Upper Tribunal
(Immigration and Asylum Chamber)

Juba (s. 94B: access to lawyers) [2021] UKUT 00095 (IAC)

THE IMMIGRATION ACTS

Heard at Field House by Skype	**Decision & Reasons Promulgated**
On 1 December 2020	**5 March 2021**

Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE PITT

UPPER TRIBUNAL JUDGE BLUM

Between

ABIODUN JUBA

(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the appellant: Mr M Westgate QC and Ms Marisa Cohen , instructed by

Wilson Solicitors LLP

For the respondent: Mr S Kovats, QC , instructed by the Government Legal Department

Nationality, Immigration and Asylum Act 2002, s. 94B: Access to lawyers

(1) In the light of Kiarie and Byndloss [2017] UKSC 42, the first question to be answered by the First-tier Tribunal in an appeal involving a claim that has been certified under section 94B of the Nationality, Immigration and Asylum Act 2002 is whether the appellant's removal from the United Kingdom pursuant to the certificate has deprived the appellant of the ability to secure legal representation and/or to give instructions and receive advice from United Kingdom lawyers (AJ (s. 94B: Kiarie and Byndloss questions) [2018] UKUT 115 (IAC)).

(2) The task for the First-tier Tribunal in answering that question is fact and context-specific. The Tribunal must, in particular, determine whether the facts demonstrate the kind of inconvenience or

difficulty that is inherent in the appellant being outside the United Kingdom; or whether there has been, or will be, an actual impediment in the taking of instructions and receiving of advice.

(3) There may be circumstances where, at some point before the hearing is due to take place, it will be evident that the appellant's legal adviser is simply not in a position to mount an effective case, owing to the appellant being outside the United Kingdom. In such circumstances, it would manifestly be wrong to undertake the hearing.

(4) The first question does not, however, necessarily have to be answered by the Tribunal before the start of any hearing of the appeal. Where the position is not clear cut, it will be a matter for the Tribunal to decide whether it addresses the first question after the hearing has taken place. Matters may arise during that hearing which show the question falls to be answered in favour of the appellant. In other cases, the answer may fall to be answered in the negative, once the hearing has occurred. For example, the oral evidence may disclose that an issue upon which it might have been thought the legal adviser was without relevant instructions is not, in fact, relevant to the outcome; or that what might otherwise have been thought to have been a "gap" in the adviser's instructions is not of such a nature.

Nationality, Immigration and Asylum Act 2002, s. 117C(4) and s. 117C(6)

(5) It is unnecessary to "read down" s. 117C(4) in order to avoid a breach of Article 14 of the ECHR because, inter alia, the case-specific factors said to support any discrimination are relevant to the s. 117C(6) exercise, which requires a more nuanced approach and a collective examination of all relevant matters.

(6) Adverse credibility findings and the fact that an individual was not born in the United Kingdom do not obviate the requirement to apply the key principle in Maslov v Austria [2009] INLR 47, as explained in CI (Nigeria) v SSHD [2019] EWCA Civ 2027

DECISION AND REASONS ON ERROR OF LAW

A. INTRODUCTION AND BACKGROUND

1.
Upper Tribunal Judge Pitt has substantially contributed to the writing of this decision. It concerns an appeal against a decision of the respondent dated 14 April 2020, which refused the appellant's Article 8 ECHR claim. The appellant brought that claim in the context of a deportation order made against him on 3 March 2015.

2.
The appellant's personal and immigration history has already been set out in some detail by the First-tier Tribunal and Upper Tribunal in previous decisions but it is expedient to provide some of that history again here.

3.
The appellant was born in Nigeria on 17 December 1987. He came to the UK with his mother, Lovett Juba, in 1989 when he was just under two years' old. Having come to the UK on a visitor visa, the appellant's mother overstayed and the family remained here for an extensive period of time without leave. In due course, however, on 8 October 2009, the appellant, his mother and his sister, Adetoun, were granted indefinite leave to remain (ILR).

4.

The appellant began committing criminal offences in 2003 when he received a warning for taking a conveyance without authority. Further offences of possession of cannabis occurred in 2005, 2007, 2008, and 2009 for which the appellant received fines of between £66 and £80. An offence of possession of cannabis in 2008 led to a community order which the appellant breached.

5.
On 25 November 2014, at Croydon Crown Court, the appellant was convicted of child abduction and sentenced to eighteen months' imprisonment. A Sexual Offences Prevention Order was made for a five year term.

6.
This offence led to the respondent commencing deportation action against the appellant. In response to deportation action, on 15 January 2015, the appellant made an Article 8 ECHR claim. The respondent refused that claim on 13 February 2015 and certified it under section 94B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). The section 94B certificate permitted the respondent to remove the appellant to Nigeria pending the outcome of an appeal against his Article 8 ECHR claim.

7.
On 3 March 2015 the respondent made a deportation order against the appellant. On the same day, the Upper Tribunal refused permission to apply for a judicial review of the s.94B certificate. Permission to appeal to the Court of Appeal was refused as was a renewed application. On 28 July 2015 the appellant was deported to Nigeria.

8.
On 14 August 2015, the appellant lodged an appeal from outside the United Kingdom, against the refusal of his human rights claim. The appeal was heard by the First-tier Tribunal on 19 May 2017. In a decision issued on 31 May 2017, the First-tier Tribunal dismissed the appeal. The appellant was represented in those proceedings by Cleveland Law Limited and the First-tier Tribunal heard oral evidence from the appellant's mother and father. No provision was made for the appellant to participate in the hearing.

9.
With the assistance of new legal representatives, Wilson Solicitors LLP, the appellant appealed against the decision of First-tier Tribunal. The Upper Tribunal found an error of law in the First-tier Tribunal's decision and set it aside to be remade in the First-tier Tribunal. The Upper Tribunal decision was reported as AJ (Section 94B; Kiarie and Byndloss questions) Nigeria [2018] UKUT 115 (IAC); [2018] Imm AR 976 and identified that the First-tier Tribunal erred in failing to assess whether the appeal could be determined without the appellant being physically present in the UK.

10.
The appeal then came before the First-tier Tribunal again on 11 and 12 February 2020 before a three-person panel, including its President. As before us, the appellant was represented by Mr Westgate and the respondent by Mr Kovats. The appellant participated in the proceedings, including giving live evidence, via a video link from the British High Commission in Lagos. The panel also heard evidence in person from the appellant's mother, Lovett Juba. In the decision issued on 14 April 2020, the First-tier Tribunal concluded that there had been an effective hearing and that the appellant could not show that his Article 8 ECHR rights were breached by deportation and the appeal was dismissed.

11.

The appellant appealed again against the decision of the First-tier Tribunal panel. He was granted permission to appeal by the Upper Tribunal on 17 August 2020. Thus the matter came before us at a hearing on 1 December 2020.

B. DECISION OF THE FIRST-TIER TRIBUNAL

12.
The First-tier Tribunal considered first whether the appeal was effective where the appellant remained abroad. The panel concluded, for the reasons set out in paragraphs 18 to 28 of the decision, that the appellant had been afforded "full opportunity to instruct and receive advice from his UK lawyers". The First-tier Tribunal found in paragraphs 29 to 32 that the appellant's ability to produce expert and other professional evidence was not impaired. In paragraphs 33 to 39 the panel found that the appellant had been able to participate effectively in the hearing and that there had been a fair disposal of the appeal notwithstanding his being in Nigeria.

13.
The appellant's oral evidence was recorded by the First-tier Tribunal in paragraphs 40 to 60 of the decision. The evidence of the appellant's mother was set out in paragraphs 61 to 75 of the decision. The First-tier Tribunal referred to the legal framework within which the evidence had to be considered in paragraphs 76 to 79.

