



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12934/2017**

THE IMMIGRATION ACTS

**Heard at Birmingham CJC
On the 18 January 2022.**

**Decision & Reasons Promulgated
On the 22 March 2022**

Before

**UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE HALL**

Between

**FN
(Anonymity direction made)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bazini instructed by Central England Law Centre.
For the Respondent: Mr Bates, a Senior Home Office Presenting Officer.

DECISION AND REASONS

Background

- 1.** This appeal returns to the Upper Tribunal following remittal by the Court of Appeal in an order sealed on 7 April 2021.
- 2.** The scope of the hearing is that set out at [3] of the Court of Appeal order, which is in the following terms:

3. The case be remitted to a freshly constituted Upper Tribunal (Immigration Asylum Chamber) to consider afresh:
 - (i) The Appellant's appeal on article 8 ECHR grounds on the following issues:
 - a. Whether the effect of the Appellant's deportation on her daughter (on the 'stay' scenario) would be "unduly harsh"; and if not,
 - b. whether there are very compelling circumstances over and above those described in Exceptions 1 and 2.

It is open to the UT to hear evidence on these issues.

- (ii) The Appellant's application for a review dated 1 May 2020 (to the extent and order remitting the issue to the UT is required) to be remitted to the Upper Tribunal.
3. The review application related to an application made on 1 May 2020, after the promulgation of the decision challenged to the Court of Appeal, asking the Upper Tribunal to consider whether the appeal should be remitted to the First-tier Tribunal in light of the decision of the Supreme Court in AM (Zimbabwe) [2020] UKSC 17.
 4. We mention the review application at this stage as it was decided that in light of the fact the Upper Tribunal is seized of the matter today with a view to determining all the issues afresh, which it was accepted by Mr Bates could include consideration of article 3 ECHR on medical grounds, and in light of the Court of Appeal remitting the case to the Upper Tribunal and not back to the First-tier Tribunal which it was within their power to do, the interests of justice did not require this hearing to be adjourned to enable remittal to the First-tier Tribunal, especially with the consequential loss of the ability to determine matters at the earliest opportunity if we did so.
 5. It is not disputed FN is a "foreign criminal" within the meaning of section 117 D(2) Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') and section 32(1) of the UK Borders Act 2007 following a conviction and sentencing on 5 February 2009 at Stoke Combined Court for deception, for which she was sentenced to a period of imprisonment. The Crown Court sentencing judge's remarks were in the following terms:

"... Your dishonesty spanned a significant period, about two years and four months, and involved a good deal of money. You earned in excess of £45,000. You came to this country illegally and sought asylum. You had failed in your initial asylum application and apparently exhausted your appeal rights by 2003.

You got your job by tendering false documents. This sort of offending is, your solicitor has already said, indeed very prevalent. But not content with the income from that paid employment, you also claimed support on the basis that you were destitute and you received a significant amount of Benefit in response to that claim. And still in September 2008 you were denying being in any paid employment at all. That wasn't desperation; that was greed. Your dishonesty was sustained. You gave no explanation in interview for where the money went nor really have you done so today as to where the bulk of this money went to.

I give you full credit for your guilty pleas and I will reduce the otherwise appropriate sentence by one third. I take account of the fact that you have no convictions. I've no doubt that you worked very hard and very well. I've also taken account of the fact that you have a young child and plainly medical problems and I will direct that the document prepared by Dr Bodah Singh should be sent to the prison governor.

You knew what you were doing was wrong. This wasn't just a case of surviving. You had a significant income. The offences are plainly so serious that only custody is appropriate. I have considered the Court of Appeal authorities. Because of the date when the electronically monitored curfew was imposed upon you you're not entitled to have those days count towards your sentence. But I don't think that's fair in your case because if you'd been granted bail I think five days later you'd have been entitled to have those days credited towards the sentence. So I'm going to reduce your sentence to take account of the days you'd otherwise have been entitled to have had against it.

I have also had regard to totality because technically the claim for the Home Office support would have merited a consecutive sentence but to keep sentences short as I can, I'm going to make all the sentences concurrent. On count 1 the sentence is six months imprisonment; on counts 2 and 3 the sentence is 15 months imprisonment; on counts 4 and 5 the sentence is ten months imprisonment. As I have said, they are all concurrent. The six days that you've spent on remand will count towards it. You will serve no more than half of that sentence before you are eligible for release on licence. Whether you are released on licence will be a matter, I suspect, for other authorities to decide. Take her down, please.

- 6.** It is also recorded in the Statement of Reasons from the Court of Appeal that the appellant's daughter, who shall be referred to as J and who was born on 4 December 2007, and who at the date of the hearing is 14 years of age, is a "qualifying child" within the meaning of section 117D(1) of the 2002 Act.
- 7.** The Secretary of State accepts it will be unduly harsh for J have to go with her mother to Burundi if her mother is deported, leaving the issue in respect of J being whether if she was to remain in the United Kingdom without her mother the effect of her mother's deportation on the child will be "unduly harsh". This is what is referred to as the "stay scenario" in the Court of Appeal order.
- 8.** It is therefore necessary for us to consider section 117C(5) of the 2002 Act which provides:
 - (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
- 9.** The appellant had a relationship with J's father, but that relationship has now ended, and it was not suggested that she had a genuine and subsisting relationship with him at the date of the appeal hearing.
- 10.** We also note that even if it was not made out that it will be unduly harsh on J to remain in the United Kingdom if her mother is deported it is still necessary for us to consider whether there are very compelling circumstances over and above those described in Exception 1 and 2,

an exercise that will require us to undertake a balancing exercise in which the weight to be given to the public interest in the appellant's deportation is a relevant factor.

The evidence

- 11.** We have been able to consider a considerable body of evidence composed of the written material, pleadings, oral evidence, and submissions made at the hearing, all of which we have properly taken into account. Whilst we may not make specific reference to any particular aspect of the evidence in this written decision that does not mean that evidence has not been properly considered by us.
- 12.** It is not disputed that the appellant is HIV-positive nor that she is a citizen of Burundi born on 9 December 1972.
- 13.** The appellant's evidence is that J is now in Year 9 at a local secondary school, lives full time with her, and that she provides for all the child's needs.
- 14.** The appellant's relationship with J's father ended in early 2020 but remained cordial until 21st June 2021 when the appellant states a domestic incident occurred. The appellant claim she has never stopped J from seeing her father but that she does not want him to come to her home and would rather not have contact with him. It is said the police have told J's father that he should not come to the appellant's property.
- 15.** The appellant states that since their relationship ended J has only seen her father face-to-face once although she speaks to him on the telephone approximately three times a week, sometimes more, sometimes less, although it is also stated in evidence that there had also been other occasions when J's father has tried to see J outside the home.
- 16.** The appellant believes that if she were deported to Burundi J would not be properly looked after. She expresses a fear that J will be stopped from having contact with her by her father. The appellant refers to the fact he does not speak to her at all and claims that he has humiliated her in front of his friends and her church by disclosing her HIV status and has even told J, which the appellant describes as being "reckless".
- 17.** The appellant has a fear that if she was deported to Burundi without J the child would fear for mother's life now she knows that she is HIV-positive.
- 18.** The appellant claims that her parents died before she left Burundi where she had lived with her grandmother on her farm, although following her grandmother passing away she has no family to return to or support and that she will be forced to return to the capital Bujumbura to survive. The appellant states she does not know whether she could find work as she left with no qualifications other than her school leaving certificate in Burundi, as a young woman in her 20s, and is now in her late 40s. She is not fit and not capable of hard farm work which she undertook in the past, has no employment history in Burundi, and while she has a Level 2 NVQ in Health and

Social Care from the UK she does not know if it will be recognised in Burundi especially as she has no useful work experience.

- 19.** The appellant claims that she will struggle to find work to support herself which would affect her ability to stay healthy. The appellant refers to the need for good nutrition to maintain her health.
- 20.** In relation to J, the appellant states that she has been her daughter's main carer for all the child's life except for the seven months when she was in prison, when she was a baby, and that since September 2017 J has lived solely with her and needs her support and care.
- 21.** The appellant's oral evidence and answers she gave to questions asked in cross-examination supported the thrust of her written evidence.
- 22.** J did not attend the hearing as she was at school, but has filed in addition to the witness statement of 31 October 2019 an up-to-date statement dated 13 January 2022 which is in the following terms:
 1. I would like to told the court about our family situation and how I feel about the possibility of my mum being deported to Burundi.
 2. I made a statement around two years ago but my circumstances have changed a lot since then. My mum and dad are now separated. I still live with my mum and my dad still lives in his home. I have not seen my dad in a long while. I speak to him every day but I do not see him. He still lives in a place where there is no bedroom for me and works long hours.
 3. It has been a very difficult year for me. I've been stressed with school and the situation with my family. My grades are low. I love both my parents and I need them both in my life. Losing my mum would make me feel that half of me had gone. I would have no one to support and guide me as a woman as I grow older.
 4. I have not been to church since last year. My mum does not feel comfortable going. I am a Christian and wants to go for religious reasons and because the church was part of my social life and I miss the people and emotional support and guidance I received there.
 5. I am worried about my mum's health if she is deported. I am scared something bad could happen to her and I would not be there for her if she fell unconscious, went to hospital or, God forbid, passed away. I was so scared that might happen and I would not be with her.
 6. I ask that my mum is allowed to remain with me in the UK. I don't know how I would cope without her.
- 23.** Although J's father did not attend the hearing there is within the original appeal bundle relied upon by the appellant a statement written by him on 14 November 2019. In that statement he confirms that he is a national of Sudan with limited leave to remain in the United Kingdom and that since September 2017, when he was granted leave to remain, he has lived separately from the appellant and J as a result of his not being allowed to live with them under the terms of the appellant's Asylum Support. The parties all live in Wolverhampton albeit on different sides of the city.
- 24.** J's father states he lives alone in a one bedroomed council property and that J does not have a room in his home as there is no available room. It is for that reason he ordinarily would have seen the appellant and J at their house.
- 25.** J's father states he works long hours in a care home in Walsall working different shifts including a 12 hour shifts from 8 AM to 8 PM. He states

that although his contracted hours are 36 hours a week he can work up to 60 hours a week if overtime is available, which he is happy to do as it enables him to earn more money.

