Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11117/2019 (V)**

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*
On Monday 21 September 2020

Decision & Reasons Promulgated
On Monday 16 November 2020

Before

UPPER TRIBUNAL JUDGE SMITH
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

AH
(ANONYMITY DIRECTION MADE)

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Chirico, Counsel, instructed by Bindmans LLP
For the Respondent: Mr. T Lindsay, Senior Home Office Presenting Officer.

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal when granting permission to appeal. For reasons which are contained within our decision below, we consider it is appropriate to continue that order. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

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DECISION AND REASONS

BACKGROUND

1. Both members of the panel have contributed to this decision.

2. The Appellant appeals against the decision of First-tier Tribunal Judge Mark Eldridge promulgated on 31 October 2019 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 18 June 2019 refusing his human rights claim in the context of a decision to deport him to Jamaica as a persistent offender.

3. The Appellant was born in 1999. He is currently aged twenty-one years. He came to the UK with indefinite leave to enter in 2011 (then aged eleven years) to join his mother and stepfather. His mother thereafter physically abused him, and he suffered sexual abuse at the hands of one of her friends (although the Appellant is reluctant to discuss the detail of either experience). The Appellant's mother ejected him from the family home when he was about thirteen years old.

4. The Appellant attributes the abuse by his mother to him resuming contact with his biological father. His father left Jamaica immediately after the Appellant's birth and the Appellant did not see him until he was aged about seven or eight years old when his father returned to that country. The Appellant's mother's family tried to prevent the Appellant having contact with his father, but the Appellant says that he saw his father quite regularly after their first meeting in Jamaica until he was brought to the UK.

5. After the Appellant was excluded from his mother's home, he called his father (who had by then returned to the UK) and went to live with his father in London. The Appellant's mother involved the police as she said that the Appellant's father had kidnapped him. It is at that stage that social services first became involved and the physical abuse was discovered.

6. The Appellant was out of school for a year after he came to London as a space could not be found at a local school. He was then found a place at a Pupil Referral Unit in September 2014. The Appellant blames those with whom he associated at that Unit for the fact that he then started to get into trouble. He says that he was at risk from gangs and he was stabbed on one occasion. Whilst the Appellant's father tried to instil discipline, he failed and the Appellant's relationship with his father deteriorated because the Appellant thought him too strict.

7. The Appellant's father handed him over to social services when the Appellant was aged sixteen years because he could not cope. The Appellant was placed into social services care and lived in semi-independent accommodation. Although the Appellant is now an adult, he remains subject to leaving care assistance until he is aged twenty-five years due to the age he was when he went into care.

8. The Appellant was able to find a job in the summer of 2016. In August 2016, he was stabbed again and hospitalised, so he was unable to work for a while.

9. The Appellant has committed a number of offences starting at the age of thirteen years. He was convicted in 2016 of possession of a knife or blade or sharply pointed article in a public place. He was sentenced to a Detention and Training Order for twelve months and forfeiture and destruction of the knife. In January 2017, he was convicted of robbery, possession of an offensive weapon in a public place and possession of a knife or blade or sharply pointed article in a public place and sentenced to a Detention and Training Order for twelve months and forfeiture and destruction of the bladed articles. In November 2017, the Appellant was convicted of two counts of assault on a constable and racially/religiously aggravated intention to cause harassment, alarm or distress and was sentenced to a Detention and Training order for two months with two months concurrent and a Community Order. In February 2018, the Appellant was convicted of failing to comply with the Community Order. He was convicted of the same offence in December 2018, the order was revoked, and he was made subject to a Detention and Training Order of four months.

10. On his own admission, the Appellant continues to smoke cannabis. The Appellant has been assessed as having symptoms of post-traumatic stress disorder ("PTSD") and depression. Having formed such opinion his own expert assessed the risk which the Appellant poses and concluded that he poses a moderate risk of violent offending and a moderate risk of causing serious harm.

11. Judge Eldridge accepted the Respondent's conclusion that the Appellant is a persistent offender. It was accepted that the Appellant could not succeed under the Immigration Rules ("the Rules") based on his family life. He has no partner or child. The Judge concluded that the Appellant did not have a family life with his relatives for the purposes of an assessment outside the Rules. In relation to the Appellant's private life, the Judge found that the Appellant could not succeed within the Rules as he has not been in the UK lawfully for more than half of his life. In any event, the Judge concluded that the Appellant is not socially and culturally integrated. Balancing the interference with the Appellant's private life against the public interest, the Judge found that the Respondent's decision to deport was proportionate and accordingly dismissed the appeal.

12. The Appellant appeals the Decision on five grounds which are, in short summary, as follows:

    Ground 1: The Judge failed to give adequate reasons for refusing to make an anonymity order or failed to have regard to material considerations when refusing that application.

    Ground 2: The Judge failed to deal with the Appellant's submissions regarding the applicability of Articles 39 and 40 of the UN Convention on the Rights of the Child ("UNCRC").