14.
The First-tier Tribunal then conducted an analysis of whether the evidence showed that the exception to deportation set out in section 117C(4) of the 2002 Act was met. The panel concluded that the appellant had not been in the UK legally for more than half his life and, therefore, that section 117C(4)(a) was not met. For the reasons set out in paragraphs 90 to 92 of the decision, the First-tier Tribunal found that the appellant was socially and culturally integrated in the UK and that section 117C(4)(b) was met.

15.
The First-tier Tribunal then went on in paragraphs 93 to 113 to assess whether the appellant faced very significant obstacles to reintegration in Nigeria. The panel found that material parts of the evidence of the appellant and Lovett Juba were not credible and concluded that the appellant had access to some support, was "a young, single man with no health problems who can make his way in Nigeria". The First-tier Tribunal therefore found that the "very significant obstacles" threshold in s. 117C(4)(c) was not met.

16.
In paragraphs 114 to 131 of the decision the First-tier Tribunal assessed whether there were very compelling circumstances capable of outweighing the public interest in deportation. The panel concluded that there were not and that s.117C(6) of the 2002 Act was not met. The appeal therefore had to be dismissed.

C. GROUNDS OF APPEAL

17.
The appellant relied on grounds dated 12 May 2020 and further submissions dated 17 July 2020. Mr Westgate confirmed that the appellant no longer relied on Ground 3 concerning data protection in light of the case of Johnson v Secretary of State for the Home Department [2020] EWCA Civ 1032.

18.

The broad challenges remaining were:-

Ground 1 - Was the appeal from abroad effective?

Ground 2 - Were the credibility findings which underpinned the conclusion that there were no very significant obstacles to reintegration lawful?

Ground 4 - When finding that there were no very compelling circumstances, did the First-tier Tribunal err in the approach to the appellant's long residence in the UK?

D. DISCUSSION AND REASONS

Ground 1 - The Panel failed to properly grapple with the evidence of Andrew Jones, and departed from his opinion about the adequacy of the opportunity that he had had to take instructions without good reason.

The Panel ought to have held that the respondent had not established that the appeal from abroad could be effected given the appellant's limited ability to communicate with his legal adviser.

21.
In Kiarie v Home Secretary [2017] UKSC 42; [2017] Imm AR 1299, Lord Wilson identified as one of his concerns, the effect of section 94B of the Nationality, Immigration and Asylum Act 2002 on "obstructing presentation of the appeal". At paragraph 60 of the judgment, having dealt with the issue of legal aid, Lord Wilson said:-

"60. … Even if an appellant abroad secured legal representation from one source or another, he and his lawyer would face formidable difficulties in giving and receiving instructions both prior to the hearing and in particular (as I will explain) during the hearing. The issue for this court is not whether article 8 requires a lawyer to be made available to represent an appellant who has been removed abroad in advance of his appeal but whether, irrespective of whether a lawyer would be available to represent him, article 8 requires that he be not removed abroad in advance of it."

22.
The difficulties Lord Wilson mentioned that might arise during the hearing concerned the feasibility of obtaining a satisfactory video-link between an appellant, located abroad, and the Tribunal and the respective legal teams, located in the United Kingdom. For his part, Lord Carnwath, at paragraph 96, recognised that "there are likely to be major logistical problems in ensuring that documents are made available and instructions obtained in the run-up and during the course of the hearing". Nevertheless, at paragraph 103, Lord Carnwath saw "no reason in principle why use of modern video facilities should not provide an effective means of providing oral evidence and participation from abroad, so long as the necessary resources are available".

23.
In AJ (s.94B: Kiarie and Byndloss questions) Nigeria [2018] UKUT 115 (IAC), the Upper Tribunal held that, in the light of Kiarie and Byndloss , the First-tier Tribunal should adopt a step-by-step approach in order to determine whether an appeal certified under section 94B can be determined without the appellant being physically present in the United Kingdom.

24.
The First-tier Tribunal should address the following questions:-

(1) Has the appellant's removal pursuant to a section 94B certificate deprived the appellant of the ability to secure legal representation and/or to give instructions and receive advice from United Kingdom lawyers?

(2) If not, is the appellant's absence from the United Kingdom likely materially to impair the production of expert and other professional evidence in respect of the appellant, upon which the appellant would otherwise have relied?

(3) If not, is it necessary to hear live evidence from the appellant?

(4) If so, can such evidence, in all the circumstances, be given in a satisfactory manner by means of a video-link?

25.
As can be seen, ground 1 of the appellant's challenge to the decision of the First-tier Tribunal concerns the first of these " AJ " questions.

26.
The following paragraphs of AJ are also of relevance:-

"45. Assuming that the appellant is legally represented, the First-tier Tribunal will need to be satisfied that the appellant has been able to provide adequate instructions to his United Kingdom lawyers and to receive advice from those lawyers. Given the state of modern communications, there is, in general, no reason why communication by telephone and email should not be regarded as adequate, particularly where the appellant's direct instructions can be supplemented by United Kingdom relatives or friends.

…

Points to bear in mind

49. It is important to stress that the First-tier Tribunal should not lightly come to the conclusion that none of these issues, whether viewed individually or collectively, prevents the fair hearing of the appeal. The thrust of Lord Wilson's judgment is plain. The difficulties facing a person in bringing an appeal in these circumstances are, in many cases, likely to be such as to make the proceedings Article 8 non-compliant. In our view, however, bearing in mind the judgment of Hickinbottom LJ in Nixon (albeit acknowledging it is a permission decision), the questions need to be raised and answered.

50. If the First-tier Tribunal comes to the conclusion that, for example, adequate instructions have not been able to be given to the appellant's legal adviser, then the availability or otherwise of video-link facilities for hearing the appellant give evidence will be immaterial, unless the First-tier Tribunal concludes that any deficiencies regarding instructions can be addressed by a private consultation between the appellant and his legal adviser, using such facilities, before the hearing begins."

27.
Mr Westgate QC drew attention to the judgment of the Divisional Court in R v Secretary of State for the Home Department ex parte Anderson [1984] Q.B. 778. The claimant in that case had been involved in a disturbance at a prison. He sought an order compelling the Secretary of State to enable the claimant to be interviewed by his legal adviser. In finding in favour of the claimant, the Divisional Court observed that "a citizen's right of unimpeded access to the courts can only be taken away by express enactment": see Raymond v Honey [1983] 1 A.C. 1, 14, per Lord Bridge of Harwich. The

Divisional Court held that section 47 of the Prison Act 1952 was “insufficient to authorise hinderance or interference with so basic a right as the right of unimpeded access to the courts”.

28.
Mr Westgate also drew attention to the judgment of Lord Reed in R (Osborn) v Parole Board [2013] UKSC 61 where, at paragraph 68, Lord Reed held that:-

“Justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken.”

29.
We now turn to the facts of the appellant’s case, as they bear on ground 1. Mr Jones is the appellant’s solicitor. He filed two witness statements before the First-tier Tribunal. In his first witness statement, he explained the need to take a detailed witness statement from an appellant, such as this appellant, covering the individual’s background and childhood circumstances; their immigration history; their educational history; their employment history; their current family circumstances, in particular, current relationships and contact with children; the circumstances of their offence or offences; their attitude to their offending; the likely consequences they will face in their country of origin if deported and any difficulties that are likely to be encountered there. Each of those factors was said to be relevant to the present appellant.

30.
The First-tier Tribunal was asked by Mr Jones to bear in mind the qualitative nature of face-to-face meetings; in particular that specific issues which end up being covered in a statement cannot be predicted in advance, other than the broad generalisations mentioned earlier. It therefore takes a significant amount of time to build up trust and confidence with an individual before they feel able to fully disclose personal information.