26. J's father states he helps the appellant by paying for a school uniform, school bus fares and sometimes for food items for J.

27. In relation to the question of whether he can care for J it is written:

7. I understand that the Court will be considering whether I can look after J alone if FN is deported. I love J very much but I need to explain to the Court that I will struggle to look after her properly on my own.
8. Practically, it will be very difficult for me to look after J. I often work 12 hour shifts. This means that, taking into account my travel time, I am out of the house for over 13 hours per day. I would have to leave the house just as J would be waking up and would not return much before she went to bed. I do not think this would allow me to give J the time and support that she will need as she grows up, especially as she will be suffering dreadfully from the loss of her mother. I worry that J will effectively be left alone for most of the week, just after she will have lost her mother's presence in her life. This is bound to affect her emotionally and damage her ability to concentrate on her education. I am worried that she will be vulnerable to people who may wish to harm if she is alone for most of the day.
9. I must also be honest and tell the Court that I would not be at all comfortable dealing with any female issues to do with J. I would find it completely inappropriate to discuss periods, puberty or feelings towards boys with J. I believe that it is the mother's role to talk to a girl about these things. All my own friends are men so I have no close female friends who could help with J. I do not have any relatives in the UK.
10. I believe that J will be completely broken by the loss of her mother. J and FN are exceptionally close. It is always her mum that J wants to turn to for comfort, guidance and support. J would be lost without her mum.
11. I would not consider moving to Burundi. In Africa it is dishonourable for a man to be taken somewhere by his wife. It is the man who should take his wife to his own country, not the other way around. I do not know whether I will be allowed to live in Burundi but even if I am allowed to live there I would not consider doing so.

28. The Tribunal has also had the benefit of considering the written and oral evidence of Reverend Ray Gaston, who in his first witness statement of 7 November 2019 describes his professional position as being a Team Vicar in the parish of Central Wolverhampton, based at St Chad's vicarage.

29. Reverend Gaston is a Church of England Priest with considerable experience of over 20 years most of which has been as a Vicar in inner city areas. He joined the parish of Central Wolverhampton in September 2015 and states he has known the appellant, J, and her father, since he joined the parish, and states they are an integral and important part of the community who are well known and loved and respected. The appellant had been regularly attending the church since 2009.

30. Commenting upon the relationship between J and her parents, Reverend Gaston writes in his original witness statement, after commenting upon the deep relationship between the appellant and J:

6. I am also aware of J's relationship with her father, R, which is also important. However, that relationship is a complement to, not an alternative to, the

primary role that J's mother plays in her development. I am aware the FN and J have lived separately from R for well over a year. Even before they lived separately, FN was J's primary carer and the main influence in her life.

7. FN is J's primary carer and the bond between mother and daughter is very strong. FN is a loving, caring and conscientious mother and with R, J's father, she has raised a lovely, thoughtful child who is a delightful member of our Sunday School. J displays all the signs of a child brought up in a stable, loving environment. J is a real testimony to her mother's strengths and abilities considering her persistently precarious situation.
8. FN and J go everywhere together, and it is FN who brings J regularly to church where J reads and is an acolyte and crucifer, which are important and highly responsible roles. J is on the church rota as a regular reader and displays a maturity in how she approaches these roles that is beyond her years. FN has encouraged J in these pursuits and J is a regular at our Children's Church, often taking responsibility to respond thoughtfully to younger children's needs. J is now helping us develop a Youth Church for our growing number of older children. J's participation is not only encouraged by FN but actively supported by her. Our church raised funds to pay for J's registration as a British citizen when she reached the age of 10 years old and was entitled to register. Church members were happy to donate to a well loved member of the congregation.
- ...
10. J is clearly already distressed and concerned about the possibility that her mother will be deported and fears for the future. She wants to stay with her mother and feels sad and anxious about the future. I cannot stress too strongly my concern for J's welfare if FN's deportation goes ahead.

31. In his more recent statement dated 15 September 2021 Reverend Gaston provides further details of the family situation. This includes the appellant disclosing to him that she had experienced a history of domestic abuse including violence stretching back of number of years and that the police have been involved when she had contacted them. Reverend Gaston records the following:

"In May of this year shortly after the Bank Holiday weekend R contacted me (I had not seen a lot of him since his leave to remain was granted) and left a message on my phone. This message was about how awful a person FN was and in this message he disclosed inappropriate intimate details about FN including information about her health that I thought should be kept confidential. He appeared to be telling me things that he thought would make me look at her in a less favourable light. Eventually I arranged through texts to see R and went round to his flat in Heath Town Wolverhampton. He wanted me to pressurise FN back into a relationship with him. I told him that this was not something I was going to do and he needed to respect her wish to be apart from him but also, that as the police had told him - after the incident at the end of May - to stay away from the house, he needed to do so. He also admitted trying to intervene and see J on her way home from school despite being told by FN J didn't want to see him or talk to at the moment.

I told him I understood that this was difficult for him as J's father to hear and believe but that he needed to respect this at this time and in the future some arrangements may be able to be made.

I understand from FN that J is now in regular contact with him by phone and that he has not as yet asked to see her in person. FN is quite clear that J needs

to have a relationship with her father and is not wanting to get in the way of this but it needs to be away from her home and not involve FN having to meet R.”

- 32.** It is clear from the oral evidence of Reverend Gaston that the initial call he refers to above reflected R’s anger with FN which he stated was not something that he had come across previously in his dealings with R. He also confirmed the strength of the relationship between FN and J and the work they did and attendance within the church and reasons for FN not attending church at this time, as a result of what R had said to others and FN’s perception this would cause her embarrassment as well as an incident that occurred at a barbecue.
- 33.** That R said inappropriate things about FN is not only corroborated by Reverend Gaston but also by further witness DG who in a letter dated 2 August 2021 writes:

I have known FN since 2016 and we become good friends. She’s also Godmother to my five year old daughter. I have also known FN’s ex-partner since 2016 with their daughter. FN used to confide in me how her ex-partner used to abuse her physically, verbally and emotionally.

On 1 June 2021, I received a phone call at around about 22.30 p.m. from R, FN’s ex-partner. He told me how they had argued earlier on when he had gone to the flat to visit his daughter and the argument escalated to a point where FN ended up calling the police for him. He said the reason for calling me was to let me know and all FN’s friends that she is an evil, wicked, jealous woman. He said he wanted to expose her to the whole world. He said that FN is a prostitute who sleeps around with different men. He said he will make it his mission to destroy her life. He told me that FN is HIV positive, she is a dying woman and that he has also told his daughter that her mum is dying with HIV. I asked him whether it was fair for his daughter to hear such news about her mum. He replied by saying that J is old enough; she can decide who she wants to live with. He then carried on saying that he called our Church Vicar and some of FN’s friends and told them this. He went on to say he will make sure that FN is deported back to her country.

I was so worried after this phone call, I rang FN the following day, I encouraged her to speak to her daughter so she can find out how she is.

- 34.** There is also within the appellant’s bundle a letter from the West Midlands Police obtained as a result of a Subject Access Request. The letter dated 24 September 2021 refers to two incidents of the police being called by FN the first on 1 June 2021 for which the incident is described as ‘Domestic abuse incident – non-crime’ the note for which reads that the caller (FN) and suspect (R) had an argument over the fact FN has moved on from the relationship with R mentioning that R had started calling FN a prostitute and also shouting about the fact she is HIV+. It is recorded when the police arrived both parties were sat on separate sofas and that no offence had been disclosed, neither party had any injuries, no threats were made. The second incident is recorded as being on 10 June 2021 for which the offence is recorded as threats to kill. The notes record FN and R being involved in ongoing domestic incidents following which R telephoned FN calling her a prostitute and threatening to tell everyone she knows she has HIV. R

stated he will make a suffer and that he will then stab himself which FN believes to be a credible threat. It is noted FN did not wish to make a statement and that as there have been no further issues or contact the investigation was closed.

- 35.** In relation to FN's medical situation the tribunal has been provided with a letter dated 28 June 2021 written by Dr U Nandy a Consultant in GU Medicine confirming that FN was diagnosed as being HIV positive in 2003 and that she has borderline diabetes diagnosed in 2020. FN's current medication appears to be a combination therapy of three tablets, Atazanavir, Ritonavir and Tenofovir. In relation to FN's condition it is written:

"At the moment FN's condition is stable, but she needs continuing medical supervision in the form of doing her HIV viral load, CD4 cell count, full blood count, U&E's, LFT's and lipid profile every three months.