Ground 3: The Judge failed to take into account material evidence, reached findings inconsistent with the evidence or failed to provide adequate reasons for rejecting evidence in relation to the following:

(i) Finding that the Appellant "is not on any recognisable journey of rehabilitation at this stage" ([55] of the Decision)

(ii) Finding that the Appellant has shown "disdain" for opportunities offered to him to deal with his mental health issues ([54] of the Decision).

(iii) Finding that the Appellant would not be "without practical support" in Jamaica ([56] of the Decision).

Ground 4: The Judge failed to carry out a holistic assessment or had regard to immaterial considerations when concluding that the Appellant is not socially and culturally integrated in the UK.

Ground 5: The Judge erred in his conclusion that the Appellant does not enjoy family life with his relatives by misdirecting himself in law and/or failing to have regard to material evidence or making findings which are inconsistent with that evidence. It is said that the Judge's conclusion in this regard is perverse.

13. Permission to appeal was granted by First-tier Tribunal Judge Landes on 14 February 2020 in the following terms so far as relevant:

> "... 2. It is arguable as set out at ground 2 that the judge failed to determine the submissions relying upon Articles 39 and 40 of the Convention on the Rights of the Child. I can trace no reference to those submissions or any obvious indication that they have been taken into account.
>
> 3. It is also arguable (ground 3) that the judge failed to give adequate reasons for concluding that the appellant was not on any recognisable journey of rehabilitation given the evidence of the social worker about the appellant seeking to change his behaviour. It is not clear to me however that the judge was saying that the appellant had a current disdain for mental health referrals. This is because in the next sentence he concludes "even now, …. he is ambivalent about seeking any therapy". That suggests a past disdain and a current ambivalence rather than a current disdain.
>
> 4. I do not consider that the judge failed to give adequate reasons for his conclusion that there would be practical support in Jamaica. His grandmother visits Jamaica regularly and at the moment there are other family members there; no reason was given for the claimed hostility of the great-grandmother.
>
> 5. I also consider it arguable (ground 4) that the judge did not conduct a holistic assessment as to whether the appellant was socially and culturally integrated into the UK.
>
> 6. So far as family life is concerned, the judge explained that the appellant was not living with family members since he was taken into care in early 2016 and he did not receive practical support from any of the three family members relied

> upon. I consider that the judge was entitled to conclude that the appellant and those family members did not enjoy family life together.
>
> 7. Despite my comments I do not restrict the grounds which may be argued.
>
> 8. I make an anonymity direction for the moment bearing in mind the terms of ground 1. Of course, it will be for the Upper Tribunal to decide whether that direction is to continue".

14. The Respondent filed a Rule 24 Reply on 30 March 2020 seeking to uphold the Decision. We were also provided with an Appellant's bundle for the hearing which included Mr Chirico's skeleton argument for the First-tier Tribunal hearing and a Note of Oral Submissions prepared by Mr Chirico for the hearing before us.

15. The hearing before us was conducted via Skype for Business. There were no technical difficulties and both parties confirmed that they were able to follow the proceedings throughout.

16. The matter comes before us to determine whether the Decision contains an error of law and, if we so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

17. We deal with the grounds as pleaded and developed by Mr Chirico in oral argument. However, for reasons which we give below, we have taken those in a slightly different order.

Ground 1

18. Mr Chirico fairly and correctly conceded that the Appellant's first ground could not be utilised to establish any error of law in the Decision. This is not a case which was pursued on the basis of any individualised risk to the Appellant in Jamaica which it is said would be exacerbated by the failure to make an anonymity direction. The basis on which it is said that an anonymity direction should be made relates to the sensitivity of some of the issues, particularly related to the Appellant's family background and history.

19. The Judge dealt with the anonymity direction at [61] of the Decision in the following terms:

> "So far as I am aware there has never been an order in place preserving the Appellant's anonymity at any stage of these proceedings. I do not consider it is appropriate to make such an order now and I do not."

20. Whilst that passage is devoid of reasons for not making an anonymity direction, whether such a direction is appropriate is largely a matter of judicial discretion. As appears from [14] of the Decision, the Judge did agree to treat the Appellant as a vulnerable witness on the basis of the sensitivity of the issues in this case.

21. As we note above, Judge Landes ordered anonymity on an interim basis when granting permission. Although we are acutely aware of the general principle of open justice, that is to be balanced in appropriate cases against the interference with the individual's right to privacy. We make clear that, in this case, the individual rights of the Appellant are based only on the sensitivity of his past family life and events which befell him as a child. They do not include the Appellant's interests in keeping private his criminal offending. Even though some or most of those offences were committed before the Appellant attained his majority, we do not order anonymity so as to prevent the Appellant's commission of those offences being disclosed. We do so only to protect the Appellant's privacy in relation to the events which we record at [3] above. Mr Lindsay indicated that the Respondent was neutral in relation to this matter.

22. Having continued the interim anonymity order for the purposes of the ongoing appeal, we need say no more about the first ground. That is now academic.

Ground 2

23. It was unclear to us at the outset of this hearing how the Appellant puts his case in relation to Articles 39 and 40 of UNCRC. We accept as did Mr Lindsay that the Judge did not deal with this argument which we accept appears in Mr Chirico's skeleton argument for the First-tier Tribunal hearing at [36] to [48] of that document. As such, there is an error of law in failing to deal with an argument put forward. The real issue which arises in relation to this ground is whether the argument is one which is capable of making any difference to the outcome. For that reason, we propose to return to this ground after dealing with the other remaining grounds.

