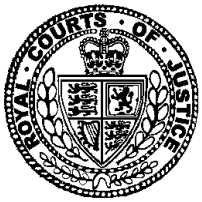

Neutral Citation Number: [2021] EWCA Civ 62

Case No: C5/2019/1865

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE PERKINS
HU/16801/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2021

Before :

LORD JUSTICE McCOMBE
LADY JUSTICE ASPLIN
and
LORD JUSTICE PHILLIPS

- -

Between:

CADONIUS DE-HAVALAN LOWE	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Barnabas Lams (instructed by TNA Solicitors) for the Appellant
Marcus Pilgerstorfer QC (instructed by the Government Legal Department) for the Respondent

Hearing date: 10 December 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 11.00 a.m. on Monday 25th January 2021.

Lord Justice McCombe:

Introduction

1. This is the appeal of Mr Cadonius Lowe ("the Appellant") from the decision of 10 April 2019 of the Upper Tribunal (Immigration and Asylum Chamber) ("UT") (UT Judge Perkins) allowing the appeal of the Secretary of State for the Home Department ("the Respondent") from a decision of 17 December 2018 of the First-tier Tribunal (Immigration and Asylum Chamber) ("FTT") (FTT Judge G Wilson). The FTT had allowed the Appellant's appeal from the decision of 1 August 2018 of the Respondent refusing the Appellant's human rights claim, raised in resistance to a deportation order made against him on 30 October 2017. The Appellant now brings this second appeal to this court pursuant to permission granted by Holroyde LJ by his order of 4 December 2019.

2. In his order, the learned Lord Justice expressed his reasons for granting permission to appeal as follows:

> "It is arguable that the UT was wrong to find that the decision of the FTT was irrational, and wrongly substituted its own assessment of whether there were "very significant obstacles" to integration in Jamaica.
>
> The second appeal test is satisfied because the seriousness of the consequences of the decision of the UT (acknowledged by the UTJ as amounting to "exile rather than deportation") provides a compelling reason why an appeal should be heard."

3. Having carefully considered the helpful arguments of Mr Lams for the Appellant and of Mr Pilgerstorfer QC for the Respondent, I find that the UT was indeed wrong to hold that the decision of the FTT was irrational and that it was also wrong in substituting its own assessment of whether there were "very significant obstacles" to the Appellant's integration into Jamaica after deportation for that of the FTT. Indeed, because the UT correctly determined that this was a case of exile rather than deportation, it expressed succinctly in summary form the basis for the underlying very significant obstacles to *this* Appellant's integration into a country of which, in spite of his being one of its nationals, he had no past experience of any meaningful kind. Further, the FTT had decided the case on the basis of the case made by the Respondent, in the light of the evidence presented by the Appellant in support of his claim, in the decision letter and in argument. Having rejected that case, on the evidence, it was right for the FTT to allow the appeal.

Background Facts

4. The background facts are as follows.

5. The Appellant and both his parents are nationals of Jamaica. The Appellant was born in Jamaica on 11 April 1999. The Appellant's mother is Ms Casina Gibson, also born in Jamaica on 27 October 1979. His father, Donovan Lowe (born 26 March 1970, also in Jamaica) stated in his witness statement that he had moved to the United Kingdom during the mother's pregnancy with the Appellant. In 2002, the Appellant, then aged

3, and his mother also moved to the UK to join the father. The parents separated in 2005 and the Appellant continued to live with his mother. The father's evidence indicated that he has three further children, all born in this country. The mother also has two further children born since her separation from the Appellant's father.

6. The Appellant became subject to the deportation order because of a criminal conviction. On 29 September 2017, in the Avon and Somerset Magistrates' Court, he had pleaded guilty to possession of a controlled drug of Class A (crack cocaine), with intent to supply, and to possession of a bladed article (a knife) in a public place. The offences had been committed in March 2017 when the Appellant was a few weeks short of his 18th birthday. He appears to have been committed to the Crown Court for sentence; we have before us the Crown Court judge's sentencing remarks. On 19 October 2017, in the Crown Court at Bristol, after full credit for his guilty pleas and his previous good character, he was sentenced by HH Judge Lambert to a term of imprisonment of 2 years and 4 months for the drugs offence, with no separate penalty being imposed for possession of the knife. In the sentencing remarks, the judge said that he took into account the mitigation, which he did not set out in any detail, apart from commenting that: "The cards have not fallen well for you".