31.
Furthermore, Mr Jones said it was often the case that issues became an important part of an appellant’s evidence, only when these were identified in passing, perhaps as an anecdote. Whilst in theory there was nothing that excluded such useful and productive conversations happening over the telephone, in Mr Jones’s view it was in the nature of telephone conversations, particularly international ones over mobile networks, that made them more difficult. Furthermore, preparation of an appellant’s statement requires discussion on the contents of various papers, such as probation and medical reports. Mr Jones has experience of taking witness statements over the telephone, as opposed to face-to-face at the office, in such cases as entry clearance cases where the appellant is abroad. Often, discussions end in confusion, because it is always more difficult for someone to understand the contents of a document that has been described to them than one they can see in front of them and read.

32.
Mr Jones said it was important that vulnerabilities an appellant may have were identified. While some appellants could self-identify, this was not always the case. This was obviously something that was much more difficult to deal with in a telephone conversation. The taking of telephone instructions from abroad did not entail just a “degree of inconvenience”, as has been found by the Upper Tribunal

at paragraph 45 of Watson v Secretary of State for the Home Department (extant appeal: s.94B challenge: forum) [2018] UKUT 165 (IAC); [2018] Imm AR 1094.

33.
The present appellant had been, according to Mr Jones, street homeless in Lagos for the vast majority of the time since he was deported in July 2015 and that was currently his situation. He lived in a very poor part of Lagos, where the electricity supply was intermittent. He charged his phone as and when he could at an internet café, run by a man with whom he had made friends. Although the appellant has an email account, his only way of checking emails was at the internet café, which he did normally two or three times a week.

34.
Mr Jones said that contacting the appellant by phone was “difficult”. On a number of occasions they would agree to speak at a specific time, only for the appellant’s phone to be cut off when Mr Jones called. It often took a few days to respond to emails.

35.
All this made the planning of the necessary work needed very difficult. The appellant had nowhere private and comfortable from which to speak to Mr Jones. He had to seek out a quiet alleyway or some other such place in the open air.

36.
In his second witness statement, Mr Jones set out a log of calls, comprising conversations with the appellant between 2 November 2018 and 20 January 2020. Time on the calls amounted to a total of 35 hours. In addition, Mr Jones said that he had email contact with the appellant. The statement set out certain difficulties that Mr Jones had encountered in respect of some of the telephone calls over that period. In addition, Mr Jones said that he had generally been hampered by noise in the background, due to the fact that the appellant was outside, together with unclear phone connections, talking over one another due to possible delay on the line, and not being able to observe one another’s body language. All of this, in Mr Jones’s view, helped to create circumstances “that are not conducive to the full and detailed discussion which is required for the proper preparation of a witness statement”. Mr Jones remained concerned that these difficulties “have impaired the process of taking Mr Juba’s instructions and preparing his witness statement”.

37.
The appellant’s witness statement before the First-tier Tribunal was just over 30 pages long and ran to 86 paragraphs. It described in detail the appellant’s life in the United Kingdom, including his attendance at schools and colleges, and his employment history. The statement also set out the personal and family history of the appellant. His interests in music and basketball were mentioned, as well as films that he had seen with his friends at the cinema. The appellant said that, following his deportation in 2015, he kept up-to-date as much as possible with what was going on in the United Kingdom, listening to a lot of UK radio stations when in the internet café. He was aware of the general election in December 2019. The statement described the appellant’s political views and that he had “mixed feelings about Brexit”, detailing the pros and cons, as he saw them. He described following Arsenal, stating however that it was “quite agonising at the moment as they seem to be losing everything”.

38.
The statement then turned to the appellant’s lack of knowledge of Nigeria and what he knew about relatives in that country. The statement dealt in detail with his relationship with his father. After a

further description of his education and time in the United Kingdom, the statement described the appellant's arrest and his time on remand. The statement referred to the circumstances of the appellant's offence and its background. Beginning at paragraph 53, the statement set out in considerable detail the appellant's arrival in Nigeria, as a result of his deportation, and what he subsequently experienced in that country. He described meeting various people, including his friend, Tunde, who is the only person that he could describe as a friend in Lagos. The appellant also referred to assistance that he had received from churches.

39.
The appellant's statement recorded that in 2016, the appellant's mother obtained a place for him on a film editing course in Nigeria. The appellant stayed for about two months at a hostel, whilst undertaking the course but he left "after having problems with some other students". After that, the appellant said he went back to sleeping rough. He then described his contact with the organisation known as CYID.

40.
In 2018, Tunde got married but the appellant was still able to stay with Tunde occasionally. Tunde was, however, not able or willing to help the appellant as he had been before. The appellant slept at a stadium which he described as "horrible". He spent a lot of time hanging around at the stadium, where there were sports facilities available for free. The appellant said that in recent months he had reduced the days that he went to the internet café because Tunde used to work there but did not do so any longer. The appellant had looked for work but had found it very difficult and had not been able to get a single job, apart from helping a woman sell fruit from a stall for a couple days at some point in 2017. His main problem was not having proof of an address and someone to act as his guarantor. Since being deported, the appellant said he had been in contact at various times with the mother of his child in the United Kingdom but she was very volatile and there were periods when she would not let him speak to his daughter. The appellant did, however, speak to his daughter on occasions when she was staying at the appellant's mother's home. The appellant and his daughter had also had one Skype conversation.

41.
The First-tier Tribunal addressed the evidence of Mr Jones as follows:-

"18. Andrew Jones solicitor for the appellant, made two statements dated 16 October 2018 and 20 January 2020. They are in the appellant's bundle at tab A, pages 72-83 and 84-89 respectively.

19. Mr Jones has only represented the appellant since 14 June 2017, following the First-tier Tribunal's dismissal of his appeal on 31 May 2017.

20. Mr Jones adopted his two statements and confirmed the truth of the same.

21. Mr Jones confirmed that he and Counsel had a Skype conference with the appellant on 3 February when the appellant attended at the Deputy High Commission in Lagos. The conference lasted three and a half hours. Asked by Mr Kovats how it went, Mr Jones said that they could take instructions. Mr Jones also confirmed that they had been able to satisfactorily communicate with the appellant prior to the hearing.

22. Mr Jones confirmed what he had said at [28] that between 5 March 2019 and 20 January 2020, he spoke to the appellant for 35 hours on the telephone.

23. Mr Jones explained that his view was that the process of taking the appellant's instructions and preparing his witness statement had been impaired because of the difficulties he set out in his statements. He acknowledged that he had spent more time in the preparation of the appellant's case; 35 hours as opposed to an average on other cases of 21 hours.

24. Mr Jones said that spending an extra amount of time in preparation did not compensate for what he described as suboptimal instructions or instructions taken in suboptimal conditions. He said he could not be sure that he had been able to get all the relevant points. Asked by Mr Kovats whether at the date of the hearing Mr Jones believed there were other matters of materiality affecting the appellant's appeal, he said that he could not be sure. As he put it, he could not know what he did not know.

25. Mr Jones identified particular difficulties:

- it was more difficult to take the appellant through the various documentation in preparing his statement as he needed to be able to see the relevant documents. See [13], page 77;

- establishing a clear chronology of events can be very difficult over a telephone because it helps for an appellant to see visually how events fit together and the only way to do that is to set out a chronology on paper;

- Mr Jones explained that in assessing any possible vulnerability, absent an appellant self-identifying the same, it would be necessary for Mr Jones to be in a position to note any potential indicators of vulnerability which is more difficult in telephone conversations than in a face to face meeting. Mr Jones said that being limited to phone contact with an appellant increased the likelihood of such issues being overlooked. Mr Jones said that he could never be as confident regarding taking instructions and spotting vulnerabilities in a situation such as he was in with the appellant, as he would have been if he had been able to see the appellant face to face. As regards taking instructions from family or friends, Mr Jones said it was not more difficult because the appellant was out of country.

26. Mr Westgate submitted that the question for us is whether the appellant had an adequate opportunity to give instructions. In Mr Westgate's view the appellant was at a disadvantage from the outset for the reasons claimed by Mr Jones such that the disadvantage could not be cured by the Tribunal weighing the situation at the end of the hearing.