To remain stable she needs to continue on HAART (highly active antiretroviral therapy). With the response FN has made so far we can assume that if she continues to take her antiretroviral therapy without any interruption her long-term prognosis is very good and her life expectancy would be almost like a normal person. If she does not get the supply of HAART (Highly Active Antiretroviral Therapy) and access to nutritious food then it will hamper her long-term prognosis in a bad way, which will eventually lead to the relapse of her HIV viral load this will lead to the breakdown of her immune system and premature death.

She will need to continue on HAART (Highly Active Anti-Retroviral Therapy) for the rest of her life and continue to have regular (three monthly) medical reviews including blood tests to monitor her progress or to detect any sign of early relapse/treatment failure.

FN has been under the care of our clinic for the management of HIV since 8 March 2010. She has done very well and is very compliant with her treatment."

- 36.** The Secretary of State has provided a document from the Country Information Unit entitled 'Burundi: HIV treatment/medication' dated 27 July 2021 which reads:

- 1 HIV
1.1.1 treatment and medication

1.1.1 An October 2020 MedCO source stated that 'there is a national HIV programme in Burundi. ARV (antiretroviral) medication such as ... tenofovir and efavirenz are available within the programme.'

The same MedCO source indicated the availability of in and outpatient treatment and follow-up by HIV specialists and laboratory research for CD4 count and viral load from public facilities in Bujumbura.

Earlier MedCO sources indicated the availability of the medications abacavir, lamivudine and atripla (combination of efavirenz/emtricitabine/tenofovir). MedCO sources was silent on atazanavir and ritonavir.

1.1.2 The World Health Organisation (WHO) 2019 Burundi HIV Country Profile suggested provision of anazanavir/ritonavir in the country.

1.1.3 An URC (University Research Company) article from July 2021 noted some progress in a rural area of the country:

‘Improvements in identifying HIV positive cases in the Rukaramu community are due to the extra efforts taken by health workers... The link between the community and health facility is also a factor in the success of AVR initiation, which stands at 100% in the Rukaramu Health Centre at the end of December 2020. 100% of HIV positive cases were enrolled on ARV’s the same day of HIV diagnosis.’

1.1.4 A Panapress article from 24 July 2021 noted that ‘Burundi has reported, over the last 24 hours, 127 new infections of coronavirus (COVID-19), the highest number of officially detected since the beginning of the pandemic, in late March 2020, the Ministry of Public Health and the fight against HIV/AIDS said on Saturday.’

1.1.5 The Foreign, although and Development Office (FCOD) Travel Advice noted that ‘outside Bujumbura, there is a lack of adequate medical facilities.’

1.1.6 The US Overseas Security Advisory Council (OSAC) 2020 Crime and Safety Report for Burundi noted that ‘ Most medical facilities in Burundi are inadequate for even routine care.’

- 37.** We find it is not made out that suitable medication to meet FN’s needs is not available or cannot be accessed in Burundi.
- 38.** We have also considered the country report of Professor Aguilar in the appellant’s bundle.
- 39.** Specific reference was also made by Mr Bazini in his submissions to two reports provided by Harris Associates Immigration Social Work Services, the first dated 15 October 2019 and the second dated 1 November 2021.
- 40.** The first report contains at Section 8.8 an interesting analysis of the benefits to J of her current circumstances, the burden upon J of her current circumstances, benefit to J if she moved to Burundi with her mother, burden to J if she moved to Burundi with her mother, benefits to J if she remains in United Kingdom with her father but without her mother, leading to the following response to specific questions asked of the author and the author’s opinion in section 9 of the report in the following terms:

1. The likely effect of deportation on J’s educational, social and emotional development;

It is clear given the information available to me that any action taken in respect of FN’s deportation will have a significant negative impact upon J.

The impact of deportation on children and their families is well documented and researched and this assessment has not been devised to provide an overview of all of this. However, I believe several key research findings are applicable within this case. From discussions with J it is clear that she feels settled and secure within her family and home environment, she has an established social network

and feels comfortable in voicing her concerns. The research completed by Chaudrey et al (2010) highlights that children experienced behavioural changes in eating and sleeping habits, and emotional changes such as increased crying, anxiety, anger, aggression, withdrawal, and a heightened sense of fear. These outcomes were still present six months later. Even with a planned transition for FN and J, there is likely to be an impact upon J and the process of forced deportation and removal will continue to have an impact upon her. When it is considered that FN identified that she has no family members or support system available to her in Burundi, the family may face homelessness, destitution and social isolation in a country that today have limited links or attachment to. If J were to remain in the United Kingdom, whilst her mother was required to leave, she would have the added pressure of worrying about her mum which will have a detrimental impact upon her. In addition, as highlighted by Langhout et al, the remaining parent often has to provide additional funds to support the family, and certainly it appears this will be applicable to R. Given he only has a one bedroomed property currently, he will need to move and there will be an increase in the rent that will be required.

Currently his shift pattern is 8 AM to 8 PM, and his working hours are likely to be required to increase to ensure that you can afford to cater for J.

Currently, J has just started her first term at secondary school and whilst she has formed a positive relationship with her form tutor, this continues to be a new environment for her and one in which she is likely to experience a level of uncertainty. Within the letter provided by her primary school (.6: Documents reviewed), the head teacher advised that FN has been incredibly supportive of J's education and has supported her throughout the education pathway thus far. If FN were to be deported were to remain within the United Kingdom, R will have to fulfil this role, whilst also completing his full-time job within a challenging environment.

In contrast, if J were to move to Burundi with her mum, whilst, I am not an expert in the education system within Burundi, the information available to me suggests that the educational opportunities available to J will not compare to that she is currently receiving. In addition, the research I have completed suggested that the language for instruction in education is either French or Kirundi (Scholaro:2018), languages that J does not speak, therefore J will need to learn these languages as well to enable her to access her education.

It is my overall conclusion that it is in J's best interests for her to remain living in the United Kingdom with both of her parents, rather than face the option of having to choose between one of them and either leave the United Kingdom with her mum or remain in the United Kingdom with her dad.

2. The effect upon J of losing day-to-day contact with one of her parents, given that she is mixed race;

Any person's identity is made up and developed by a wide variety of things, this can include who they choose to associate with, activities that they like to complete and where they were born. For J, although born in the United Kingdom, mum is from Burundi and her dad is from Sudan. Given that she has been able to establish close relationships with both of them, they can support her to develop an understanding of both these aspects of her identity and ensure that when she wishes she can understand these cultures in great detail.

Given the deportation order in respect of her mum and the proposed arrangements for her care, she is likely to lose day-to-day contact with one of her caregivers if the plans go ahead given the constraints of either of her parents to be able to contact the other regularly. This is likely to have an impact upon how

she is able to experience and consider one aspect of culture. David (2017) in his considerations highlights that mixed race children thrive in environments in which they are able to talk about their multiple heritages and allowed to identify with multiple group identities. Whilst, FN and R may try to provide this environment, the loss of one of them for J, is likely to prevent this from effectively happening as and when J needs to fully explore her identity. This ultimately, may result in J losing a vital understanding of our own future culture and identity.

In addition, given that one proposal for J is for her to move to Burundi with her mom, she is likely to lose the influence of her own birth country and culture, as whilst, it is recognised that Burundi may share similarities with aspects of the United Kingdom, I believe that it is reasonable to suggest it will not share a similar culture or outlook as the United Kingdom given that it is a separate country.

3. The effect of J's development if she moves to Burundi with her mother (her stated preferred option);

As has been highlighted above, I believe there is significant evidence to suggest that there will be a negative impact upon J's well-being and development if she were to move to Burundi with her mum which is the current favourite option for her.

In consideration of the strengths and burdens table tool as completed above, I believe that it is clear that the burdens of the move to Burundi far outweigh the benefits to J. Given that she will lose the positive relationship with her father, her education is likely to be significantly disrupted and she is likely to be socially isolated. I conclude there is likely to be an impact upon her material, emotional and educational outcome for future. This would have an impact upon her ability to continue to meet the Five Outcomes for Children and Young People as outlined in Every Child Matters (2003).

In addition, given the uncertainty in respect of where the family would live, how they would be able to financially survive and how the family would integrate within a community that her mum has not been a part of for a prolonged period of time, the period leading up to the move, at the initial stages of the move itself is likely to be increasingly stressful for J (alongside her parents.)

4. The effect on J if she stays in Wolverhampton with her father while her mother is deported to Burundi.

As above, given the consideration of the benefits and burdens tool I am concerned that the burden emotionally for J if she were to remain in the care of her father whilst the mother returns to Burundi is excessive and is likely to have a significant impact upon her.

It is recognised that remaining in the United Kingdom is likely to be of greater benefit to J than moving to live in Burundi. These benefits include her stability, possible security and educational prospects, however, the impact upon the family emotionally and the limited contact that J would be able to have with her mum is likely to have a significant detrimental impact towards her emotional well-being and stability. The financial implications to this arrangement will mean that R will be solely responsible for J and additional costs of housing and basic necessities will increase, given the nature of his work, his working hours on J's chronological age, I am unsure whether he will be able to continue in his current employment and therefore, his financial stability is likely to change.