7. Following the conviction the Respondent made the deportation order.

The Respondent's Decision on the Appellant's Human Rights Claim

8. As required by the Immigration Rules, in considering the Appellant's human rights claim in resistance to the order, the Respondent addressed the question whether he fell within the "private life exception to deportation" in para. 399A. The relevant requirements were:

> "(a) the foreign criminal has been lawfully resident in the UK for most of his life, and
>
> (b) the foreign criminal is socially and culturally integrated in the UK, and
>
> (c) there would be very significant obstacles to the foreign criminal's integration into the country to which he is proposed to be deported".

9. It was accepted by the Respondent that (a) and (b) of this test was satisfied in the Appellant's case. However, it was found that (c) was not. The reasons given were these:

> "It is not accepted that there would be very significant obstacles to your integration into the country to which it is proposed to deport you. This is in part because in your submissions you have stated that "We are instructed that he was not too close to his father's side of the family. He has close ties with his mother, step brother, his uncles and cousins from his mother's side". Therefore it has been taken that your father and your extended family still live in Jamaica (as you entered the UK with your mother, and you have not provided evidence

> otherwise) and therefore they would be able to help you readjust to your new life in Jamaica following your deportation. Further, you are now an adult, a national of Jamaica, and educated in the UK, which means that irrespective of any familial support in Jamaica, you would be able to obtain employment, obtain help or assistance from the Jamaican government commensurate with your Jamaican nationality and you speak English which is a national language of Jamaica.
>
> Further, you have provided no evidence that your deportation would result in your mother or other members of your family in the UK losing all contact with you. It is acknowledged that their subsequent communication with you might not be the same as remaining in the family home, or even living separately in the same country, but it is considered that you could maintain contact with them if you wish, and there is no evidence that they would be unable to visit you in Jamaica. It is acknowledged that your absence will likely result in some negative emotional impact on your family members here, but they will continue to be able to keep in touch with you through the use of modern modes of communication.
>
> Therefore, having considered the individual facts of your case, it is not accepted that you meet the requirements of the private life exception to deportation."

10. After these findings, the Respondent addressed the question whether there were "very compelling circumstances" such that the Appellant should not be deported. It was found that there were none. The letter stated:

> "Notwithstanding your length of residence and presence in the UK since early childhood, you have been convicted of serious criminality. It is acknowledged that you were relatively young when you received your most recent conviction, but having taken that factor into account with the other factors which count in your favour, it is still not accepted that the public interest in proceeding with your deportation is outweighed."

Accordingly, the Article 8 claim was refused. The Appellant appealed to the FTT.

11. The battleground for that appeal was the Appellant's contest to the points raised in the Respondent's decision letter as to whether there were very significant obstacles to integration. The Respondent was saying that the Appellant failed to satisfy the requirement that there should be "very significant obstacles" to integration because the Appellant's father and extended family were still in Jamaica and available to support him. Although it was being said by the Respondent that, whether that support existed or not, he was an adult with some education, who could get employment or assistance from the local government, family or no family, that was a secondary judgment made without having seen the Appellant himself. It was not being held against him, as it was later in the UT, that he had not produced evidence showing that "he had made any real attempt to sort out how he might live in Jamaica", including

questions of employment difficulties or how he might not be able to obtain accommodation there.

The FTT Decision

12. In passages of the FTT decision, which have provoked no criticism, either by the Respondent or the UT, the FTT judge set out the relevant provisions of the Immigration Rules and of primary legislation to be considered in the determination of claims by foreign criminals that their deportation would be contrary to Article 8 of the European Convention on Human Rights and Fundamental Freedoms: viz. paras. 398 and 399A of the Rules and section 117C of the Nationality, Immigration and Asylum Act 2002. So far as relevant for present purposes, Section 117C of the 2002 Act mirrors the Immigration Rules quoted by the Respondent in the letter refusing the Appellant's claim. The statutory provisions are as follows:

> "(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."