Ground 3

24. By means of this ground of claim the Appellant raises three individual challenges that are linked by the assertion that the Judge Eldridge made findings inconsistent with the evidence before him.

25. The Appellant complains about what is said to be a stark finding that he 'is not on any recognisable journey of rehabilitation' at [55] of the Decision. It is appropriate to consider the paragraph in its entirety:

> '55. It must be accepted that the majority of the Appellant's offending occurred whilst he was under the age of 18 but the factors which I have indicated, the risk he continues to pose of serious offending, the spurning of treatment proposed and offered, and the nature of his offending leads me to conclude that he continues to pose a real threat of conduct such as carrying bladed instruments and violent offending. The public interest in his removal by way of deportation is very high. With the attitude he has shown to community sentences, the fact that he has disappeared at times whilst under the care of social services and, to a limited extent, his continuing on a daily basis to flout the criminal law through his drug habit lead me to conclude that **he is not on any recognisable journey of rehabilitation at this stage**.'

[our emphasis]

26. Mr Chirico submitted that the Judge had failed to factor into his assessment the unchallenged evidence of Mr Huntley, the Appellant's social worker, that the Appellant was trying to change his behaviour and such attitude was evidenced by his engagement both with Mr Huntley and his probation officer though his attending all appointments and being keen to look for work. Such evidence was said to be directly incompatible with the conclusion that the Appellant is not on any recognisable journey of rehabilitation.

27. We are satisfied that the Judge took Mr Huntley's evidence into account. Indeed, the Judge expressly noted as part of his assessment, at [49] of the Decision that Mr Huntley was a disinterested expert who had worked with the Appellant throughout 2019, seeing him on several occasions, and that Mr. Huntley spoke of the Appellant "<u>trying to change his behaviour</u> and <u>now being engaged</u> with probation" (our emphasis). It was a matter for the Judge to consider the evidence relied upon by the Appellant in the round and it was reasonably open to him to prefer the evidence of Dr Davies, Consultant Forensic Psychologist (the Appellant's own expert). At [50] consideration was given to Dr Davies' assessment that the Appellant was a moderate risk of further violent offending and a moderate risk of serious harm and was "<u>currently ambivalent</u> as to therapy" (our emphasis).

28. Mr Chirico further submitted that in reaching his conclusion as to rehabilitation, the Judge failed to consider the Appellant's evidence that he used cannabis as a form of coping 'until he gets the opportunity to go to work and make something of [him]self'. We observe that the Judge considered the Appellant's evidence and was entitled to place weight upon his confirmation to Dr Davies, as detailed in a report authored the week before the hearing, that he was ambivalent about seeking any therapy that was offered to him. We are satisfied that the Appellant's illicit drug use could properly be seen by the Judge as a choice or habit that he was content to engage in whilst being aware that it was a criminal act.

29. Further, the Judge was lawfully entitled to conclude on the evidence before him that the Appellant remained a moderate (or medium) risk of both further violent offending and of serious harm to others in the community, as confirmed by Dr Davies and the general assessment contained within the OASys report. Consideration of such risk was part and parcel of the assessment of rehabilitation.

30. The Judge did not treat past events and action as indicative of risk and rehabilitation but looked at them in conjunction with the Appellant's ongoing limited engagement with offers of support and treatment. In the circumstances we are satisfied that the Judge took all relevant factors into account when concluding that the Appellant was not on any recognisable journey of rehabilitation at the time of his Decision.

31. The Appellant's second complaint concerns the Judge's finding, at [54], that he has shown a disdain for the opportunities offered to him in terms of mental health referrals. By means of his grounds of appeal, Mr Chirico asserted at §24 that 'the

FTT's position is plainly that [the Appellant] has, through his own fault, failed to obtain mental health support' and that such conclusion failed to engage with the difficulties that the Appellant might face in approaching mental health professionals consequent to his history of abuse.

32. We observe the relevant paragraph:

> '54. I am concerned that he has shown a disdain for the opportunities offered to him in terms of mental health referrals and, above all, court orders that were aimed at rehabilitation within the community. Even now, talking with Ms. Davies, he is ambivalent about seeking any therapy that might be offered to him. He has to be seen on the basis of the expert evidence available to me to be at least a medium risk of reoffending and a medium risk of causing serious harm to members of the public. These are important factors in ascertaining the interests of the state.'
>
> [our emphasis]

33. Before us Mr Chirico accepted from the outset that the Judge had not concluded that the Appellant has a current disdain for mental health referrals. Rather, upon reading [54] in its entirety, he submitted that the Judge found a past disdain and a current ambivalence. His submission was that the Judge failed to take into account the reason for the Appellant's failure to take offered medical support, which lies in his history of abuse, and that the use of 'disdain' placed blame upon a victim of abuse.