It is also important to highlight that Zayas and Bradlee (2014) amongst others have highlighted that deported family members often find it hard to support their families, and alongside the trauma and stigma of deportation they can find it hard to maintain contact with their family members that remain, which can lead to severed relationships. Given, J's view that she would find it 'heartbreaking' to be separated from her mum, she would be distraught if their relationship could not be maintained.

5. The effect on J of beginning puberty and starting secondary school without her mother in the UK.

Currently it is accepted that FN is J's primary caregiver. As Allen, B et al (2015) highlighted within their paper and the research completed by Thomson et al's (2006) demonstrates that the importance of a supportive primary caregiver in a child's formative years is well established and the removal of this person may result in 'aberrant development, increased stress as a result of losing a primary social support, and concern about the well-being of the parent'. Given that J is incredibly close with her mum as she was the person she identified that she would talk to about any worries or problems, it is of concern that J would lose this person given her stages of development as she approaches adolescence.

FN identified that whilst R cared for J in the past, this next developmental stage for J is likely to be more challenging for him and R himself recognises this. He identified that he is unable to identify any significant female role models for J that he is able to access independently. J herself identified that if she has any problems in respect of boys or 'lady problems' it would be her mum that she would speak to.

Whilst, this report and conclusion does not wish to indicate that male care givers are unable to provide the emotional support that teenage girls require, given the relationship that J has with her mum, and her views in respect of how her mum supports her, it is clear that the loss of FN at this crucial stage within her life will have an impact upon J.

6. Any other matters pertaining to the effective deportation proceedings on J that you feel relevant.

From my conversations with J, it is clear that she currently is in a state of worry concerning the long-term future for her family. She identified at various times in the conversation that she is worried about her mum and her wish for the future is that all refugees are welcome. I believe that both FN and R have done their best to shield J from this anxiety, however, given the nature of the possible deportation it will be incredibly difficult for J to avoid their own worries and fears and it is clear that she is aware of the possible deportation and has great anxiety in reference to this. She worries that in the future, she will be in a position in which she will have to pick which parent to live with, and this provides her with a great amount of challenge.

Given the duration in which this 'threat' has been present for the family, I am concerned that J continues to be in a place of continual worry and anxiety. It is well documented (NHS: 2006), how anxiety can impact upon children and whilst she manages this well it is possible that this could further impact upon her life in the future. She also has limited people in which she identified that she can talk about this with, for example she has identified that she has not shared the fact that her mum may be deported with her friends.

41. The second report, dated 1 November 2021 was commissioned to review the findings of the original assessment of October 2019 given the passage of time. At the beginning of the report is a section

containing a summary of the conclusions reached in the following terms:

2. Summary of Conclusions
 - 2.1. FN has resided within the United Kingdom for over 18 years and it is evident from the information available that she has established a life within the United Kingdom. She continues to be a full-time parent to her daughter J who is a British citizen. Both J and FN view the United Kingdom as their home and given the passage of time since the previous report was completed this opinion has only strengthened for FN.
 - 2.2. This assessment is considered the impact upon J if FN were to be deported from the country and if she were to remain in the United Kingdom with her father. In addition, it has considered the scenario of J moving to Burundi with her mother if FN were to be deported. It is my professional opinion that the impact of any deportation of FN to Burundi will have a significant negative impact upon J and this is reflected throughout this report.
 - 2.3. FN has life experiences that are challenging both within the United Kingdom and Burundi, however, despite these she appears to continue to be present, supportive and a constant parent to her daughter J. Would have a detrimental impact upon J's overall well-being and ability to achieve.
 - 2.4. Currently, FN is meeting physical and emotional needs of J, despite a small support network which has further decreased following the separation from R. If FN and J were to relocate to Burundi, it is identified that this would have a significant negative impact upon J and the fulfilment of her basic needs given the challenges that they would face.
 - 2.5. Regardless of whether, R will be supportive of the facilitating contact between FN and J if he became the sole carer to J following deportation, it is unlikely that the two would be able to maintain any physical contact given the costs associated with airfare to Burundi. In addition, it is likely that FN will be subject to a re-entry to the UK ban which will prevent her from visiting J. The responsibility therefore, will be placed upon J.
 - 2.6. Therefore, the family will have to rely upon virtual communications where possible, which are unlikely to meet the long-term needs of J given her relationship with her mum. In addition there are significant factors which will impact upon the families ability to utilise these effectively. It is also noted that FN is significantly concerned that this contact will be discouraged and/or prevented by R.
 - 2.7. As part of this assessment, the benefits and burdens of both J remaining in the care of FN but being forced to relocate to Burundi and the impact of FN being deported and J remaining in the care of her father have been considered. This clearly identifies the negative impact of both of these proposed options for J in her ability to meet the outcomes identified within Every Child Matters (2003).
 - 2.8. Therefore, it is the conclusion of this report that it is in J's best interests as a British citizen for FN to be able to remain residing in United Kingdom.

Discussion

- 42.** It is not in dispute before us that the best interests of J are for both her parents to remain in the United Kingdom, with her mother providing for her needs as she has done in the past. The question is not, however, what are the child's best interests but whether her mother's deportation from United Kingdom with J remaining will be "unduly harsh" on the child.
- 43.** It is clear that if FN is removed from the United Kingdom J's only remaining parent and potential carer is her father R. We considered the claim that R has unsuitable accommodation as he lives in a one-bedroom flat, but this only reflects the position at the date of the hearing, when R has no caring responsibilities, and no evidence was provided to show that if R has his daughter living with him he will not be able to obtain more suitable accommodation from the local authority. We believe that he will be able to secure at least two bedroomed accommodation meaning that this is not, on its own, the determinative issue.
- 44.** Similarly in relation to R's working hours and earned income, it is recognised that to provide appropriate parenting R may have to reduce his hours and that this may have a direct impact upon the level of his earned income. There was no analysis in the evidence, however, of the income available to R if he was the primary carer of J which will include in addition to earned income, child benefit and eligible Tax Credits. It was not made out that the income from all sources will be insufficient to support a household composed of R and J as is the case for many single-parent families with dependant teenage children.
- 45.** Whilst we note R's expressed concerns about his inability to meet the needs of his daughter as she moves through puberty and into adult hood, these are concerns that many in the situation of R may have to face when having to assume responsibility for their children. That may happen for reasons of divorce, death, or deportation, but it has not been shown such issues are insurmountable in light of an awareness of the issue and support services available within the school, GP surgeries, or other community facilities. There was no evidence led before us to show that J will be denied access to suitable advice and assistance if this was required.
- 46.** The core of FN and J's case in this regard is based upon the impact upon J of the loss of her mother who is her primary carer.
- 47.** We accepted the bond between FN and J is very strong. We accept that it is important that such a bond should be maintained even if it has to be modified as a result of FN's deportation.
- 48.** We note in this regard the comments made by FN that she is concerned that if she is deported and R becomes the primary carer for J that he will obstruct and/or not to encourage contact between J and her mother. There is no specific evidence before us to show that this is likely to occur, although the practical difficulties in facilitating such contact may limit the nature and frequency of the same. It is clear that prior to the outbursts recorded above that those who had dealings with R thought him to be a reasonable individual and that his verbal attack upon FN was not one that would have been expected of

him. It is clear that, for whatever reason, R was very angry with FN and acted in a wholly inappropriate manner in seeking to gain revenge for whatever had upset him. The fact that no criminal charges had been laid does not mean that the conduct of R is irrelevant, and even if not an issue examined by the criminal courts it may still amount to domestic abuse. The fact that R clearly has as part of his make-up and personality the ability to lose his temper and act in such a manner is noted by us.

- 49.** Although the standard of care R may be capable of offering to J if FN is deported may initially not be of a similar standard to that J currently has the benefit of, it was not made out that that standard R can provide will lead to J suffering to an extent that intervention by Social Services or others may be required. It is also the case that J, who is currently 14 years of age, will continue to develop and become more independent of any parent especially as she enters adult hood. Child and Adolescent services within the UK have not been shown not to be available to J if required. It must be remembered that during the period FN was in prison R was the primary carer for J with no evidence being made available to us to show that J's needs were not met at this time, demonstrating a degree of capability in R's ability to care for his daughter.
- 50.** It is also noted that contact between R and J is ongoing, albeit indirectly, and that R has attempted to see his daughter directly indicating a wish to preserve the bond they have, as recognised in the Social Worker's report. It is not made out that R would deliberately upset or cause emotional harm to J by preventing any contact with FN in reality.
- 51.** It has not been made out before us that the domino effect upon R of having to meet the needs of J, when adopting a wider holistic assessment of the impact of FN's removal, will amount to unduly harsh consequences.
- 52.** That leads us to considering the key question which is whether the removal of FN from the UK, when FN has been the sole or primary carer for J, with the exception of her time in prison and immigration detention, will result in a situation which is "unduly harsh" for the child. We have evaluated the answer to this question with reference only to J herself. We have in particular not weighed the impact of deportation upon J against the criminality of FN, as such an approach is prohibited in law on the basis of the child cannot be blamed for matters to which he or she is not responsible.
- 53.** We accept that FN's removal would be harsh but that is not the requisite test.
- 54.** We have also ensured that the focus of our assessment is on the emotional impact upon J in light of the guidance provided by the Court of Appeal in HA(Iraq) [2020] EWCA Civ 1176 with particular reference to the judgements of Underhill LJ at [44-56] and Peter Jackson LJ at [157-159].