13. It was common ground before us that in fact the Appellant and each of his parents had indefinite leave to remain in the UK, as I understand it, from about 2016. A photocopy residence permit, evidencing the father's indefinite leave to remain was exhibited (as "DL 1") to his witness statement of 25 October 2018 (Bundle B, p. 56 before us). The fact that the Respondent asserted in the important part of the refusal letter that it had been taken by officials that the Appellant's father and extended family still lived in Jamaica is a puzzling one. It seems that this remained the Respondent's position up to and including the hearing before the FTT where the matter was clearly a live issue. Six full paragraphs of the 35 paragraph FTT decision are devoted to the evidence and to Mr Lams' submissions on that point. The FTT's conclusion, in para. 23 of the decision, was this:

> "On the evidence before me, I find that the Appellant has lived in the UK since the age of three. On the basis of the Appellant's and the Appellant's mother's evidence and to a lesser extent the father's witness statement, I find that the Appellant's father resides in the UK and has done since in or around 1997/98. I find that the Appellant's father left Jamaica approximately 20 years ago and has formed family units within the UK. I find that the Appellant's mother has been absent from Jamaica for 16 years and left family and other connections she had within Jamaica due to abuse. Accordingly, I find that she is unlikely to have maintained contact. I find that the Appellant's mother and siblings have relocated to America. On the evidence before me, I find that the Appellant does not have family or other connections in Jamaica."

14. Also apparently in issue before the Tribunal was the question of the extent of the Appellant's reliance upon his parents for financial and other support and his ability to carry on his life independently of them, whether up to the present date in the UK and on his prospective deportation to Jamaica. That issue was addressed by the FTT judge in paras. 24 to 29 of the decision.

15. The FTT judge saw the witness statements and heard oral evidence from the Appellant and his mother. He found that the evidence of both of them was credible.

16. According to the evidence of the Appellant and his mother, which the FTT judge accepted, there was some background to the Appellant's conviction. In 2014, when the Appellant was 15, he was introduced by a school friend to a group of youths, previously unknown to him. The group is described as "a gang". For reasons that are unclear, the Appellant had an argument with one of the boys who incited another in the group to stab him. As a result, the Appellant sustained a serious facial laceration to the lower right of his mouth requiring 28 stitches. The mother exhibited a photograph of the injury as CG4 to her statement: Bundle B p. 36 before us. After the incident was reported to the police, the offender received a custodial sentence and, according to the Appellant, he (the Appellant) began to be bullied and threatened as a "snitch". The Appellant said in his statement that he fell in debt to the gang and became involved in handling drugs for that reason; before the FTT, the Appellant said that the "debt" was £500: para. 26 of the FTT decision.

17. As I have said, in issue before the FTT was the extent to which the Appellant remained particularly dependent upon his parents for financial and other support. The FTT judge summarised the arguments on this in paras. 24 and following of his decision and concluded:

> "26 … I find that the Appellant has always been dependent upon either his mother, father or the state, through Her Majesty's Prison Service, for accommodation and financial support.
>
> 27. The Appellant's mother provided financial support whilst the Appellant was imprisoned. In oral evidence the Appellant's mother stated that she sent the Appellant £20-30 usually on a

> monthly basis but whenever she could. The Appellant's mother also stated that the Appellant's father would occasionally send money, this was limited to £20 to £30 and was irregular. In oral evidence, the Appellant described how his family would not be able to afford the £500 debt which he claimed was the trigger for the attack that he suffered.
>
> 28. In closing submissions. Ms Williams asserted that the Appellant's family provided financial support to the Appellant whilst in the UK and this could continue whilst he was in Jamaica. Mr Lams asserted that the sums involved were very modest and would not provide any meaningful support for the Appellant whilst in Jamaica. I agree."
>
> 29. On the evidence before me I find that the Appellant's family have limited means and that they would not be able to provide either a lump sum or regular income to assist the Appellant on return to Jamaica at a level that would provide any meaningful support to the Appellant until such time as he could support himself."

18. The FTT judge's final decision in paras. 30 to 32 was this:

> "30. I bring forward all my findings of fact and apply them to the law as set out above.
>
> 31. Exception 1 (section 1117C(4) of the [Nationality, Immigration and Asylum] Act 2002 and reflected in Paragraph 399A of the Immigration Rules) is, in my judgment, met by the Appellant. The Respondent accepts that the Appellant has been lawfully resident within the UK the majority of his life and that he is socially and culturally integrated into the UK withstanding [sic] his offending. Accordingly, I need to consider whether there are significant obstacles to the Appellant's integration into Jamaica. I accept that the Appellant speaks English which is one of the official languages of Jamaica. I accept the Appellant is a young healthy man of working age who is educated. However, the Appellant has grown up in, been educated in and spent his whole adult life to date in the UK. It is that length of time in the UK; that lack of any family or support in Jamaica; the Appellant never having lived an independent life away from either of his parents or state institutions and a lack of financial support which would allow the Appellant to seek basic necessities such as accommodation which present significant obstacles to his integration into Jamaica.
>
> 32. I accept that there is a significant public interest in the deportation of foreign criminals. However, for the reasons set out above, Exception 1 is met and the public interest does not require the Appellant's deportation. That weights very heavily

> in his favour and accordingly I conclude that the Respondent's decision to deport the Appellant is a disproportionate interference when weighed against his family and private life in the UK."