27. Our view at the hearing having heard the evidence of Mr Jones and the submissions made by Mr Westgate was that the appellant's removal had not deprived him of the ability to secure legal representation and/or to give instructions and receive advice from those advising him.

28. We acknowledge that the ideal must be for all evidence to be given in person in court. Nevertheless, Mr Jones has produced a lengthy, detailed and comprehensive bundle. He has prepared two detailed witness statements dated 4 September 2017 and 20 January 2020. We do accept that Mr Jones has been faced with difficulties in communicating with the appellant. Communication has not been straightforward but there is nothing to suggest that the appellant has had anything other than excellent representation and full opportunity to instruct and receive advice from his UK lawyers. We

find Mr Jones' concerns that more might have come out, had he been able to take instructions from the appellant face to face, to be speculative and without foundation."

42.
Mr Westgate submits that, at paragraph 28 of its decision, the First-tier Tribunal focussed on the wrong questions; namely, the quality of the representation that the appellant had received, rather than whether the process was fair and whether the appellant had had an effective ability to communicate with his lawyers.

43.
In our view, paragraph 28 of the First-tier Tribunal's decision needs to be read in the context of the decision as a whole. The Tribunal's phrase "excellent representation and full opportunity to instruct and receive advice from his UK lawyers" demonstrates that the First-tier Tribunal was, in substance, considering the first of the four AJ questions. Plainly, the quality of the representation is of relevance in deciding whether an appellant has been deprived of the ability to secure legal representation of the nature needed in order to mount an effective appeal from outside the United Kingdom.

44.
The Tribunal's reference to "full opportunity to instruct and receive advice" is not, as Mr Westgate submits, perverse. The Tribunal was concerned with whether the opportunity to instruct and receive advice had been materially impaired. It is clear from the paragraphs that precede paragraph 28 that the First-tier Tribunal was well aware of the difficulties that Mr Jones had encountered, and which led to him spending significantly more time on the appellant's case than would have been likely, had the appellant been present in the United Kingdom. In describing the appellant's opportunity as "full" the First-tier Tribunal was not, in our view, ignoring the difficulties described by Mr Jones. Rather, it was concluding that, despite them, the first of the AJ questions fell to be answered positively.

45.
In so finding, we agree with Mr Westgate that section 94B of the 2002 Act does not expressly or impliedly mandate any diminution from the common law requirement for a person to have unimpeded access to justice, which includes access to a legal adviser. If the position were otherwise, the Supreme Court in Kiarie would have so found. The task for the First-tier Tribunal, in answering the first AJ question, is fact and context-specific. The Tribunal must, in particular, determine whether the facts demonstrate the kind of inconvenience or difficulty that is inherent in the appellant being outside the United Kingdom; or whether there has been, or will be, an actual impediment in the taking of instructions and receiving of advice.

46.
Mr Westgate criticises the Tribunal for not having appropriate regard to the evidence of Mr Jones. Given the way in which the Tribunal approached his evidence it is, however, not possible to sustain such a criticism. Whilst Mr Jones has very great experience of presenting human rights claims, the experienced First-tier Tribunal panel, for its part, has commensurate experience in hearing and deciding such claims.

47.
The panel can be assumed to have had regard, in particular, to the appellant's witness statement, which we have summarised above. That statement is, on any view, extremely detailed, covering all aspects of the appellant's life in the United Kingdom and Nigeria, down to levels of detail such as the appellant's views on Brexit and his favourite football team.

48.
Mr Westgate criticises the Tribunal for finding that Mr Jones's concerns, that more might have come out, had he been able to take instructions from the appellant face-to-face, were speculative and without foundation. Mr Jones had said in cross-examination that he could not know what he did not know. The issue has, however, to be addressed in a fact-specific manner, applying the Tribunal's expertise. Given the number of hours quite properly spent by Mr Jones, in communication with the appellant, and despite the sub-optimal circumstances of those communications, of which the Tribunal was fully aware, the Tribunal was, in our view, entitled to conclude that Mr Jones's residual concerns that something might have been missing were not such as to constitute an impediment to justice, as described above.

49.
Mr Westgate raises a challenge to the temporal element of the Tribunal's conclusion on AJ question 1. He submits that this question falls to answered before the Tribunal embarks on the substantive hearing. The Tribunal must, in all cases, answer the question at that point. If the answer is in the appellant's favour, then the hearing should not take place. If the answer to the question is not in the appellant's favour at that point, then the Tribunal should embark upon the hearing on the basis that it may emerge during the course of the hearing that the appellant has not, in fact, had the requisite ability to give instructions or receive advice. If so, the Tribunal would have to adjourn, having given a direction that the appeal cannot be lawfully determined unless the appellant is physically present in the United Kingdom.

50.
Although such a course may be necessary in certain circumstances, we consider it would be wrong to make it mandatory in all cases. There may, of course, be circumstances where, at some point before the hearing is due to take place, it will be evident that the appellant's legal adviser is simply not in a position to mount an effective case, owing to the appellant being outside the United Kingdom. In such circumstances, it would manifestly be wrong to undertake the hearing. Where, however, the position is not clear cut, it will be a matter for the Tribunal to decide whether it addresses the first question after the hearing has taken place. Mr Westgate is quite correct to say matters may arise during that hearing which show the question falls to be answered in favour of the appellant. We do not agree, however, that it can never be the case that the answer may fall to be answered in the negative, once the hearing has occurred. For example, the oral evidence may disclose that an issue upon which it might have been thought the adviser was without relevant instructions is not, in fact, relevant to the outcome; or that what might otherwise have been thought to have been a "gap" in the adviser's instructions is not of such a nature.

51.
The Tribunal must, however, guard against the danger that, merely because it appears all has proceeded smoothly at the hearing, this necessarily means there has been no actual impediment in the giving of instructions and receiving of advice.

52.
Having considered the decision of the First-tier Tribunal, and having had full regard to submissions of Mr Westgate, we conclude that the Tribunal committed no error of the kind alleged in ground 1.

Ground 2 – Were the credibility findings which underpinned the conclusion that there were no very significant obstacles to reintegration lawful?

53.

The First-tier Tribunal found that the appellant did not face very significant obstacles to reintegration in Nigeria and therefore concluded that section 117C(4)(c) of the 2002 Act was not met. The grounds submitted that:

“In reaching these conclusions the Panel made factual findings that were not open to it on the evidence and it failed to have regard to relevant considerations or to address material evidence. These errors affect the overall assessment of the Appellant’s credibility and are addressed below.”

54.
The grounds went to on challenge five specific aspects of the findings made by the First-tier Tribunal, the first four taken from the headings used in the decision:-

a.
support from Charles Juba (the appellant’s father)

b.
involvement with the Centre for Youths Integrated Development (CYID)

c.
family support

d.
homelessness

e.
demeanour

55.
Before turning to the specific findings under challenge, it is important to set out the context in which they were made. The credibility findings said to be unlawful are immediately preceded in the decision of the First-tier Tribunal by unchallenged findings that the appellant and his mother had shown themselves to be untruthful witnesses. In paragraphs 98 to 100 of the decision, under the heading “A Previous Willingness to Lie” the First-tier Tribunal found as follows:-

“Previous Willingness to Lie

98.
The appellant had a previous deportation hearing heard on 19 May 2017. In support of that appeal, Mrs Lovett Juba made a statement dated 16 May 2017. She endorsed the statement saying that it was true to the best of her knowledge and belief. There was a fundamental untruth at [6] when Mrs Juba said:

‘6. As father and guardian their father was always in contact with my children and enjoyed spending time with them. My son, the appellant, was always in contact with his father until he was removed to Nigeria in July 2015.’