55. In Zoumbas v Secretary of State for the Home Department [2013] UKSC 74 the Supreme Court set out at [10] what are more commonly referred to as the ‘Zoumbas principles’ in the following terms:

10. In their written case counsel for Mr Zoumbas set out legal principles which were relevant in this case and which they derived from three decisions of this court, namely *ZH (Tanzania)* (above), *H v Lord Advocate* 2012 SC (UKSC) 308 and *H(H) v Deputy Prosecutor of the Italian Republic* [2013] 1 AC 338. Those principles are not in doubt and Ms Drummond on behalf of the Secretary of State did not challenge them. We paraphrase them as follows:

- (1) The best interests of a child are an integral part of the proportionality assessment under article 8 ECHR;
- (2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child’s best interests do not of themselves have the status of the paramount consideration;
- (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
- (4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
- (5) It is important to have a clear idea of a child’s circumstances and of what is in a child’s best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
- (6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and
- (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

56. We have taken into account the ‘Zoumbas principles’ and consider our decision to be in compliance with the same. As noted above it is not disputed that the best interests of the child is for her to have both her parents with her in the United Kingdom.

57. We do not find sufficient evidence has been produced to support a finding that if FN is deported from the United Kingdom J will suffer physical harm as a result of either the inability of R to meet or provide for the child’s needs or as a result of self-harm. The question is whether the degree of any emotional harm will make FN’s removal “unduly harsh”.

58. We accept that in addition to the normal consequences of removing a primary carer from a child an additional element in this appeal is J's fear of the impact upon her mother of her mother's removal as a result of her suffering HIV. R has been rightly criticised for using FN's HIV status as a 'weapon' to get back at her as a result of their recent falling out. It is said that R told J her mother is HIV+ which the child did not know previously, which was an irresponsible act especially as the evidence indicates that not only was J told her mother is HIV positive but that as a result of the same she is likely to die. In the report from the Independent Social Worker dated 1 November 2021 in relation to this specific issue it is written (setting out the question asked by FN's instructing solicitor followed by the answer):

6. **I am instructed that J has been told by her father that her mother is HIV positive. This information had previously been withheld from J. We request that the report confirms, if possible without unnecessary upset to J, whether J knows this information and whether the knowledge of her mother's HIV status is likely to worsen J's anxiety if her mother is deported back to Burundi.**

I have been unable to confirm with J whether she is aware of her mother's HIV status given the possibility of causing her significant distress. FN advises that R did tell J this information. R in my conversation with him advises that he did not inform J this information, however, she overheard he and FN talking about her HIV positive status.

Given that both FN and R are both advising that J is aware, whilst, the context in which they advise this has taken place is different it seems a reasonable conclusion that J does have this knowledge. It would also be reasonable to conclude that this is likely to further impact upon J's emotional distress.

I have been able to find limited empirical evidence to evaluate the current health care system within Burundi, including the absence of any country of origin reports from the Home Office, however, the information available has suggested the healthcare system 'suffers from a lack of adequate infrastructure and human resources to meet urgent community needs (US AID: 2021). Given that J will be aware both of the seriousness if the HIV illness is not appropriately managed and that the services available are likely to be comparably worse than that of the UK it would be incredibly unusual if this did not cause J significant worry and anxiety for the safety of her mother. If she were to experience and witness the challenges that FN may have in accessing appropriate medical support, the impact on J will be increasingly detrimental regardless of whether this is when she is present in Burundi or remaining in the UK.

In addition, I would highlight that if FN is unable to gain the appropriate treatment and her immune system does break down as identified by Dr Nandy as a possibility, she will have no one to care for her. Given she has no family in Burundi, if FN returns to Burundi alone, she will either have to be cared for in the community (if this is available in Burundi) by strangers until she dies or this will take place in hospital. If J goes to Burundi with her mum, this role could fall to her.

I cannot be considered as an expert concerning the process of the breakdown of the immune system if an adult with HIV stops HAART treatment and so therefore, will only put forward the following with no timescales; this would be

a significantly traumatic and distressing event to witness as an adult with no previous trauma. J has over four years before she reaches adulthood and within her childhood it has already been reported she has witnessed domestic abuse and she will have experienced the emotional distress of her mother being deported. She goes to Burundi with her mother she will witness this first hand in a country in which she isn't a citizen and does not speak the language, or if she remains in the UK whilst her mother is deported she will be unable to be present to support her mum.

- 59.** The medical evidence shows that FN is doing well on her antiretroviral combination therapy which combined with her maintaining a nutritious and good diet has enabled her to live as near as possible a normal life as she can in the United Kingdom. The information provided by the Secretary of State indicates that the drug combination required by FN is available within Burundi and there are numerous sources within the public domain to show that there are NGOs and AIDS organisations who work within Burundi.
- 60.** We note a potential problem for FN is that disclosed in the World Food Programme (WFP) brief for Burundi dated November 2021 which shows Burundi is the second country most affected by chronic malnutrition in the world. There is in the same document, however, a clear indication of the provision of food and nutritional assistance to those within the country who need it as part of the work undertaken by the WFP to improve food security.
- 61.** There is an issue about whether FN will be able to obtain suitable employment in light of her lack of qualifications and work experience and time outside Burundi and the information in the WFP report indicating 90% of the population depend on agriculture for their livelihood. Although FN worked on her grandmother's farm previously, whether it has passed to another family member or whether it could provide work and assistance for her is not known to us, as the appellant provided insufficient evidence dealing with this point.
- 62.** It will be a further stress upon J if during indirect contact with her mother there is any indication that her mother has not been able to maintain sufficient nutrition, indicated as being essential in the medical evidence, such that her health starts to fail. We accept that there will be a feeling of helplessness in J if she remains in the UK and is unable to help her mother.
- 63.** We accept that the relationship between J and her mother is very strong, but we also find there is a relationship between J and her father. J clearly wishes to maintain contact with her father as demonstrated by the fact she went to his property to watch a football match and maintains regular indirect contact with him. There is clear evidence before us of an appropriate father daughter relationship within the confines of the physical separation of J's parents and its related history.

- 64.** It is not disputed that J will remain in the United Kingdom where she will be able to enjoy the significant and weighty benefits of her British citizenship.
- 65.** Tying together the issues we have considered in relation to the question of whether deportation will be “unduly harsh” upon J, whilst acknowledging that it may be such when a primary carer is deported without more, we find that although the degree of harshness in this case if FN is deported will be greater than some the Tribunal has to deal with, we do not find that it has been shown to be “unduly harsh” upon J, on the facts.
- 66.** We therefore move on to consider the second aspect of the case which is whether there are “very compelling circumstances over and above Exceptions 1 and 2”: s117C(6) NIAA 2002. This requires us to consider whether there are in this case circumstances that are more compelling than the existing exceptions: see Akinyemi v The Secretary of State for the Home Department [2017] EWCA Civ 236 (04 April 2017) at [14].
- 67.** We accept that the word “very” imports a very high threshold, and that “Compelling” means circumstances which have a powerful, irresistible and convincing effect: see SSHD v Garzon [2018] EWCA Civ 1225.
- 68.** Section 117 C (4) provides that Exception 1 to the right to deport 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.
- 69.** As is clear from the Statement of Reasons from the Court of Appeal it is not suggested that the Upper Tribunal should consider Exception 1. If we had done so we would not find it met for even though we accept FN will experience difficulties in reintegrating into Burundi, we do not find it is made out that very significant obstacles exist that she would not be able to overcome to enable her to reintegrate into her home state.
- 70.** Section 117C(5), Exception 2, applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C’s deportation on the partner or child would be unduly harsh. As noted above we have not found FN is able to succeed on this basis for the reasons we set out above.

71. Case law has provided guidance on the type of issues to be considered in such an exercise which include:

- i. ability to meet both s117C Exceptions in conjunction with other factors collectively NA (Pakistan) (supra) at [32].

In this case it is not made out the appellant can meet the exceptions set out in section 117C, but we have considered all other relevant factors further below.

- ii. seriousness of the offence is relevant to whether there are very compelling circumstances - MS (Philippines) at [49-52], SSHD v PF (Nigeria) [2019] EWCA Civ 1139. The fact that the sentence was at bottom of range (ie 12 months) can be taken into account: HA (Iraq) (supra) [149].

Details of the appellant's offences are set out in the sentencing remarks of HH J Glenn. Whilst not an offence of violence the conviction does relate to an offence of dishonesty over a significant period of two years and four months involving a considerable sum by making a false claim to be destitute resulting in receipt of a significant amount of Benefit and claiming to be entitled to work; offences that could potentially have denied a person who could have taken such employment lawfully the benefit of employment and the income they could have received from such, the cost to the public purse of receiving benefits to which there was no lawful entitlement and in relation to which there is a significant deterrent element to prevent benefit fraud.

Personal history does not suggest any motivation for why FN had a need to offend and she was found culpable on the basis of greed. In relation to her current circumstances it is accepted FN is HIV-positive for which she receives medical treatment that is available to HIV sufferers in the UK.

- iii. In this case there is no old sentence reactivated as a ground for automatic deportation.
- iv. Particularly strong public interest. It is accepted there is a strong public interest in deporting foreign criminals. We accept the public interest "almost always" outweighs countervailing considerations of private or family life in a case involving a 'serious offender': Hesham Ali at [46] and KE (Nigeria) at [34].