19. In other words, the FTT dealt with the appeal against the Respondent's decision on the basis of the evidence produced by the Appellant, upon the case raised against him upon that evidence by the Respondent and having seen the Appellant and his mother giving their evidence. He rejected the Respondent's case, and, in my judgment, he was entitled to do so. It is impossible to say that on the respective cases advanced by the parties the decision on those points was, in any ordinary sense of that word, "irrational". The judge was entitled to assess the Appellant that he saw in the witness box and to decide, in the light of all the information before him in the written and oral evidence, whether he would face very significant obstacles to integration in Jamaica. In my judgment, he did that clearly and cogently, even if relatively briefly.

The Appeal to the UT and its Decision

20. The Respondent appealed to the UT and that appeal was allowed. The primary ground of appeal, and the ground which the UT accepted was that the FTT's decision was indeed "irrational". The UT found that the "very significant obstacles" exception was only met in "strong circumstances" and that those circumstances were not "identified in the evidence" in the present case: para. 32.

21. The UT judge accepted Mr Lams' submissions that "perversity was not easy to prove" and that the UT could only interfere "if it is a case where the conclusion it reached was not open" to the FTT. However, the UT judge then said that he had asked Mr Lams to identify the relevant "very significant obstacles". He said he had struggled to follow Mr Lams' answer "because the case was not made out". However, he did not examine the FFT judge's findings on the basis of the evidence as a whole, which the FTT judge had read and heard, thus having the opportunity of seeing the witnesses and hearing their examination and cross-examination. In the next few paragraphs of the decision, it seems to me that the UT re-assessed the case for itself and indeed raised arguments against him which do not appear to have played any part at all in the Respondent's original decision or in the Respondent's case before the FTT. At paras. 27 to 29, the UT judge said:

> "27. Certainly, the claimant is a young man with no real experience of independent living. Certainly, he has no experience of life in Jamaica, and certainly he would be on his own in the sense that there is no evidence of financial support from the United Kingdom or any relatives in Jamaica having the slightest interest in him. However, the claimant had not produced any evidence that showed he had made any real attempt to sort out how he might live in Jamaica. I am told nothing about employment difficulties or opportunities or how he might or might not be able to obtain accommodation. The evidence was silent about these findings.
>
> 28. Given that the claimant had sufficient wit (albeit of a thoroughly discreditable kind) to be part of a drug ring

> enterprise, I cannot accept that he can be regarded a helpless babe. Neither can I accept in the absence of clear evidence, that a person who has been locked up for whatever is necessary in a sentence of two years and four months, had not learned some street wisdom of a kind that would assist him.
>
> 29. The claimant does have qualifications of sorts. He does speak the main local language. I can see many reasons why he will not wish to return to Jamaica and I can see many things that will be difficult for him there, or which could be expected to be difficult which is probably all that is necessary but I cannot see anything here that I would describe properly as a "very significant obstacle".

22. In effect, as I see it, the UT judge was making his own decision here.

23. It had not been suggested by the Respondent in the decision letter, or before the FTT, that the Appellant should have been making his own enquiries or adducing evidence before the FTT about accommodation and/or employment in Jamaica in order to satisfy the statutory burden upon him. In my judgment, it was not for the UT to assess the Appellant's "wit" in the light of his "part in a drug ring enterprise" or to speculate whether he could be regarded as a "helpless babe" that "had not learned some street wisdom of a kind that would assist him" from his period in custody. What mattered was whether the FTT judge was entitled to find, on the evidence that *he* had seen and heard, and which the UT had not, and on the case made against him, that this young man with his characteristics and background, would face very significant obstacles to integration in Jamaica.