34. We find that when read as a whole, [54] the "disdain" is identifiable as mainly directed towards the Appellant's attitude to court orders that were aimed at supporting his rehabilitation and his lack of engagement with them. If and insofar as the Judge placed weight on the Appellant's failure to engage in the past or now with therapy to address his difficulties, we accept that the use of the word "disdain" may be an unfortunate one. However, the broad point is that the Appellant was and is unwilling to engage with the pathways to rehabilitation that have been offered to him, whatever his reasons. That was a matter on which the Judge was entitled to place weight.

35. The Appellant further complains that the Judge erred in concluding that he would enjoy practical support upon return to Jamaica as there was evidence before the Judge that his great-grandmother and his half-sister are unable to offer him any ongoing support. Before us, Mr Chirico acknowledged that this was not the strongest point advanced on behalf of the Appellant.

36. The Judge addressed this issue at [56] and [59] of the Decision, observing that the Appellant's grandmother had visited Jamaica for between six weeks and four months in recent times and that family members in this country were willing to support him on his return to Jamaica, including his father.

37. We observe that the support available on return does not have to be extensive and are satisfied that the Judge appropriately considered the nature and substance of the support available to the Appellant on return. He was not required to detail the

persons unable to offer such support within his Decision. He only needed to be satisfied to the appropriate standard that such support was available. The finding he reached was one which was open to him on the evidence.

38. For the foregoing reasons, we are satisfied that there is no error of law disclosed under any of the heads of the third ground.

Ground 4

39. The Appellant complains by means of this ground that in concluding that he is not 'socially and culturally integrated' in this country the Judge failed to conduct a holistic assessment and further had regard to immaterial considerations. The Judge addressed social and cultural integration at [41] of the Decision:

> '41. Even if that had been incorrect, I would not have found that the Appellant was socially and culturally integrated in the United Kingdom. In my judgement carrying bladed instruments, committing offences of robbery, assaulting police officers in the execution of their duty and daily use of proscribed drugs does not show such integration. In the decision in *Binbuga* cultural and social integration was described at paragraph 56 of the judgment of Hamblen LJ as 'the extent to which a foreign criminal has become incorporated within the lawful social structure of the UK'. He took this further in paragraph 57 in describing it as 'the acceptance and assumption by the foreign criminal of the culture of the UK, its core values, ideas, customs and social behaviour. This includes acceptance of the principle of the rule of law.'

40. Mr Chirico submitted that the Judge took a reductive and unlawful approach by wholly failing to undertake a holistic assessment and instead exclusively referred to the Appellant's criminal conduct. By adopting such approach, the Judge is said to have failed to have regard to several factors favourable to the Appellant, including his length of residence in this country, the reasons underpinning his criminality including his history of sexual and physical abuse, and the positive evidence presented by Mr Huntley and Dr Davies.

41. The Appellant placed reliance on the Court of Appeal's judgment in CI (Nigeria) v. Secretary of State for the Home Department [2019] EWCA Civ 2027 ("CI (Nigeria)") at [56] to [62]. The point there made is, as we accept, that the nature and context of offending is only one part of the overall issue of integration.

42. As the Court of Appeal held at [57] "it is important to keep in mind that the rationale behind the test is to determine whether the person concerned has established a private life in the UK which has a substantial claim to protection under Article 8". The Court of Appeal went on to say that "[r]elevant social ties obviously include relationships with friends and relatives, as well as ties formed through employment or other paid or unpaid work or through participation in communal activities". The Court of Appeal also pointed out though that integration as a concept is "constituted at a deep level by familiarity with and participation in the shared customs, traditions,

practices, beliefs, values, linguistic idioms and other local knowledge which situate a person in a society or social group and generate a sense of belonging".

43. The first point we make is that what the Judge says at [41] of the Decision has to be read in the context of the Decision as a whole. In particular, the Judge had, at [34] to [39] of the Decision, considered the extent of the Appellant's private life and family relationships. He was aware that the Appellant has been present in this country from the age of eleven. He made findings on the Appellant's interaction with family members, and the emotional ties that he enjoyed with his father, sister and grandmother. He noted the support received by the Appellant from Lambeth council.

44. However, he also observed records from Lambeth that identified the Appellant as exhibiting very anti-social behaviour and concerns being raised as to his stalking female contemporaries. He took the Appellant's criminal convictions and his continuing use of cannabis into account along with other relevant issues, as he was required to do.

45. Paragraph [41] of the Decision therefore draws together what is said about the Appellant's offending at [30] to [33] of the Decision against the Appellant's community ties at [34] to [39] of the Decision.

46. Second, that approach is underlined by the penultimate sentence of [41] of the Decision. Although the Judge was there quoting from the case of Binbuga v Secretary of State for the Home Department [2019] EWCA Civ 551, that sentence encapsulates the principles set out by the Court of Appeal in CI (Nigeria).