In Hesham Ali the Supreme Court found:

- 37. How is the reference in rule 398 to "exceptional circumstances" to be understood, compatibly with Convention rights? That question was considered in the case of MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192; [2014] 1 WLR 544. The Court of

Appeal accepted the submission made on behalf of the Secretary of State that the reference to exceptional circumstances (an expression which had been derived from the *Jeunesse* line of case law) served the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who did not satisfy rules 398 and 399 or 399A, and that it was only exceptionally that such foreign criminals would succeed in showing that their rights under article 8 trumped the public interest in their deportation (paras 40 and 41). The court went on to explain that this did not mean that a test of exceptionality was being applied. Rather, the word “exceptional” denoted a departure from a general rule: “The general rule in the present context is that, in the case of a foreign prisoner (sic) to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the ‘exceptional circumstances’.” (para 43) The court added that “the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence” (para 44). As explained in the next paragraph, those dicta summarise the effect of the new rules, construed compatibly with Convention rights.

38. The implication of the new rules is that rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of rules 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as *Laws LJ* put it in *SS (Nigeria)*. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and rules 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with *Huang* [2007] 2 AC 167, para 20), but they can be said to involve “exceptional circumstances” in the sense that they involve a departure from the general rule.

...

46. These observations apply a fortiori to tribunals hearing appeals against deportation decisions. The special feature in that context is that the decision under review has involved the application of rules which have been made by the Secretary of State in the exercise of a responsibility

entrusted to her by Parliament, and which Parliament has approved. It is the duty of appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law. But, where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, they should attach considerable weight to that assessment: in particular, that a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life; that great weight should generally be given to the public interest in the deportation of a foreign offender who has received a custodial sentence of more than 12 months; and that, where the circumstances do not fall within rules 399 or 399A, the public interest in the deportation of such offenders can generally be outweighed only by countervailing factors which are very compelling, as explained in paras 37-38 above.

In this appeal FN was sentenced to a number of concurrent sentences the longest of which was for a period of 15 months imprisonment. She therefore falls within the category of a 'medium' offender having been sentenced to between 12 months and four years imprisonment.

The comments in Hesham Ali by reference to the Immigration Rules remain relevant for the provisions of the rules reflect the statutory provisions that we have referred to above. FN cannot meet the Rules.

- v. Poor immigration history: see Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60.

FN's immigration history shows she entered the United Kingdom on 10 October 2003 and claimed asylum which was refused on 31 October 2003. The appeal against that decision was dismissed on 16 February 2004. FN remained in the UK unlawfully and her appeal against the decision to deport her from the United Kingdom was dismissed by the First-tier Tribunal in a decision promulgated on 7 July 2010 on both protection and human rights grounds. It is recorded in the earlier decision of the Upper Tribunal set aside by the Court of Appeal in relation to FN's immigration history, which we find is not infected by any misunderstanding of the facts and which was not challenged before the Court to Appeal, the following:

9. At the hearing of that appeal (against the deportation order) Immigration Judge Frankish heard evidence from the appellant and her partner, RA. Insofar as the appellant claimed that her removal in pursuance of the deportation order was breached United Kingdom's obligations under the Refugee Convention, Immigration Judge Frankish stated:

"16. ... So far as asylum is concerned, the appellant relies upon the rather speculative suggestion that election violence in connection with the election as of today, the date of drafting, such as to place her at risk. Her

asylum claim was considered in detail on appeal on 16 February 2004 (AS/59039/2003). It was accepted that she was a citizen of Burundi but, for the detailed reasons given (paragraph 31), she was not credible. The appeal was rejected. The 2003 country case of N (Burundi) UKIAT 00065, has since dropped off the country guidance list. It dealt with the post war civil situation and found that conditions, although bad, did not cross the threshold as to necessitate international protection...

18. We were not taken to any new facts, any new political developments, any new case law country guidance to suggest that it would be wrong to diverged from the previous findings in accordance with Devaseelan so far as asylum is concerned, we find no reason to diverged from the findings in a previous determination in accordance with Devaseelan..."
10. Immigration Judge Frankish also considered the appellant's Article 8 claim, noting that the human rights of third parties, i.e. the appellant's partner and her daughter, must also be considered. Immigration Judge Frankish concluded, at [27], as follows:

"the appellant is subject to automatic deportation, having been sentenced to more than one year of custody, subject to the consideration above. The guidance of EO indicates that the two Conventions should be considered first. Having found the appellant not to fall under either Convention, however, it is difficult to see how a breach of the rules will apply by removal of the appellant. She has ties to the UK but would be taking those ties with her, certainly the daughter and the husband (actually partner) would be free to join her. She came to the UK with no right to do so and has derived considerable benefit, largely to which she was not entitled. The partnership she has formed and the child she has conceived of all taken place in the knowledge that she had no right to be in the UK, nor indeed did her partner. It is not possible to conclude that there is any breach under the rules by reason of automatic deportation."

11. The appellant remained in the UK unlawfully made further submissions on 21 February 2014, 28 March 2014, 20 August 2015, 14 August 2017 and 26 September 2017, were addressed to the respondent in the decision to refuse the protection of human rights claims, served on 21 November 2017.

FN therefore has a very poor immigration history. Below we consider submissions made by Mr Bazini concerning the delay in this appeal which he submitted is relevant to the weight to be given to the public interest in FN's deportation.

- vi. Rehabilitation cannot in itself constitute a very compelling circumstance and the cases in which it could make a significant contribution are likely to be rare: see Velasquez Taylor v Secretary of State for the Home Department [2015] EWCA Civ 845 [§21] but also CI (Nigeria) and Garzon (supra) in which Court of Appeal did treat it as a relevant factor capable of attracting some weight, a view approved in HA (Iraq) (supra) [132-142] , KB (Nigeria) [33] and AA (Nigeria) [40].

In this appeal there is no evidence of rehabilitation of the particular type recognised by the Court of Appeal in SM (Zimbabwe) v Secretary of State for the Home Department [2021] EWCA Civ 1566. In that case the Tribunals below were found to have erred in failing to recognise the weight to be attached to the rehabilitation of a "very particular type", namely

that a strong family life now existed with the victim of the original crime (A's stepson).

It is not disputed before us that FN has both family and private life in the United Kingdom. The family life is with her daughter J following the breakdown of her relationship with R. FN's private life includes her home and friends and did include the church and contact with Reverend Gaston who has maintained contact and provided support for her. There is no evidence, however, that a private life has been formed with the victims of her crimes which cannot be reasonably expected on the facts.

What is not disputed before us is that since the offences were committed and FN convicted and sentenced to imprisonment on 5 February 2009 she has not reoffended. There is no evidence of a propensity to reoffend in the future and the evidence supports FN's statement that she has no intention of committing further criminal offences. We are satisfied that there is evidence in this case of complete rehabilitation although that is not itself a determinative factor as we do not find that the fact FN has not broken the law since amounts to a significant contribution, as all she has really done is what every citizen of the UK is expected to do.

- vii. Contributing to the community adds nothing to the existing (limited) weight to be attached to rehabilitation Jallow v Secretary of State for the Home Department [2021] EWCA Civ 788 (24 May 2021).

We note FN's work within the church and her contribution to which Reverend Gaston spoke about in his evidence. FN has not attended church since R told individuals that she is HIV positive but it was not made out that any contribution she has made to the church community adds anything to the weight that we can give to her rehabilitation.

- viii. Public interest not a monolith and must be approached flexibly, recognising that there will be cases (albeit unusual) where the person's circumstances outweigh the strong public interest in removal: Akinyemi v The Secretary of State for the Home Department [2019] EWCA Civ 2098 (04 December 2019)

- 72.** In relation to the issue of delay. An order of Dingemans LJ dated 17 August 2020 which adjourned the application for permission to appeal to the Court of Appeal contained the following direction:

Decision: adjourned for further written submissions as follows:

1. The Respondent to serve a brief statement of reasons, no page limit applying, setting out why permission to appeal should be refused by 4 pm on 14 September 2020.

2. The Appellant to serve a response to the Respondent's brief statement of reasons by 4 pm on 28 September 2020.
3. The application for permission to appeal will then be determined on the papers (unless, in the light of the further submissions, it is considered necessary to have an oral hearing of the application for permission to appeal).

Reasons:

Inquiries suggest that judgment in HA and RA (Iraq) v SSHD is likely to be delivered soon. These directions give both the Respondent and Appellant an opportunity to address the judgment and its relevance, if any.

It would be helpful for the Respondent to explain what, if any action, was taken by the Respondent after the Appellant became appeal rights exhausted on 29 September 2010 before the relevant decision was made in November 2017. It would be helpful for both the Respondent and Appellant to address what, if any, effect the delay from 29 September 2010 until the decision made in November 2017 had or should have on the application of the "unduly harsh" and "very compelling circumstances" tests.

It would be helpful to know what, if anything, has happened to the Appellant's application for reconsideration made on 1 May 2020. Assuming that nothing has happened (and therefore treating it as refused) it would be helpful for both Respondent and Appellant to address the article 3 ECHR (HIV and its treatment in Burundi) ground.