99.
In cross-examination, Mrs Juba said that in 2017 at the first deportation hearing, she told the judge that she was telling the truth but she conceded that she was not doing so. Mrs Juba’s explanation for the lie was that her solicitor at Cleveland Law Limited put her up to it. He told her it was best to say what she did. Because he was a lawyer, she thought she should do what he said. We are particularly concerned that a grave allegation has been made against Cleveland Law Limited without them being

asked to comment. See BT (Former solicitors alleged misconduct) Nepal [2004] UKIAT 00311 and MM [2004] UKIAT 00182 at [36]. We do not accept that Cleveland Law Limited advised Mrs Juba to lie to the Tribunal. The appellant also had criticisms to make of Cleveland Law Limited in his statement of 4 September 2017. There was no evidence that any of the complaints against Cleveland Law Limited in particular at [15]-[16] of his statement were ever put to them.

100.
The appellant has also lied. In his statement of 4 September 2017, made when the current solicitors Wilsons had been instructed, presumably for the Upper Tribunal hearing, the appellant signed a statement stating that the facts were true when he knew that was not the case. He said at [7] that his mum brought his daughter to see him in prison which was untrue and which he acknowledged at [52] of his statement dated 20 January 2020".

56.
Further, the panel was told that the appellant's father, Charles Juba, had also given false evidence at the hearing in 2017 by way of a witness statement dated 19 May 2017. Lovett Juba commented on this in paragraph 36 of her statement dated 14 January 2020:-

" It was only after he had been deported that Abi [the appellant] himself made contact with his father via Facebook. At that time we did not have a working phone number for Charles. I then got Charles involved in the appeal process and made sure he attended the hearing. I explained to the solicitors then dealing with the appeal what the real situation was with Charles' lack of involvement in our lives, but the solicitor said that it would be better to say that Abi was close with Charles. That is why Charles and I said what we said in our statements. I am very sorry that I did not tell the truth about this in 2017."

57.
The case before the First-tier Tribunal was, therefore, that the appellant, his mother and his father had all lied to the First-tier Tribunal in 2017 and, also, that the explanation for this given by Lovett Juba was firmly rejected.

58.
This was clearly a significant matter. It will be obvious that it was open to the First-tier Tribunal to approach other evidence from those witnesses with great caution.

a.
Support from Charles Juba

59.
The appellant raised a number of concerns about the findings of the First-tier Tribunal on whether he could access any support from his father, Charles Juba.

60.
Firstly, the appellant maintained before the First-tier Tribunal that at the time of the hearing in 2017 he had not been aware that his parents had made false statements about the contact he had with Charles Juba. The First-tier Tribunal rejected this evidence in paragraph 104 of the decision, finding that it was not "credible that the appellant would have been unaware of the case put forward on his behalf" in 2017.

61.

The appellant submits that this adverse credibility finding was not open to the panel. It was common ground that the 2017 statement by Charles Juba was made and signed only on 19 May 2017, the day of the hearing, and that the appellant did not participate in that hearing at all. It was submitted that he could not, therefore, have known at the time what was in his father's statement.

62.
We do not find this argument had merit. Firstly, as above, this conclusion was open to the Tribunal given the context of the appellant and his parents all having given false evidence in 2017. Secondly, the materials show unarguably that the appellant and his mother were in close contact after he went to Nigeria in 2015 and that she was closely involved in the preparation of the appeal in 2017. This is shown in the extract from her witness statement set out above, for example. She knew before the hearing about the false evidence that was to be given, her own statement dated 16 May 2017 containing the false account of close contact. It is our view, therefore, that there was more than sufficient evidence for the First-tier Tribunal to find that the appellant did know about what was being said on his behalf in the appeal in 2017 and that they were entitled to make the adverse credibility finding in paragraph 104 of the decision.

63.
The appellant also submits that the assessment of whether there was support available from Charles Juba failed to take into account Lovett Juba's evidence, for example in her witness statement dated 14 January 2020, on the reasons why she had not wanted the appellant to have contact with his father or the Juba family in Nigeria.

64.
We also do not find that this submission is made out for a number of reasons. Firstly, as before, the panel was entitled to doubt the reliability of evidence given by Lovett Juba where she had given false evidence previously, indeed, on the specific issue of the appellant's contact with Charles Juba. Put simply, the panel did not have to accept her evidence at its highest.

65.
Secondly, the First-tier Tribunal was clearly aware of this aspect of the evidence as it is referred to in paragraphs 65 and 68 of the decision, Lovett Juba stating:-

"… she did not ask Charles Juba to help the appellant because she has never asked him for such help. That was because she did not trust the Jubas."

The panel was not required to set out every part of the evidence on all issues argued before it and it is not arguable that a failure to refer to the more detailed account in the witness statement amounts to an error of law.

66.
Thirdly, there was clearly contrary evidence showing that Lovett Juba had asked Charles Juba for support. She involved him in the appellant's appeal in 2017, for example. Also, the evidence included an email exchange dated 17 September 2017 between Lovett Juba and Charles Juba in which she upbraids him for not having contacted the appellant when he was visiting Lagos. This is wholly at odds with her evidence set out in paragraph 68 of the decision as to never asking Charles Juba for help and not trusting the Juba family.

67.

We therefore do not find that the grounds show that First-tier Tribunal erred in the assessment of the evidence concerning potential support from Charles Juba.

68.
For completeness sake, in response to an elaboration on this ground set out in paragraph 25 of the appellant's skeleton argument, it is also not our judgment that the Tribunal was obliged to conclude from brief emails dated 18 and 19 October 2017 between the appellant and his father that no support was available from Charles Juba or members of his family in Nigeria. Where they seek to suggest otherwise, the grounds have no merit. The suggestion in the skeleton argument that the Tribunal should have inferred from the fact of Charles Juba's company in Nigeria having closed in 2016 that he and his relatives in Nigeria could not provide the appellant with any support is equally without force.

69.
We therefore conclude that the First-tier Tribunal took a lawful approach when assessing the evidence concerning support from Charles Juba and his family.

b. Centre for Youths Integrated Development (CYID)

70.
The appellant also maintained that the First-tier Tribunal erred in the assessment of the evidence on the appellant's involvement with the Centre for Youths Integrated Development (CYID). The appellant maintained that he received limited support from CYID when he returned to Nigeria in 2015 and was no longer in contact with them. He relied on a letter from the organisation dated 10 May 2017, most of which is set out in paragraph 45 of the First-tier Tribunal's decision. The letter stated that CYID encountered the appellant in 2017, that he was homeless, was not eating regularly, had been robbed and "was lost in Nigeria as the country is completely foreign to him."

71.
The First-tier Tribunal considered the evidence on the appellant's involvement with CYID in paragraph 108:-

" We have referred to CYID at [45] above. The appellant claims to have lost touch with CYID and its director Mr Victor. We do not accept as credible that the appellant would not be keen to forge links with such an organisation and particularly because of their aims to be a social investment programme implemented through establishment of a training and referral service for returnee migrants as regards opportunities for job creation and employment."

72.
The appellant maintains that this finding was not open to the First-tier Tribunal. Firstly, the First-tier Tribunal failed to have regard to a further email dated 16 January 2020 from CYID. This email stated:-

"… Abiodun was not offered any concrete services because there was no funding for such, CYID programs is for the duration of 3 months and to benefits (sic) from such program the returnee will either be living in the environment where the project is located or paid for hostel and in this case Abiodun could not afford any payment so we were unable to help him further.

CYID has no communication with him since 2017."

73.
Secondly, the appellant maintained that the Tribunal took an irrational approach to the evidence from CYID. In paragraph 45 of the decision, the panel "relied" on the CYID letter from 2017 as showing

“that the director of CYID knew a lot about the appellant which the appellant conceded was true.” In paragraph 108 of the decision, however, the panel chose not to rely on the information from CYID on the limited support they gave the appellant. It was not open to the First-tier Tribunal to place weight on the parts of the evidence from CYID that undermined the appellant and no weight on the parts that supported his case.