24. The UT judge's decision continued in para. 31 to state quite correctly that the only relevant exception to deportation is "very significant obstacles to integration" and that the decision had been made that it is in the public interest to deport a person such as the Appellant unless the exception applied. He agreed with Mr Lams' observation that deportation in this case represented "exile" rather than deportation, but he found that "that is precisely what Parliament requires". He went on to say this, in para. 32:

> "If this decision is right then many decisions against young people who are being removed to their country of nationality where they have no experience would be contrary to the law. Maybe that is precisely what Parliament intended. Maybe that is the balancing measure to prevent excessive consequences in the case of young people who have no contact in the country of which they happen to be a national. However, I do not accept that. Parliament has decided there needs to be very significant obstacles. Clearly the Secretary of State did not consider there were else he would not have made the decision in the first place. The First-tier Tribunal was satisfied that there were but I cannot work out why. Not only is there nothing here that I would identify as a "very significant obstacle" but in my judgment there is nothing that can be identified as a "very significant obstacle". Whilst it is necessary to make a rounded assessment of all the circumstances, it is also necessary to

> apply the law in statute. The exception will only apply in strong circumstances. I do not accept that those circumstances have been identified in the evidence here. I find the Secretary of State's grounds are made out. The decision of the First-tier Tribunal was irrational. I set aside its decision and I re-make a decision dismissing the claimant's appeal."

25. I find it strange, however, that the Respondent's own decision that there were no significant obstacles to integration by the Appellant should be prayed in aid here, given that the Respondent had clearly been working under a significant and serious misapprehension, in the context of this case, in assuming that the Appellant had a father and extended family in Jamaica. The Respondent was wrong about that and the objection to the Appellant's human rights claim on that basis had been rejected by the FTT.

26. In my judgment, in this case, the UT went outside its function in remaking the decision on the facts, on the basis of the written materials alone and without sufficient reference to the issues that were raised before the FTT and whether the FTT had been entitled to find as it did on those issues.

Further Discussion

27. Both Mr Lams and Mr Pilgerstorfer directed us to the decision of this court in *Kamara v Secretary of State for the Home Department* [2016] 4 WLR 152 for guidance on the application of the statutory test of "very significant obstacles to integration". In that case Sales LJ (as he then was) said (at [14]):

> In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

28. Importantly, as *Kamara* shows, decisions of the present character made by the fact finding tribunal are "broad evaluative decisions". In his skeleton argument, Mr Pilgerstorfer submitted (in para. 24) that the appellate Court is in as good a position as the first instance judge to appraise whether the facts found and relied upon meet the legal standard. In my judgment, that submission was contrary to authority, and, with respect to Mr Pilgerstorfer, when confronted by the court with the possibility that the

submission was incorrect, he qualified the submission in a manner to which I will return. Yet again, the well-known judgment of Lewison LJ in *Fage UK Ltd. v Chobani UK Ltd.* [2014] EWCA Civ 5 at [114] is relevant.

29. At [114] – [115], Lewison LJ explained the caution to be exercised by appellate courts in interfering with evaluative decisions of first instance judges. Para. [114] is particularly well known, but para. [115] is also of relevance to the present case. The Lord Justice said this:

> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva Plc [1997] R.P.C. 1* ; *Piglowska v Piglowski [1999] 1 W.L.R. 1360* ; *Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23; [2007] 1 W.L.R. 1325* ; *Re B (A Child) (Care Proceedings) [2013] UKSC 33; [2013] 1 W.L.R. 1911* and most recently and comprehensively *McGraddie v McGraddie [2013] UKSC 58; [2013] 1 W.L.R. 2477* . These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include
>
> i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii. The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.
>
> 115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He

> should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A [2002] EWCA Civ 1039; [2003] 2 W.L.R. 210*; *Bekoe v Broomes [2005] UKPC 39*; *Argos Ltd v Office of Fair Trading [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135*"

30. In this case, the FTT had determined the issues that were before it, being those which were regarded as being central to the question of whether the Appellant had demonstrated the relevant "very significant obstacles". It was not necessary for the FTT to deal with a case that was not being made by the Respondent. The appeal to the FTT was "the first and last night of the show", not a "dress rehearsal".

31. Equally, it is to be recalled that judgments at first instance are necessarily an incomplete impression made upon the judge by the primary evidence. This FTT judge reached the conclusion that he did on the issues raised and he expressed himself succinctly on them. This is what Lord Hoffmann said on the point in the well-known passage of his speech in the House of Lords in *Biogen Inc. v Medeva plc* [1997] RPC 1 at 45:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (*as Renan said, la vérité est dans une nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation…".