73. The Secretary of State's response dated 14 September 2020 in relation to the delay point contains the following:

Passage of time

11. As a matter of law, the SoS does not accept that the mere passage of time per se must be taken into account when applying the 'undue harsh' test. In KO (Nigeria) the Supreme Court held that the Court or Tribunal applying the 'undue harsh' test is focused on the effect of deportation on a qualifying child/partners and is not concerned with extraneous matters.
12. Whilst the passage of time itself cannot affect whether or not deportation would produce unduly harsh effects, it is recognised that during a passage of time, Article 8 rights can change. A Tribunal must, of course, apply s117B(4) and (5) - little weight should be given to private life established by a person when in the UK unlawfully, or when their immigration status is precarious. Further, during a passage of time, a qualifying child will age and mature and be exposed to life which may alter the 'unduly harsh' assessment for him/her.
13. In this case, the UT assessed the evidence as at February 2020 and formative view on 'unduly harsh' as at that date (i.e. after the passage of time that is identified). The effects of that passage of time were inextricably built into that evidence. No further or separate consideration of the passage of time was required.
14. The same approach applies to 'very compelling circumstances' over and above the exceptions. Given the terms of s117C(1) and (2) - which put into statutory form that it is in the public interest for foreign criminals to be deported - the mere passage of time does not change that public interest. What can change during that period, however, are the factual circumstances, such that an assessment of whether there are very compelling over and above the exceptions may change. Again here, the focus is on the change in the circumstances as a result of the passage of time, rather than the passage of time per se. This frequently arises in the context of arguments surrounding rehabilitation. As stated above, and as the Court of Appeal recognised in HA

and RA (Iraq) rehabilitation is in principle a relevant but rarely a factor of great weight. Nonetheless, it is rehabilitation that is potentially relevant, rather than the passage of time over which rehabilitation is alleged to have occurred. Under this test too, the Tribunal must also apply s117B(4) and (5).

15. As requested, on the facts, FN became appeal rights exhausted (following the decision of Judge Frankish) on 29 September 2020 (that decision having been promulgated on 7 July 2010). During that time, as the UT noted, "*The appellant remained in the UK unlawfully*" and made a string of further submissions in 2014, 2015 and 2017 which led to the decision in November 2017. Having considered her records, the SoS further notes that one cause of the delay arose due to uncertainties over the family unit. A fair amount of investigation was required as to the relevant nationalities (FN's partner RA is Sudanese) and whether the family needed to be treated as a unit. RA also had a separate asylum claim, with his own set of further representations which needed to be considered. A switchover between daughter and parents occurred between sets of representations. Further, it appears that one set of issued deportation paperwork contained a technical error was therefore withdrawn and re-issued.

- 74.** The appellant's response accordance with the direction from the Court of Appeal refers to the decision of the House of Lords of EB (Kosovo) [2008] UKHL 4 and argues that delay can impact on both the "unduly harsh" test and the "very compelling circumstances" test. At [16] of the response it is written:

16. In this case despite appeal rights being exhausted in September 2010 the Respondent did nothing to enforce the outcome of that appeal for many years. No attempt was made to deport the Appellant prior to the further representations she made from 2013 onwards. Therefore the Respondent had almost 3 years to deport the Appellant before any further representations were made. In the event that representations were made on a number of occasions since 2013 there is simply no justification for the Respondent to take over four years to make a decision. Representations at any given time set out the relevant position of the family unit at that particular time, it is because the Respondent delayed in making a decision that further representations had to be made to keep the Respondent up-to-date with the family circumstances. That is a commonplace matter for the Respondent to have to deal with and it is an unsurprising consequence if decisions are not made promptly. The Respondent's admission that her deportation paperwork had to be withdrawn due to a technical error to be reissued, further illustrates the delay on the part of the Respondent, although the Respondent fails to explain how long it took to reissued the decision once the error was discovered.

- 75.** In EB (Kosovo) (FC) v SSHD 2008 UKHL 41 the House of Lords said that delay could be relevant in three ways. First the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of delay the likelier this is to be true. To the extent that it is true the applicant's case will be strengthened. Secondly, delay may be relevant to an immigrant without leave to enter or remain who is in a precarious situation, liable to removal at any time. Any relationship into which such an applicant enters is likely, initially, to be tentative, being entered into under the shadow of severance by administrative order. This is more true where the other party to the relationship is aware of the precarious nature of the position and is treated as

relevant to the quality of the relationship. Thirdly delay may be relevant in reducing the weight that would otherwise be accorded to fair and firm immigration control if the delay is shown to be the result of a dysfunctional system which yields unpredictable and unfair results.

- 76.** The Supreme Court in *Agyarko* [2017] UKSC 11 considered (para 52), referring to *EB (Kosovo)* that the cogency of the public interest in the removal of a person living in the UK unlawfully was liable to diminish or looking at the matter from the opposite perspective, the weight to be given to precarious family life was liable to increase if there was a protracted delay in the enforcement of immigration control.
- 77.** We do not find it made out that the delay in this matter has been shown to be unlawful. The explanation provided by the Secretary of State in response to the direction of the Court of Appeal reflects the reality that many in the field of immigration and asylum in the United Kingdom experience, where applications are unlikely to be determined as quickly as they would wish and when many can take a substantial number of years to resolve. It has not been shown to be irrational for the decision-maker to undertake the investigations required on the facts, which do not appear to have occurred as may be suggested in the appellant's response as a result of lack of action by the Secretary of State, but rather as a result of the changes to arrangements that occurred within the family. We do not find it made out any delay was unlawful. We make such finding being unaware of the details regarding the problems encountered with the original paperwork containing the technical error and the time-limit between withdrawal and reissue.
- 78.** Even if delay were to have the effect of strengthening the appellant's case by reducing the weight to be given to the public interest and increasing the weight to be given to any private life within the United Kingdom, this has to be weighed within the overall balance of the article 8 assessment which in relation to deportation include the statutory requirement upon Secretary of State to deport foreign criminals. There is a wide margin of appreciation to a signatory to the ECHR in relation to such matters. We would still find that there is strong public interest in the deportation of a foreign criminal and that any delay does not reduce the same to the extent submitted on the appellant's behalf in this case.
- 79.** We have also considered the claim based on Article 3 ECHR on the basis of FN's medical condition. Whilst we accept that article 8 could be engaged in medical terms based on the relationship between FN and her treating physicians in the United Kingdom the case was made out as enabling the appellant to succeed on that basis.
- 80.** In *AM (Zimbabwe) v Secretary of State for the Home Department* [2020] UKSC 17 the Supreme Court applied the ECtHR's decision in *Paposhvili v. Belgium* (Application No. 41738/10) (13 December 2016) as to the effect of article 3 and set aside the judgment of the House of

Lords in N v. Secretary of State for the Home Department [2005] UKHL 31.

- 81.** The correct test is whether on account of the absence of appropriate treatment in Burundi or the lack of access to such treatment, there is a real risk of FN being exposed to a serious, rapid and irreversible decline in her state of health resulting in intense suffering or to a significant reduction in life expectancy.
- 82.** ‘Significant’, in the context of the new criterion identified by the Court in Paposhvili means ‘substantial’. Were a reduction in life expectancy to be less than substantial, it would not attain the minimum level of severity which art.3 required as found in *AM (Zimbabwe) v. Secretary of State for the Home Department* [2020] UKSC 17.
- 83.** As noted above, FN has made substantial progress whilst in United Kingdom in being able to live as near a normal life as a result of her medical treatment. We do not accept, as noted above, that FN has established that appropriate treatment by way of the necessary antiretroviral drugs will not be available to her in Burundi. We have noted the evidence FN sought to rely upon but do not consider that material to be complete especially when there is insufficient reference or examination of the role of the NGOs and other organisations who play an active part in dealing with HIV in Burundi.
- 84.** In terms of having access to such treatment, we have acknowledged the difficulties FN may face in establishing herself in Burundi.
- 85.** FN’s evidence relating to the poor state of the economy in Burundi supported by a report published by the Danish Trade Union Development Agency headed ‘Labour Market Profile Burundi 2021/2022’. This confirms that *“Burundi’s economic growth collapsed in 2015, fuelled by political turmoil. Donors withdrew development aid forcing the government to cut public investments and raised domestic public debt to finance the social spending. Another economic downturn hit the country in 2020, sparked by the global Covid-19 pandemic. The economic slump, no minimum wage hikes, and low social protection coverage hindered poverty reduction, keeping Burundi among the poorest countries in the world”*.
- 86.** The report refers to a Social Protection Code in Burundi noting that the Social Security Code of 1999 was replaced by the Social Protection Code in May 2020. One of the significant improvements of the law was that it makes no distinction between formal workers and those in the informal economy concerning labour rights, social protection, and social dialogue. The law sets the vulnerable groups and their living conditions for receiving social protection. It further specifies the financing of non-contributory systems through the Social Protection Support Fund and any other funding source, including external. The new measure created an authority responsible for regulating social protection programmes and systems. A decree is setting out the missions, organisation and functioning of the authority responsible for regulating social protection programs and systems that have already been gazetted.