47. For those reasons, we are satisfied that the Judge did undertake a holistic assessment as to integration.

48. We add that, when considering the fact-sensitive nature of an Article 8 assessment, the scenarios in CI (Nigeria) and Akinyemi v Secretary of State for the Home Department (No.2) ("Akinyemi No 2") [2019] EWCA Civ 2098 do not assist the Appellant. In the former, the appellant arrived in the United Kingdom when aged one. In the latter, the appellant was born in this country and had not left it. In this matter, the Appellant arrived in this country when aged eleven and committed his first offence – battery, for which he received a reprimand - when aged thirteen. By the age of fifteen he was considered by persons in authority to be a stalker and received his first conviction when aged seventeen in relation to the possession of a knife or blade or sharply pointed article in a public place.

49. Having undertaken a holistic assessment, the Judge lawfully determined that the Appellant was not socially and culturally integrated in this country and gave lawful reasons for so concluding. There is no error of law under this ground.

Ground 5

50. Before the First-tier Tribunal the Appellant asserted that he enjoyed a family life with his sister, his father and his grandmother. The Judge concluded that for the purposes of Article 8 a family life was not established between the Appellant and these relatives. The Judge noted at [36] - [39] of the Decision that the Appellant is not leading an independent life because he remains in receipt of support from Lambeth Council, but found that he does not receive any practical support from his father, sister and grandmother. The Judge found that whilst the Appellant's sister has a sincere affection for him, they enjoy little contact and had not seen each other for a considerable period of time. As to the Appellant and his father, they have an on-off relationship and by the time of the hearing were seeing each other once a month. The Judge accepted that the Appellant's grandmother has sincere affection for the Appellant, but she has other relatives living with her for whom she was responsible.

51. The Judge concluded, at [39], that:

> '39. … it is clear that the Appellant has many needs, but I do not find that the nature of the relationship on a practical level is that of family life between the Appellant and any of the relatives he has relied upon. Emotional support will be provided by his grandmother whenever possible and sometimes by his father but I do not consider that the relationships between them amount of [sic] family life within the terms of Article 8 …'

52. The Appellant's first complaint is that the Judge erred in confining his assessment to the date of the hearing, a time when he was required by bail conditions to reside with his uncle in Bournemouth, as such approach failed to engage with the positive obligation placed upon the Respondent to ensure respect for family life. Consequent to such positive obligation, the Appellant submitted that the Judge was required to examine the 'potential' for family life if his appeal was successful, thereby permitting the Appellant to return to London and be closer to his father, sister and grandmother.

53. The Court of Appeal confirmed in Singh v. Entry Clearance Officer, New Delhi [2004] EWCA Civ 1075, at [38], that the potential for the development of family life is relevant in determining whether family life already exists. In this matter, the Judge was considering circumstances existing between the Appellant and certain family members, and he was entitled to place into his assessment of the existence or otherwise of family life the fact that the Appellant left the family home in 2016 and having been placed into local authority care was living semi-independently.

54. The evidence confirmed that the Appellant had not received practical support from his father, sister and grandmother for significant time, nor did the evidence before the Judge identify a likelihood as to an increase in practical support provided by family members towards the Appellant at a future time.

55. We note that the Appellant and his family members sought to identify the strength of their emotional ties, with the Appellant referencing his enjoyment of being able to get

things of his chest when he visits his father and the enjoyment of being able to pop in and see his grandmother.

56. We are satisfied however that the Judge considered the family dynamic as detailed before him and was mindful that considerations of Article 8 rights are fact sensitive when he concluded that family life did not exist between the Appellant and identified family members at the date of his decision. Further, observing the evidence of emotional support advanced by the Appellant the Judge proceeded to consider 'potential' development at [39], concluding that such support would be provided by his grandmother 'whenever possible' and 'sometimes' by his father, but such support was not capable of establishing a family life for the purpose of article 8. Such assessment is consistent with the approach confirmed by the Court of Appeal in Kugathas v. Secretary of State for the Home Department [2003] EWCA Civ 31, that a finding of family life between adults requires more than the normal emotional ties.

57. For those reasons, we can discern no error of law under the fifth ground.

Ground 2 revisited

58. We have concluded that there is no error of law disclosed by the Appellant's grounds 3, 4 and 5. However, as we accepted at [23] above, ground 2 does disclose an error in relation to the Judge's failure to deal with the Appellant's arguments regarding Articles 39 and 40 UNCRC. As we there indicated, the question which now arises is whether that argument is one which is capable of affecting the outcome of this appeal or whether, as we have concluded, for reasons set out below, the argument is one which, had it been considered, would have made no difference.

59. We initially understood from his skeleton argument that Mr Chirico was seeking to place direct reliance on an instrument of international law which, so far as we could ascertain, has not been incorporated into domestic law (at least so far as the articles relied upon are concerned). Mr Chirico confirmed however that this is not the way in which the case is put. He accepted that the Tribunal could not and should not seek to interpret or apply Articles 39 and 40 UNCRC directly.

60. The way in which Mr Chirico seeks to place reliance on Articles 39 and 40 is as follows. The Supreme Court in Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60 "reaffirmed … the need for domestic decision-makers to be guided by the Strasbourg jurisprudence". The Tribunal is of course also obliged by the Human Rights Act 1998 to have regard to the case-law of the Strasbourg court.