32. It was, in my view, quite open to the FTT judge to find that there were the necessary very significant obstacles based on the impression made upon him as to the effect of the "exile" of *this* young man, with all his characteristics, attributes, qualities and defects that were disclosed by the evidence. Not every healthy young man, in a case such as this, would make the same impression. However, this was a 19 year old with a conviction, when he appeared before the FTT. He had lived for all but the first three years of his life in the UK and had no connection to Jamaica whatsoever other than a residual nationality. The judge found that he had a specific dependency on his parents. The judge was entitled to form his own impression of the obstacles he would face on being dumped in Jamaica at the end of the prison term. He was not an adult foreign

criminal, like some whose cases come before the courts, with a significant foundation of knowledge of the country of his birth from an earlier time in life, and who is being returned to a country with which he has some acquaintance. It is not surprising to me that a judge (if not all judges) would find, as this judge did, that there were very significant obstacles to integration. Others might have made a different decision, but this was very much a case on its own facts to be assessed on the evidence.

33. Mr Pilgerstorfer, as I have said, refined his core submission on the appeal from that stated in his very capable skeleton argument. In his oral submissions, he said that the question for us was whether it was within the lawful parameters of legitimate evaluative judgment for the FTT to have found the facts as it did. For the reasons I have endeavoured to give, I believe that it was, given the precise nature of the issues that were before the FTT and the evidence as a whole that was before it. In my judgment, with respect to the obvious care and concern with which the UT Judge examined the case, he impermissibly substituted its own assessment of the case, without having heard the evidence and without the resultant important opportunity to assess the Appellant personally in the face of the statutory test. The UT also raised issues against the Appellant that had formed no part of the case being made against him by the Respondent either in the original decision, against which the appeal to the FTT was brought, or before the FTT itself.

Conclusion

34. For these reasons, I would allow this appeal.

Lady Justice Asplin:

35. I gratefully adopt McCombe LJ's summary of the background to this matter and of the relevant legal principles. I too would allow the appeal for the reasons which he has given.

36. In my judgment, the decision of the FTT judge was not irrational. He heard the witnesses and having considered the oral and written evidence before him, was entitled to decide that the Appellant would face very significant obstacles to integration in Jamaica. Having considered the totality of that evidence, the FTT judge stated, at paragraph 31 of his judgment, that it was the length of time in the UK (being the Appellant's whole adult life and in fact, the entirety of his life since he was around three years old), the fact that the Appellant had never lived an independent life away from his parents or state institutions, the lack of any family support in Jamaica and the lack of financial support for basic necessities which created the significant obstacles to integration in Jamaica. It seems to me that there is nothing irrational in such a conclusion.

37. The UT judge quite properly accepted that the UT could only interfere if the conclusion reached by the FTT was not open to it. It seems to me, however, that the UT judge went on to make the decision afresh and to take into account matters which had not featured before the FTT at all. This is particularly apparent at paragraphs 27 – 29 of the UT decision which are helpfully set out at paragraph 21 above.

38. First, at paragraph 27 of the UT decision, the UT judge appears to draw an adverse inference from the lack of evidence about "employment difficulties or opportunities"

and whether the Appellant "might or might not be able to obtain accommodation." There is no suggestion, however, that these matters had featured in the Respondent's case or had been raised before the FTT at all.

39. Secondly, at paragraph 28 of the UT decision, the UT judge went on, quite impermissibly in my view, to form his own conclusions about the Appellant, despite having neither seen nor heard him. It was not for the UT judge to come to conclusions about the Appellant's "wit" based upon his involvement in a drug ring. Nor was it open to him on an appeal of this nature to conclude that he was "unable to accept in the absence of clear evidence, that a person who has been locked up for whatever is necessary in a sentence of two years and four months, had not learned some street wisdom of a kind that would assist him." The UT judge allowed himself to speculate about the Appellant and to bolster that impermissible speculation by reliance upon a perceived lack of evidence to the contrary. It was that impermissible speculation which led, in part, to his decision.

40. It seems to me that the UT judge strayed from his task and in doing so failed to take account of the fact that the FTT judge had had the benefit of hearing both the Appellant and his mother give evidence and had reached a broad evaluation decision. Instead of determining whether the FTT judge's decision was irrational, the UT judge embarked upon making the decision himself, took account of matters which had not featured before the FTT and allowed himself to speculate about the Appellant.