74.
We do not find that this ground shows a material error for a number of reasons. Firstly, the statements in paragraph 45 of the decision are not findings of the First-tier Tribunal but a record of the cross-examination of the appellant by Mr Kovats on the letter from CYID. They cannot show a contradiction in the approach taken by the First-tier Tribunal to the evidence from CYID. We accept that the decision makes no reference to the 2020 email from CYID and that this email provided some additional weight to the appellant’s claim that he had limited assistance from CYID. Having considered whether this was something capable of undermining the overall credibility findings of the First-tier Tribunal, we conclude that it was not, given the extent and cogency of the reasoning given by the First-tier Tribunal for finding the appellant’s evidence that he was homeless, destitute and unable to integrate into Nigeria was not credible.

c. Family support

75.
The undisputed evidence before the First-tier Tribunal was that the appellant had been in receipt of approximately £340 per month from his mother from 2018 onwards. The appellant’s evidence, recorded in paragraphs 46 and 47 of the decision, was that these funds made a significant difference as “he was struggling until his mother sent decent money”. Paragraph 58 of the decision records his statement that he “had cleaned up since his mum had been able to send him more money”. In her statement dated 14 January 2020, at paragraph 57, Lovett Juba states that sending £340 per month left her with “just enough to live on”. The figures provided by her in paragraphs 56 and 57 of her 2020 witness statement did not suggest that she was unable to continue to afford to send the appellant funds. Those paragraphs also indicated that her daughter, Adetoun Juba, offered her support when she needed money for bills, that evidence being confirmed at the hearing: paragraph 63.

76.
Paragraph 30 of the appellant’s grounds submitted that the First-tier Tribunal should have considered whether the funding from the appellant’s mother was sustainable. The grounds also maintained that the panel erred in finding financial support for the appellant could be provided by Adetoun Juba.

77.
We find it difficult to see how the First-tier Tribunal could have concluded other than that the financial support for the appellant was sustainable. The evidence indicated that the increased financial support had been provided for approximately two years. We were not taken to evidence showing that the situation was not sustainable, albeit that it left Lovett Juba with limited funds. The finding of the First-tier Tribunal at paragraph 112 of the decision that the appellant’s sister could help support the appellant, either directly or indirectly, was consistent with the evidence that she helped Lovett Juba when needed. We do not therefore find that these challenges have merit.

d. Homelessness

78.

The appellant submitted that the First-tier Tribunal erred in concluding in paragraph 110 that he was not homeless. We do not find this ground has merit. As above, the evidence before the panel in 2020 was that appellant was in receipt of £340 per month and he accepted in his evidence that this was a "decent" amount of money that had improved his circumstances. The evidence from CYID was from 2017, and so was not current.

79.
The appellant also maintained that the conclusion he was not homeless failed to take into account evidence from his legal representative, Mr Jones, on his first-hand experience of the appellant's circumstances whilst taking instructions and giving advice by telephone. Mr Jones' witness statements dated 16 October 2018 and 20 January 2020 refer to the appellant having nowhere private to speak, difficulties with background noise and difficulties in charging his mobile phone, in part due to power cuts. That corroborated the appellant's claim to be homeless.

80.
We take no issue with the statements made by Mr Jones and accept that they are an accurate record of his experience when communicating with the appellant. We do not see anything in those statements, however, that was inconsistent with the appellant living in a church or a hostel as he accepts he has done at times. We therefore do not find that the evidence from Mr Jones could be determinative of the appellant being homeless or showed that the First-tier Tribunal erred in finding that he was not.

e. Demeanour

81.
In paragraph 107 the First-tier Tribunal said this:-

"We do not accept as credible that the appellant has not seen Tunde for a few months. As Mr Kovats put it to the appellant, he looked in good health, clean and that he had got it together and the appellant quipped in return that the video link was not doing him justice. He appeared via the video link well nourished, smartly turned out and presented well, wholly at odds with someone alleged to be living on the margins of Nigerian society."

82.
The appellant submits that this amounted to placing weight on the appellant's appearance and demeanour and that this was unsound. Our view is that these comments drew an inference from physical appearance and not demeanour. As above, the appellant stated in oral evidence, recorded in paragraph 58 of the decision, that "he had cleaned up since his mum had been able to send him more money". He did not suggest that he had managed to present well only for the hearing, for example, but explained that his appearance was due to the increased funding from his mother. We conclude that the First-tier Tribunal was entitled to find that the appellant had "presented well" and was in better circumstances than before.

Ground 4 - When finding that there were no very compelling circumstances, did the First-tier Tribunal err in the approach to the appellant's long residence in the UK?

83.
Ground 3 was not pursued before us. In its amended form, Ground 4 contains a number of challenges to the First-tier Tribunal's conclusions on section 117C of the 2002 Act. The appellant contends that

the First-tier Tribunal erred in finding that section 117C(4)(a) was not satisfied in the case of the appellant.

84.
Section 117C(4) states:-

“(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.”

85.
If Exception 1 is satisfied then, in the case of a foreign criminal who has not been sentenced to a period of imprisonment of four years or more, the public interest does not require his or her deportation. So much is plain from section 117C(3).

86.
Even if the First-tier Tribunal was correct in holding that the appellant had not been lawfully resident in the United Kingdom for most of his life, Mr Westgate submits that the Tribunal erred in coming to the conclusion, for the purposes of section 117C(6), that there were not “very compelling circumstances” in the appellant’s case, such as to make deportation a disproportionate interference with his Article 8 rights.

87.
In CI (Nigeria) v Secretary of State for the Home Department [2019] EWCA Civ 2027; [2020] Imm AR 503, the Court of Appeal was concerned with a Nigerian national who had come to the United Kingdom with his mother when he was 1 year old and had lived in the country ever since. He was then aged 27. In light of criminal offending by CI, the decision was made that he should be deported to Nigeria.

88.
At paragraphs 100 and 101 of his judgment, Leggatt LJ said the fact that CI had been eligible to apply for indefinite leave to remain in the United Kingdom for almost ten years was of relevance to the proportionality assessment in his case. By the same token, Mr Westgate submits that the First-tier Tribunal was wrong in failing to ascribe weight to the fact that the appellant’s period of overstaying in the United Kingdom, from April 1991 to November 2006, when he was granted indefinite leave to remain, was of no material significance. According to Mr Westgate, the appellant would qualify for leave under Policy DP5/96 at any time after 1999, when that policy was amended.

89.
In Akinyemi v Secretary of State for the Home Department [2017] EWCA Civ 236; [2017] Imm AR 1216, the appellant (A) was born in the United Kingdom to Nigerian nationals who, although lawfully present, were not settled (so that A did not become a British citizen by birth). There was a period during which A would have had an absolute right to become a British citizen, if he had applied for it. Giving the judgment at the Court, Underhill LJ held that, for the purposes of section 117B(4)(a), which provides that little weight should be given to a private life established at a time when the person concerned is in the United Kingdom unlawfully, it was “unnatural to describe a person’s presence in

the UK as “unlawful” (which is not necessarily the same as not being “lawful”) when there is no specific legal obligation of which they are in breach by being here and no legal right to remove them …” (paragraph 41). That position arose because A was born in the United Kingdom.

90.
By contrast, CI had not been born in the United Kingdom, a fact which Leggatt LJ regarded as highly significant in determining the application of section 117C(4)(a). This is apparent from paragraph 41 of the judgment:-

“41. Furthermore, the fact that sections 117B(4) and 117C(4)(a) of the 2002 Act have a common rationale means that to treat someone who is in breach of a legal obligation by being in the UK and is legally liable to be removed as "lawfully resident" for the purpose of section 117C(4)(a) would be inconsistent with the Akinyemi case, which treated such a person as in the UK "unlawfully" for the purpose of section 117B(4). Although, as Underhill LJ pointed out, the opposite is not necessarily true, it would be illogical to regard someone who is in the UK "unlawfully" as nevertheless "lawfully resident" here, for the purpose of the same exercise of deciding whether the interference with private life caused by deporting the person on account of criminal offending is justified in the public interest.”