61. Next, Mr Chirico draws attention to the Strasbourg cases of Uner v Netherlands (Application No. 46410/99, 18 October 2006) particularly as reaffirmed in Maslov v Austria (Application 1638/03, 23 June 2008) ("Maslov"). Mr Chirico relies in particular on paragraphs [73], [75] and [82] of the Grand Chamber's judgment which he submits provide general guidance about the principles to be applied in Article 8 deportation cases. Those include in particular the obligation to have regard to the best interests of the child in any case where the person to be expelled is still a minor or "the reason for the expulsion lies in offences committed when a minor" ([82] of the

judgment in Maslov). This obligation is, says Mr Chirico, derived from the UNCRC (see reference at [82] of the judgment to [36] where Article 40 is cited). The Grand Chamber goes on at [83] of the judgment to set out the relevance of Article 40 as follows:

> "The Court considers that, where expulsion measures against a juvenile offender are concerned, the obligation to take the best interests of the child into account includes an obligation to facilitate his or her reintegration. In this connection, the Court notes that Article 40 of the Convention on the Rights of the Child makes reintegration an aim to be pursued by the juvenile justice system (see paragraphs 36-38 above). In the Court's view this aim will not be achieved by severing family or social ties through expulsion, which must remain a means of last resort in the case of a juvenile offender…"

62. Based on this analysis, Mr Chirico concludes that Article 8 ECHR has to encompass consideration of the aim of Article 40 UNCRC when assessing the proportionality of the deportation of a person as the Appellant who has committed crimes whilst still a child, for the purposes of facilitating reintegration (even where, as here, the Appellant is no longer a child). His submission is that, in a similar vein, the Tribunal should have regard to Article 39 UNCRC even though he accepted that there is no express reference to that article made by the Strasbourg court in Maslov or any other case.

63. Particularly in relation to Article 40 UNCRC, as we canvassed with Mr Chirico, we were unable to understand how his submission amounts to any more than a development of an argument that the Tribunal should take into account the guidance in Maslov insofar as that is relevant to this case. We will come to the relevance of the judgment in that case below.

64. We begin our analysis however by setting out articles 39 and 40 UNCRC which read as follows:

> "Article 39
>
> States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment of punishment; or armed conflicts. Such recovering and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.
>
> Article 40
>
> 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
>
> 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused or, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

65. It goes without saying that the UNCRC is concerned with all children which of course includes non-national minors. It is however not specifically targeted at foreign

national children and nor is it concerned generally with immigration. As such, whilst we accept Mr Chirico's submission that the provisions of the UNCRC are addressed to State Parties generally rather than any individual part of the State, the relevance of the individual provisions does rather depend on the context to which that provision is directed. Although the Grand Chamber in Maslov confined itself to a citation of Article 40(1) UNCRC, we have set out the whole of Article 40 so that the sub-article can also be read in context.

66. As we set out at [60] to [62] above, Mr Chirico's argument in relation to Article 40 turns on what is said by the Grand Chamber at [82] and [83] of its judgment in Maslov. We note at this juncture that, although paragraph [83] does speak of reintegration in general terms and relates Article 40 to the need to integrate juvenile offenders in the context of deportation, that has to be read with what is said about Article 40 earlier in the judgment as follows:

> "37. The Committee on the Rights of the Child, in its concluding observations on the second periodic report of Austria (see CRC/C/15/Add 251, 31 March 2005 §§ 53 and 54), expressed its concern about the increasing number of persons below the age of 18 placed into detention, a measure disproportionately affecting those of foreign origin, and recommended with regard to Article 40 of the Convention on the Rights of the Child that appropriate measures to promote the recovery and social integration involved in the juvenile justice system be taken.
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> 38. In its General Comment no. 10 (2007) on children's rights in juvenile justice (see CRC/C/GC/10, 25 April 2007, §71), the Committee on the Rights of the Child emphasised with regard to measures in the sphere of juvenile justice:
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>> '… that the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in Article 40§1 of CRC [Convention on the Rights of the Child] … In cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safeguard the well-being and the best interests of the child and to promote his/her reintegration.'"

67. Before turning to the relevance of what is said in Maslov to this case, we make the following general observations.

68. First, as we have already noted, the legal system in the United Kingdom provides (in broad terms) that domestic courts are unable to adjudicate on rights arising in international law unless those are incorporated into domestic legislation or are part of customary international law (see JH Rayner (Mincing Lane) Ltd and others v. Department of Trade and Industry and Others – the "Tin Council" cases – [1990] 2 AC 418). As we have already noted, Mr Chirico did not disagree with that proposition.

69. Second, as we observed in the course of Mr Chirico's submissions, the Grand Chamber is part of a supranational court which itself operates therefore on the international plane and is not constrained by the doctrine of incorporation. As such, it is perhaps unsurprising that it informs its judgments by reference to other international instruments.

70. Third, whilst we do not disagree that those other international instruments may inform human rights in the domestic arena where directly relevant, through the lens of Article 8 ECHR and Strasbourg cases, that cannot be used as some sort of mechanism to apply those rights directly in domestic law to avoid the need for incorporation and circumvent the doctrine.