41. As I have already mentioned, for these reasons, I would allow this appeal.

Lord Justice Phillips:

42. I gratefully adopt McCombe LJ's summary of the background and of the relevant law and principles. I have the misfortune, however, to disagree with his conclusion as to whether the UT properly applied the law and those principles.

43. The question of whether there would be "very significant obstacles" to integration, for the purposes of Exception 1 of s.117C of the 2002 Act, necessarily arises in very specific and (for the deportee) challenging circumstances. The foreign criminal will have spent at least half their life in the United Kingdom, will be socially and culturally integrated here, but upon deportation will be deposited at an airport in another country (often straight from a UK prison) with a serious criminal record against their name. There can be no doubt that many such deportees will face obstacles, some of them significant, in making a new life in the third country, including the considerable emotional trauma of being uprooted from their life in the UK. Finding accommodation, obtaining employment and building a new social life will be a challenge for many.

44. To fall within Exception 1, however, there must be something above and beyond those circumstances. Obvious examples (but only examples) of the type of factor which might be regarded as giving rise to very significant obstacles are disability (mental or physical), serious language difficulties in the destination country or likelihood of being the subject of discrimination or other mistreatment.

45. In the present case, as the FTT found, the Appellant is a healthy young man of working age (then 19), with a UK education and a BTEC qualification in business

studies, who speaks the national language of Jamaica, English. On the face of matters, he appears as well placed as many (and better than some) deportees to make a new life in the destination country.

46. The matters identified by the FTT as giving rise to a finding that there were very significant obstacles in the Appellant's case appear to be the following:

    i) "the Appellant has not formed an independent family unit of his own... there are elements of dependence, involving more than the normal emotional ties. Accordingly, I find that the Appellant has a family life with his mother" [12];

    ii) "the Appellant does not have family or other connections in Jamaica" [23];

    iii) "the Appellant has always been dependent on either his mother, father or the state, through Her Majesty's Prison Service, for accommodation and financial support." [26];

    iv) "the Appellant's family...would not be able to provide…any meaningful support to the Appellant until such time as he could support himself." [29].

47. The UT judge asked himself whether those factors were capable of amounting to very significant obstacles, or whether they were not so capable, so that the FTT judge's conclusion was not one he was entitled to reach (in other words, a perverse or irrational decision). In my judgment that was a proper question as a matter of law. The UT judge was not substituting his own assessment of the evidence, but considering whether the evidence passed the threshold for the conclusion reached. In that context the UT cannot be criticised for pointing out that certain matters, which might have demonstrated that there were very significant obstacles, were not advanced by the Appellant (such as difficulty in finding accommodation or employment).

48. In my judgment the UT was also justified in deciding that the factors identified by the FTT were not capable of amounting to very significant obstacles. Many young immigrants, including criminal deportees, arrive in a new country with no connections or financial support, but make a new integrated life within a reasonable time. The FTT did not identify any aspect of the Appellant's circumstances which indicated that he was not reasonably capable of doing the same. The fact that the Appellant has been dependent on his family, emotionally and financially, and has no connections in Jamaica, is wholly insufficient, in my judgment, to take the Appellant's case out of the norm and bring it within an Exception to the course that is recognised to be in the public interest. I take into account that the FTT heard evidence from the Appellant and his mother and that the FTT judge's reasons may not reveal all the impressions that evidence made. But it behoves the fact-finder to identify any evidence, or impression made, which is important to his findings, and an appellate court, considering whether such findings were justified on the evidence, is entitled to assume that it has done so.

49. I agree with McCombe LJ that the UT judge was wrong to find support for his conclusion in the Respondent's decision to deport, being the very decision under consideration and one which was based on a factual assumption which the FTT had

found to be incorrect. But it was a passing reference, by way of illustration, and was not a factor in the UT's reasoning.

50. For the above reasons I would dismiss the appeal.

Agreed Order

UPON HEARING Mr B. Lams for the Appellant and Mr M Pilgerstorfer QC for the Respondent

IT IS ORDERED THAT

1. The appeal be allowed.

2. The decision of the Upper Tribunal dated 10 April 2019 is set aside and the decision of the First Tier Tribunal dated 17 December 2018 is restored.

3. The Respondent do pay the Appellant's reasonable costs of the appeal to the Court of Appeal to be assessed if not agreed.

4. There be a detailed assessment of the Appellant's publicly funded costs.

Dated 25 January 2021