity direction is made.

Signed J Keith  
Upper Tribunal Judge Keith

Date: 29<sup>th</sup> October 2020