71. Fourth, for that reason, the way in which the ECtHR uses those other international instruments and relies upon them has to be carefully considered in its context. As we have already said, the UNCRC is not directly concerned with foreign national children nor the context of immigration. What it has to say about the rights and interests of children may be relevant to a particular case, but the context is all important.

72. Turning then to the case of Maslov, we begin by summarising the facts of that case. The appellant in that case, a Bulgarian national, had entered Austria lawfully with his family in 1990 at the age of six. He had remained lawfully throughout. His parents became nationals of Austria. The appellant underwent his education in Austria. Notwithstanding a series of minor offences committed in 1998 (when the appellant would have been aged about fourteen or fifteen years), in March 1999, he was given a permit to settle indefinitely in Austria. He was convicted some six months later of a number of much more serious offences committed between November 1998 and June 1999. He was sentenced to a term of imprisonment with an order to undergo drug therapy. He was later convicted for further offences and sentenced to a term of further imprisonment. The appellant was made the subject of an exclusion order in 2001 when he would have been aged about seventeen years old. His appeal against exclusion relied on his family ties as his entire family lived in Austria and although the courts had noted the parents' inability to influence the appellant, he had remained living with his family outside the periods of imprisonment. He was still living with his family at the time of the exclusion order.

73. We have already set the reference to Article 40 UNCRC in its context within the judgment at [66] above. As is there evident, that article was particularly relevant in Maslov because of what had been said by the Committee on the Rights of the Child about Austria's increasing practice of detaining those under eighteen. Those comments related of course to the juvenile criminal justice system as a whole, but it was noted that the practice had a disproportionate effect on foreign nationals such as the appellant. Mr Maslov had been made subject to two fairly lengthy terms of imprisonment by the time he reached eighteen years.

74. In order to understand the Grand Chamber's approach, the relevant starting point is [71] to [75] where the Court set out the general principles which apply to cases such as Maslov as follows:

> "71. In a case like the present one, where the person to be expelled is a young adult who has not yet founded a family of his own, the relevant criteria are - the nature and seriousness of the offence committed by the applicant; - the length of the applicant's stay in the country from which he or she is to be expelled; - the time elapsed since the offence was committed and the applicant's conduct during that period; and - the solidity of social, cultural and family ties with the host country and with the country of destination.
>
> 72. The Court would also clarify that the age of the person concerned can play a role when applying some of the above criteria. For instance, when assessing the nature and seriousness of the offences committed by an applicant, it has to be taken into account whether he or she committed them as a juvenile or as an adult…
>
> 73. In turn, when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult…
>
> 74. Although Article 8 provides no absolute protection against expulsion for any category of aliens (see Uner, cited above, §55), including those who were born in the host country or moved there in their early childhood, the Court has already found that regard is to be had to the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there4 and received their education there (see Uner, §58 in fine).
>
> 75. In short, the Court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country very serious reasons are required to justify expulsion. This is all the more so where the person concerned committed the offences underlying the expulsion measure as a juvenile."

75. We pause to observe two matters arising from that part of the judgment. First, that approach largely reflects the domestic approach contained in the Rules and Section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C") when considering private life (*viz* time spent in the UK, social and cultural integration in the UK and obstacles to reintegration in home country). As such, those are all matters which were taken into account by Judge Eldridge and, as we have already concluded, there is no legal error in his conclusions on those issues.

76. Second, there are some rather important differences between the situation of this Appellant and Mr Maslov. First, the Appellant came here when he was almost a teenager and not as a young child. We accept that he came here and has remained here lawfully. Second, unlike Mr Maslov, the Appellant has not continued living with his family. He was already estranged from them at the time of his detention. We have concluded that the Judge did not err in relation to his conclusion that the Appellant does not enjoy family life with his family. Third, contrary to Mr Maslov

who had committed no offences after his release from prison until he was deported, the Appellant in this case is said to remain a medium risk of further offending and, again unlike Mr Maslov, some of the Appellant's offending has involved violence or at least the risk of violence.

77. Returning then to the point at which we began this discussion with the Grand Chamber's reference to Article 40 at [83] of the judgment (as set out at [61] above), the reference has to be read in its context of an aim of the juvenile justice system and one about which concerns had recently been raised by the committee related to the UNCRC about the country against which Mr Maslov had brought his complaint. In its observation, therefore, the Court was using Article 40 UNCRC merely as an interpretative aid to the principle already enunciated about the need to rehabilitate youth offenders. It merely "notes" the aim of Article 40 and does not suggest that Article 8 directly incorporates that provision which is as we understand Mr Chirico's case.

78. Even if we are wrong about that, we come back to the point that the reference to Article 40 UNCRC adds nothing to this case. The Judge noted that the convictions and offences were at a time when the Appellant was not yet an adult ([7] to [9] of the Decision). However, even on the Appellant's own evidence, he remained a risk and he was aged twenty years at the hearing before Judge Eldridge. Crucially, the Judge found that the Appellant was not integrated in the UK, a conclusion which we have upheld. There is therefore no aim within Article 40 which has any bearing on this case.