91.
At paragraph 50, Leggatt LJ had this to say about sections 117A to 117D:-

50. … It is apparent that Part 5A of the 2002 Act is intended to provide a clear and straightforward set of rules for decision-makers to apply: see KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 ; [2018] 1 WLR 5273 , paras 14-15. It would defeat that purpose if, in order to determine whether a person satisfied the test of lawful residence at a particular time, it was necessary to investigate potentially complex and conjectural questions as to whether, if an application for leave to remain had been made or determined sooner and had been refused, or perhaps even if such an application was in fact refused, the decision could have been successfully challenged by way of judicial review.”

92.
At paragraph 51, Leggatt LJ concluded that -

“the interpretation which is most consistent with the aims of the legislation, including the aim of legal certainty, looks simply at the person’s legal status at the relevant time (subject to the special case of successful asylum-seekers). If a “foreign criminal” has no legal right to be in the UK and is in breach of UK immigration law by being here, then that person is not “lawfully resident” in the UK. …”

93.
What, then, is the significance (if any) of a person having an immigration history, in which there is a significant period when they could have applied for, and been entitled to obtain British citizenship or indefinite leave to remain? Having cited from R (Agyarko) v Secretary of State for the Home Department [2017] UKSC 11; [2017] Imm AR 764, Leggatt LJ held:-

“53. The stage at which such considerations are relevant, however, in a case involving deportation of a "foreign criminal" is in assessing whether there are "very compelling circumstances" over and above those described in the Exceptions which outweigh the public interest in deportation. That is indeed implicit in Lord Reed's discussion, which starts from the premise that the applicant is residing in the UK unlawfully.”

94.

As he did before the First-tier Tribunal, Mr Westgate submits that the judgment in CI (Nigeria) does not preclude the appellant from arguing that section 117C(4)(a) requires to be "read down" in order to avoid a breach of Article 14 of the ECHR, taken with Article 8. Mr Westgate says that the distinction between persons such as the appellant in Agyarko , who are born in the United Kingdom and those, such as CI and the present appellant, who are not, unlawfully discriminates against the latter.

95.
For this purpose, Mr Westgate relies on R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57. In that case, the claimant was an overstayer in the United Kingdom, having arrived lawfully at the age of 6. She had been educated in England. In January 2012 she was granted discretionary leave to remain. She obtained a place at university in England but could not qualify tor a student loan because of her immigration status. The Supreme Court held that, given the claimant (i) had lived in the United Kingdom for most of her life; (ii) had been educated here; (iii) could not be removed save for grave misconduct; and (iv) had been treated as a member of United Kingdom society, with a reasonable prospect of that society benefiting from the contribution she could make having had a university education, the legal restriction on her ability to obtain a student loan by reason of her immigration status was not rationally connected to the objectives of the student loan legislation. In any event, even if a bright line rule were justified, the particular rule chosen was not rationally connected to its aim or proportionate in its achievement.

96.
We do not accept Mr Westgate's submissions on the discrimination issue. The way in which section 117C(4)(a) has been interpreted by the Higher Courts as operating, as between those born in the United Kingdom and those not so born, is plainly rational. Immigration and nationality law by its very nature ascribes significance to being born in the United Kingdom. The comparison with the legislation considered by the Supreme Court in Tigere is, accordingly, inapt.

97.
As we have seen, in CI (Nigeria) , Leggatt LJ placed particular significance upon the need for Part 5A "to provide a clear and straightforward set of rules for decision-makers to apply". To accept the appellant's submissions on discrimination would be to make section 117C(4)(a) anything but clear and straightforward.

98.
As Mr Kovats submitted, there is, in fact, no need to adopt such a problematic approach. As we have already seen from paragraph 53 of Leggatt LJ's judgment, the answer to this ground of challenge is plain. It lies in section 117C(6) and its phrase "very compelling circumstances". In NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662; [2017] Imm AR 1, Jackson LJ explained how, despite its opening words apparently confining the provision to those sentenced to a period of imprisonment of at least four years, section 117C(6) in fact must cover those who had been sentenced to a period of imprisonment of at least one year but less than four years (the so-called "medium offenders"). Were this not so, there would be a risk of section 117C generating decisions that are incompatible with United Kingdom's obligations under Article 8 of the ECHR.

99.
Accordingly, the inherently case-specific factors prayed in aid by the appellant in respect of his discrimination ground are relevant to the section 117C(6) exercise, as described by Jackson LJ.

100.

It is important to observe that the operation of section 117C(6) requires a more nuanced approach to the words “over and above those described in Exceptions 1 and 2”, than might at first be apparent. This emerges from the following paragraphs of Jackson LJ’s judgment:-

“31. An interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament's intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having regard to the guidance given by the ECtHR in Maslov v Austria [2009] INLR 47 , and hence highly relevant to whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2."

32. Similarly, in the case of a medium offender, if all he could advance in support of his Article 8 claim was a "near miss" case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.”

101.
Thus, to take the case of CI (Nigeria) or that of the present appellant, the fact that the individuals concerned have been unable to satisfy section 117C(4)(a) does not mean that the “compelling circumstances, over and above those described in Exceptions 1 and 2” must be confined to circumstances that are of a conceptually different kind from those analysed as part of the section 117C(4)(a) exercise.

102.
This addresses the submission found in paragraph 58 of the skeleton argument of Mr Westgate and Ms Cohen, that consideration of the individual’s case under section 117C(6) does not avoid the alleged incompatibility between section 117C(4)(a) and Articles 8/14 “because it means that an affected applicant can never come within s.117C(4)”. That submission, with respect, ignores what Jackson LJ said about the nature of the exercise.

103.
The significance of the point made in paragraph 32 of NA (Pakistan) was expressly recognised by Leggatt LJ at paragraph 93 of CI (Nigeria) :-

“93. It is clear that the words "circumstances, over and above those described in Exceptions 1 and 2", which are used in section 117C(6) and which the Court of Appeal in NA (Pakistan) held are to be read

into section 117C(3), do not prevent a person facing deportation from relying on matters falling within the scope of the Exceptions to establish "very compelling circumstances" at the second stage of the analysis: …”

104.
As can be seen from the analysis of Leggatt LJ that begins at paragraph 94 of his judgment, one consequence of the correct application of section 117C(6) is that it will be wrong for a Tribunal to ignore matters going to social and cultural integration in the United Kingdom (section 117C(4)(b)) and whether there would be very significant obstacles to integration into the country of proposed deportation (section 117C(4)(c)), merely because the individual concerned has failed to meet the requirement in section 117C(4)(a) to be lawfully resident in the United Kingdom for most of their life.

105.
It is clear from paragraph 90 of the First-tier Tribunal’s decision that it did not fall into such an error. On the contrary, the First-tier Tribunal expressly said that, notwithstanding Exception 1 had been found not to apply, it would nevertheless consider section 117C(4)(b) and (c) “because they are relevant to ‘very compelling circumstances’”. At paragraph 92, the First-tier Tribunal came to the conclusion that the appellant was socially and culturally integrated in the United Kingdom. Beginning at paragraph 93, it then went on to examine whether there were significant obstacles to integration into Nigeria. It was at this point that the First-tier Tribunal considered the appellant’s lack of credibility regarding his alleged circumstances in Nigeria. For the reasons we have given, we do not find that the First-tier Tribunal erred in reaching those findings. At paragraph 113, the First-tier Tribunal was, we find, entitled to its conclusions that “on the balance of probabilities … the appellant has integrated in Nigeria” and that “he is a young, single man with no health problems who can make his own way in Nigeria”.