- 87.** In relation to the employment situation FN will face it is written: *“The country mainly relies on employment in subsistence agricultural activities. ...The urbanisation rate is on the rise, driven by the fast growing population and decreasing viability of farming to support a family, forcing many young people to move to urban zones searching for work. With few formal jobs available, many urban young Burundians turn to higher education to improve their employment prospects. But in a market flooded with graduates, a university degree alone is often not enough. It supports the fact that unemployment in Bujumbura tends to rise linked to the level of educational attainment”*. As noted above, FN only has her school leaving certificate with no evidence that any qualifications obtained in the UK will be recognised in Burundi and lacks any work experience outside the field of agriculture.
- 88.** There is no minimum wage provision in Burundi and the Social Protection Code provisions can only be implemented once they can be afforded which does not appear to be the case in light of the economic reality in Burundi at this time. It is written *“The social protection system has not offered unemployment insurance schemes, forcing many workers to enter casual or informal activities as a survival strategy to generate earnings. However, the Labour Code from 2020 provides that during periods of specific (technical and economic) unemployment, the worker is paid an unemployment benefit at the Danish Trade Union Development Agency Burundi Labour Market Profile 2021/2022 Page 19 expense of social security. It is a novel concept in the country and is supposed to be introduced as soon as economic conditions allow it.”*
- 89.** In addition to those who have always lived in Burundi seeking employment there is also competition that FN will face from those who have fled Burundi as refugees during the time of civil war or political upheaval who are now seeking to return. In this respect it is written: *“Refugee returnees are more likely to engage in agricultural activities for subsistence and therefore have a low income, not to mention put further pressure on the rural population density. A study indicated that restrictions on economic activities while forced in displacement abroad resulted in high levels of inactivity with a risk of potential deterioration of skills.⁵⁶ Equally, the repatriation movements put pressure on Burundi’s public resources concerning reintegrating all returnees into the society. Many lost their homes and assets when they left, such as land, and must be provided with the means to fulfil their basic needs. This situation has been a complicated challenge for the country.*

Burundian returnees have been challenged by socio-economic aspects and the complications triggered by the Covid-19 pandemic. Amidst the Covid-19 pandemic, the voluntary repatriation process continued uninterrupted until mid-May 2020, when it was suspended in connection with the start of the national electoral period. The activities resumed in July 2020, with considerable monthly returns,

averaging 7,000 individuals/month in September and November 2020. An ambitious Joint Refugee Return and Reintegration Plan for 2021 projected 143,000 Burundian returns.”

90. In relation to the nature of employment structure in Burundi:

“Burundi’s employment structure is dominated by the informal economy marred by loopholes in labour and business regulations such as paying taxes, working conditions, and social security. The informal economy’ concept could be interpreted into three facets:

- Informal economy: Unincorporated enterprises owned by households.*
- Informal employment (employment relationship): A job held by an employee is considered informal if the job does not entail social security contribution by the employer and is not entitled to paid sick leave and paid annual leave.*
- Own-account workers and employers: Own-account workers (without hired workers) operating an informal enterprise are classified as informal employment.*

Most new jobs In Burundi are created in the informal economy, crowding out formal posts in the formal sector. The informal economy absorbed many workers since unemployment is not an option, by the same token the weak application of labour regulations to protect workers, e.g., use of written employment contracts.

Informality is the norm in the agricultural sector. The narrow industry and service sectors in Burundi are also highly dominated by informal employment, 86% and 91%, respectively. The service sector, covering just 6% of the total employment, has a lower informal employment share of 56% since it is more involved in the public sector. Only around 3.3% of enterprises are formal.⁶⁰ Data show that Burundi’s informal employment in non-agricultural employment was 89%, lower than DR Congo (94%) but significantly higher than Rwanda (69%) and Tanzania (72%). Burundi’s proportion of informal employment in total employment was 98% (see more in Table 11).

...

A recent analysis from the International Monetary Fund showed that Burundi’s size and development of the so-called ‘shadow economy’ (informal economy) experienced an increasing rate from 27% in 1991 to 36% in 2015. On the positive side, informal payment to public officials fell from 57% of firms in 2006 to 31% in 2014, reaching close to the SSA average at 29%.

Low education levels in Burundi have kept many workers in informality. More than three-quarters of those in informal employment in the non-agricultural sector do not have basic education. Less than

3.8% have been able to continue education beyond the primary level. Organised workers from the informal economy are in progress, mainly among drivers, street vendors, hairdressers, construction workers, domestic workers, and agricultural workers. Several trade unions registered a significant hike in their membership rate: Affiliated organised workers from the informal economy rose from 32,000 members in 2013 to 155,000 in 2020, equalled 384% growth.”

- 91.** In addition to the lack of experience there is also the issue of FN’s health and ability to be able to work in the agricultural sector; although as this point was not specifically addressed in the medical evidence we cannot speculate as to the extent of her ability to undertake physical work.
- 92.** It is not disputed FN will have to effectively ‘start from scratch’ with no evidence of remittances from the UK or available family support in Burundi. FN will need to provide suitable accommodation for herself and to meet her other basic needs. We have commented above upon the observation that she requires proper nutrition but even if the available food is not the same as that in the UK that is not the proper test. It was not made out that FN will not be able to access food that is sufficient to meet her basic needs. We accept there is a possibility that if her level of nutritional intake drops and she may not be able to fight her illness as she is able to in the UK but that of itself does not establish a significant reduction in her life expectancy. We note the document provided on FN’s behalf from the World Food Programme dated November 2021 clearly showing assistance to returnees to Burundi as follows:

Assistance to returnees: WFP provided food and nutrition assistance to 2,910 Burundian returnees (1,426 males or 49% in 1,484 females or 51%), distributing 158mt of in-kind food. The assistance consisted of hot meals provided at transit centres, and a three-month return package consisting of cereals, pulses, vegetable oil and iodised salt.

- 93.** A number of transit centres exist in Burundi supported by the UNHCR with the assistance of local partners whose stated aim is to ensure that returnees are well and ably prepared to finally begin life back in their home country when they leave the transit centre. There is insufficient evidence before us to show that FN would not be able to access such facilities and receive support and assistance in providing nutrition and appropriate access to medical resources as required and assistance in enabling her to re-establish herself within Burundi.
- 94.** What will be relevant is if as a result of difficulties in establishing herself and meeting her basic needs FN is not able to access or afford the medication she requires which will, on the basis of the medical evidence, result in a significant reduction in life expectancy. The national HIV policy in Burundi has been to provide all, regardless of their CD4 count, with required antiretroviral therapy. We have not

been referred to sufficient evidence to show that FN will not be able to access her required antiretroviral therapy and it is therefore not made out that such treatment will not be available and accessible to her.

- 95.** We do not find that FN has established that she is able to succeed pursuant to article 3 ECHR on the basis of the decision in *AM (Zimbabwe)*.
- 96.** We have considered the emotional impact upon FN of being deported and removed from being the primary carer of J which, whilst we consider it will be extremely traumatic for her, we do not find has been established as being the determinative factor. We have considered this as an additional point to be weighed as part of the balancing exercise. It was not suggested that there is a real risk of suicide in this matter.
- 97.** We have considered the rights of those other than FN pursuant to the guidance provided by the House of Lords in *Beoku-Betts (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2008] UKHL 39. The person who would suggest their rights are disproportionately interfered is J which we have addressed above when assessing the question of whether deportation of her mother would be “unduly harsh” upon her. So far as R is concerned there is clearly no subsisting family or private life connection between him and FN that gives rise to a protected right.
- 98.** FN has provided the decision in *Unuane v UK* (Application No 80343/17) which involved a Nigerian national who entered the UK as a visitor and who commenced a relationship with a Portuguese national resulting in his being granted a right of residence. The appellant in that case was convicted of obtaining a money transfer by deception and sentenced to a period of unpaid work and fine in 2005 and in November 2019 was sentenced for offences relating to the falsification of some 30 applications for leave to remain. The appellant was made the subject of a deportation order and his appeal against that decision failed before both the First-tier and Upper Tribunals. The appellant applied to the European Court of Human Rights arguing his deportation would violate article 8 of the ECHR. The Court in their judgement referred to the criteria set out in *Boultif v Switzerland* and *Under v the Netherlands* to facilitate the application of Article 8 expulsion cases by domestic courts. The Court recognised the weight to be attached to the criteria would inevitably vary according to specific circumstances.
- 99.** The Boultif criteria requires consideration of :
- a. the nature and seriousness of the offence committed by the applicant;
 - b. the length of the applicant’s stay in the country from which he is going to be expelled;
 - c. the time elapsed since the offence was committed as well as the applicant’s conduct in that period;
 - d. the nationalities of the various persons concerned;
 - e. the applicant’s family situation, such as the length of the marriage; and other factors expressing the effectiveness of a couple’s family life;

- f. whether the spouse knew about the offence at the time when he or she entered into a family relationship; and whether there are children in the marriage, and if so, their age.
- g. Not least, the Court will also consider the seriousness of the difficulties which the spouse is likely to encounter in the country of origin, though the mere fact that a person might face certain difficulties in accompanying her or his spouse cannot in itself exclude an expulsion.'

100. These issues have been considered by us above.

101. Having reviewed all relevant aspects raised in support of the appellant's case, having carefully analysed the merits of the appeal, and having given adequate reasons in support of the findings made on each point, we are drawn to the conclusion that the only outcome properly available to this tribunal in relation to this matter is for the appeal to be dismissed. We find the Secretary of State has made out that any interference in a protected right is proportionate pursuant to article 8 ECHR and that no other basis on which we can properly legally allowed the appeal has been made out on the facts.

Decision

102. We dismiss the appeal.

Anonymity.

103. The First-tier Tribunal made an anonymity order. We make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated 18 February 2022