79. We also note Mr Chirico's reliance on the Court of Appeal's judgment in this context in Akinyemi No.2 We accept as was there said that the public interest has a "moveable" quality and that, in appropriate cases, the strong public interest in deportation of foreign criminals may be diminished by specific factors in an individual case. In that case, the factor which appears to have significantly weighed with the court in determining that the Upper Tribunal had erred in dismissing the appeal was that the appellant in that case was born in the UK (see [33] and [53] of the judgment). That is of course not the case here. Whilst there are some common factors in that case when compared with the instant case, that is not the test. Article 8 requires a balance of individual rights against the public interest in this case and it is rarely appropriate to pray in aid the facts of another case, whatever factual similarities there might be to that case.

80. Reliance was also placed on the case of CI (Nigeria). We do not need to deal with that case in any depth as it is already covered above in what we have to say about the findings concerning integration. We would simply observe that the judgment in that case merely serves to underpin what we say about Akinyemi No. 2 and Mr Chirico's arguments about Maslov and Article 40. The relevance of a foreign criminal's lawful residence (or even unlawful residence) as a child is relevant to the degree of social and cultural integration in the UK. That may, in appropriate cases, be of sufficient depth to lead to a finding that there is a private and/or family life which outweighs the public interest due either to the strengthening of the factors on the side of the

interference or a diminution of the public interest on the other. However, as we have already concluded, the Judge considered the strength of private life formed (including the Appellant's family relationships) when carrying out the balancing exercise and there is no error in his assessment.

81. Further, Mr Chirico's reliance on those two cases merely serves to illustrate our point that the Article 40 argument adds nothing as, in substance, the Court of Appeal was in those cases applying the guidance taken from Maslov which we have dealt with above. Whilst the Judge did not refer to Maslov expressly in the Decision, he followed the guidance in substance because he considered the case first through the lens of the Rules and Section 117C which incorporate the parts of the judgment which are relevant for these purposes.

82. We can deal more shortly with Article 39 UNCRC. Mr Chirico does not rely on any Strasbourg case which makes any reference to that article. He seeks to introduce it by analogy with Article 40. If Article 8 incorporates Article 40 UNCRC in a relevant case, as he contends, then the same is true of Article 39. For the reasons we have already given, Maslov does not illustrate what Mr Chirico says it does in relation to the interaction of Article 8 and Article 40. At most, Article 40 is used as a shorthand to inform a principle of Article 8. It is no more than an aid to interpretation. In any event, unlike Mr Maslov's case, there is no criticism made of the UK failing to observe an aim of the juvenile justice system in this case. None is suggested by the evidence.

83. It is in this regard that Mr Chirico's case also falls apart on Article 39 even if it were correct in law (which we do not accept). As we had understood part of his argument, it was being suggested that the system in this country had let down the Appellant in relation to his care due to his troubled background. The Appellant was, as we have noted, taken into the care of the local authority when he was aged sixteen years. There is a passing suggestion to a failure to find the Appellant a place in education before that when he first moved to London to live with his father but no complaint is made about the local authority's treatment of him after he was placed into care and allocated semi-independent accommodation. Judge Eldridge had evidence from Mr Huntley who is the Appellant's allocated social worker. We have read his evidence with some care. There is nothing in it to suggest that the authorities have failed the Appellant in their care of him.

84. As we observed in the course of Mr Chirico's submissions, it seems to us that whereas Article 40 is concerned with the juvenile justice system, Article 39 is relevant to the position of vulnerable children and, therefore, in this context, to State care of such children. There is no evidence that the UK has failed in its obligations to "take all appropriate measures" in relation to the Appellant. True it is that the Appellant has been found not to have integrated in the UK but that is not by reason of any failure by the authorities but by reason of his own actions.

85. Even if Mr Chirico's argument was correct in law, therefore, Articles 39 and 40 have no bearing on this case on the evidence. They add nothing to the issue whether the

Appellant is in fact socially and culturally integrated in the UK and whether removing him from his family who live in the UK and from his private life here would disrupt such integration. Judge Eldridge made a finding that the Appellant is not integrated and does not have family life with his relatives in the UK. Having upheld those findings, therefore, there is nothing in Mr Chirico's submissions based on Article 39 and 40 UNCRC which could conceivably make any difference to those findings.

86. For those reasons, although we accept that Judge Eldridge erred by failing to deal with these arguments, we conclude that such error makes no difference, and we decline to set aside the Decision based on that error.

CONCLUSION

87. For the above reasons, we are satisfied that there is an error of law in the Decision for failure to consider the arguments concerning Articles 39 and 40 UNCRC but that the error could make no difference to the outcome for the reasons we have given. We are satisfied that there is no other error of law identified by the grounds. We therefore decline to set aside the Decision. We uphold the Decision.

DECISION

The Decision of First-tier Tribunal Judge Mark Eldridge promulgated on 31 October 2019 does involve the making of an error on a point of law on ground two only, but we decline to set aside the decision on that basis as the error makes no difference. The grounds do not establish any other error of law. We therefore uphold the Decision with the consequence that the Appellant's appeal remains dismissed.

Signed: *L K Smith*

Upper Tribunal Judge Smith

Dated: 12 November 2020