106.
At paragraph 120, the First-tier Tribunal reminded itself that the test of “very compelling circumstances” was higher than the threshold of “unduly harsh”: Chege (section 117D – Article 8 – approach) [2015] UKUT 00165 (IAC). At paragraph 121, following the approach set out in NA (Pakistan) , the Tribunal made a self-direction that all matters relied upon needed to be examined collectively in order to determine whether they were sufficiently compelling to outweigh the public interest in deportation. A near-miss under either Exception 1 or Exception 2 was, the Tribunal said, insufficient to show the circumstances over and above those described in the Exceptions; “however, in principle, there may be features of the kind described in the Exceptions which have such great force that they amount to very compelling circumstances”.

107.
It is at this point that the First-tier Tribunal dealt with the ECtHR case of Maslov v Austria [2009] INLR 47. The First-tier Tribunal noted the key finding at paragraph 75 of Maslov that “for a settled migrant who has lawfully spent all or the major part of his or her childhood or youth in the host country, very serious reasons are required to justify expulsion”.

108.
Maslov was extensively considered by Leggatt LJ in CI (Nigeria) , beginning at paragraph 103. At paragraph 109, he noted that the Maslov principle, as articulated at paragraph 75 of the ECtHR’s judgment, is not applicable to “criminal offenders who are unlawfully present in the UK”. Leggatt LJ then turned to the correct approach in respect of that part of paragraph 75 which concerns a person having “lawfully spent all or the major part of his or her childhood and youth in the host country”:-

“110. … however, CI is not unlawfully present in the UK. He has indefinite leave to remain and is thus a "settled migrant", as that expression has been used in the case law of the European Court. On the other hand, he has not spent all or the major part of his childhood and youth lawfully in the UK, and therefore does not fall within the description in para 75 of the Maslov judgment. This raises the question whether, as the Upper Tribunal judge in this case thought, the principles stated in Maslov (and, in particular, para 75 of the judgment) are inapplicable because they are confined to settled migrants who have had that status – or who at any rate have been lawfully present in the host country – for most of their childhood.

111. In my view, the relevance of the Maslov case (and other cases in the same line of authority) is not limited in this way. In the first place, it would be wrong to read the court's judgment in that case as if it were a legislative text. As discussed by Sir Stanley Burnton (with whom McFarlane and Maurice Kay LJJ agreed) in R (Akpinar) v Upper Tribunal [2014] EWCA Civ 937 ; [2015] 1 WLR 466 , paras 30-54, the statement in para 75 of the Maslov judgment about the need for "very serious reasons" is not to be read as laying down a new rule of law but rather as indicating the way in which the balancing exercise should be approached in the circumstances of that case. As Sir Stanley Burnton pointed out, this is confirmed by the way in which the court expressed its ultimate conclusion in para 100 of the judgment that there had been a violation of article 8 in that case:

"Having regard to the foregoing considerations, in particular the – with one exception – non-violent nature of the offences committed when a minor and the State's duty to facilitate his reintegration into society, the length of the applicant's lawful residence in Austria, his family, social and linguistic ties with Austria and the lack of proven ties with his country of origin, the Court finds that the imposition of an exclusion order, even of a limited duration, was disproportionate to the legitimate aim pursued, 'the prevention of disorder or crime'. …"

This was a conventional balancing exercise, with no bright line rule applied in relation to the length of the applicant's lawful residence in Austria.

112. Secondly, as I have indicated, the distinction of principle drawn in the case law of the European Court is between the expulsion of a person who has no right of residence in the host country on the one hand and, on the other hand, expulsion which involves the withdrawal of a right of residence previously granted. There is no such distinction of principle between a person who has spent most of their childhood lawfully in the UK and someone who has spent part but less than half of their childhood living in the country lawfully. The difference is one of weight and degree. Such a difference is compatible with adopting the condition specified in section 117C(4)(a) that a foreign criminal has been lawfully resident in the UK for most of his life as a prima facie requirement. But it would not be consistent with the test of proportionality under article 8, which involves a balancing exercise, to treat the principles stated in the Maslov case as inapplicable to a settled migrant with a right of residence just because the individual concerned, although present in the country since early childhood, has not had a right of residence for a particular length or proportion of their time in the host country.

113. Third, as discussed above, although little weight should generally be given to a private life established when a person was present in the UK unlawfully or without a right of permanent residence, it would not (as the Upper Tribunal judge recognised) be fair to adopt this approach on the particular facts of this case, where the grant of indefinite leave to remain was delayed for many years when CI was a child for no good reason and through no fault of his. In determining whether it is compatible with article 8 to deport him from the UK, CI should not in these circumstances have less

weight accorded to the fact that he has spent his childhood and youth in the UK than would be the case if he had had a vested right of residence for most of that period.

114. I therefore consider that the Upper Tribunal judge erred in regarding the principles established in Maslov as inapplicable in the present case because CI was not a settled migrant for most of his childhood."

109.
The First-tier Tribunal dealt with Maslov as follows:-

"125. The passage from Maslov [i.e. the finding at paragraph 75 of the ECtHR's judgment] is mentioned at [51] of Akinyemi as having been referred to in Hesham Ali at [26] per Lord Reed to the effect that the deportation of a person in his 30s who was born in the host country and had never left it was very hard to justify as proportionate. Of course, whilst he came as a very young child, the appellant was not born here and as we understand Akinyemi and Hesham Ali , there were no adverse credibility findings against the appellants in those cases, such as we have made against the appellant."

110.
We agree with Mr Westgate that, at paragraph 125, the First-tier Tribunal fell into legal error. The First-tier Tribunal must, we consider, be taken to have decided that the Maslov principle had no application at all to the appellant because he was not born in the United Kingdom and/or because he had been the subject of adverse credibility findings by the Tribunal. So far as being born in the United Kingdom is concerned, there is nothing in paragraph 26 of Lord Reed's judgment in Hesham Ali that suggests Maslov is to be interpreted by United Kingdom courts and tribunals as applying only to those born in the host country. On the contrary, in that paragraph Lord Reed said:-

"… when assessing the length of a person'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 makes a difference whether the person came 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 …".

111.
We also agree with Mr Westgate that adverse credibility findings cannot rob a person of the benefit of Maslov , unless, of course, those findings show that, in reality, there is no factual basis for that case to apply.

112.
In the present case, the First-tier Tribunal accordingly erred in finding that Maslov could not increase the weight that fell to be placed on the appellant's side of the proportionality balance. We have considered whether this error can be said to be material. Reading the decision as whole and, in particular, the passages that follow paragraph 125, we have concluded it is not possible to say that the decision would have been bound to have been the same, had the error not occurred.

113.
As can be seen from the foregoing analysis, the decision of the First-tier Tribunal does not fall to be disturbed on the grounds of Article 8 procedural unfairness or because of any error in the Tribunal's findings as to credibility. Although we have concluded that the decision must be set aside, this is only in respect of the Tribunal's Article 8 proportionality exercise, by reference to section 117C(6). The Tribunal's findings of fact stand.

114.
In those circumstances, the nature and extent of the re-making exercise are such that the exercise should take place in the Upper Tribunal. Both parties will, of course, be permitted to file and serve evidence relating to the position, as at the date of the forthcoming hearing. The re-making will be conducted by Upper Tribunal Judges Pitt and Blum, for which purpose we hereby transfer conduct of those proceedings to them.

115.
In view of our decision, it is unnecessary to address the appellant's amended ground, which criticises the way in which the First-tier Tribunal approached the significance of the appellant's offence of child abduction. It will be for the Upper Tribunal, following the forthcoming hearing, to determine the significance to be given to that offence, in undertaking the section 117C(6) exercise.

Decision

116.
The decision of the First-tier Tribunal involved the making of an error of law. The decision is, accordingly, set aside to the extent described above. The Upper Tribunal will re-make the decision in the appeal, as explained above.

Signed Date: **5 March 2021**

The Hon. Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber