



IAC-AH-SAR-V1

**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15952/2018
("V")**

THE IMMIGRATION ACTS

**Heard at Field House and also via Decision & Reasons
Teams Promulgated
On the 18th January 2022 On the 28 February 2022**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

**MR JAMIL ASSYNE HYDAR
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: *Mr L Youssefian*, instructed by TTS Solicitors

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

DECISION AND REASONS

Background

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of leave to remain by reference to the appellant's human rights. That refusal was made in the context of an automatic deportation order having been made against the appellant pursuant to Section 32(5) of the UK Borders Act 2007, by virtue of the appellant being

a foreign criminal, as defined under Section 117D of the Nationality, Immigration and Asylum Act 2002. I will come on to describe both the appellant's immigration and offending history and the index offence, ultimately reduced on appeal to six years' imprisonment.

2. As recorded in the error of law decision of the Honourable Mrs Justice McGowan and Upper Tribunal Judge Blundell promulgated on 14th April 2020, a copy of which is annexed to these reasons, the appellant is a "British Protected Person" who was born in Sierra Leone on 10th May 1976. He entered the UK as a visitor on 6th June 1997. It is accepted that he did so using a passport as a British Overseas Citizen which had been issued in error but nevertheless was a passport genuinely issued to the appellant.
3. A matter of days later on 9th June 1997, the appellant claimed asylum, was interviewed and his application for asylum was refused on 6th October 1999, but he was granted exceptional leave to remain for 12 months in order to allow the respondent to monitor the situation in Freetown, Sierra Leone. On 24th April 2003, the appellant was granted further leave to remain until 6th October 2003. On 3rd October 2003, his then solicitors applied for ILR on his behalf which was granted on 30th October 2003.
4. As further indicated in the error of law decision, the appellant began committing criminal offences in the UK less than a year after his arrival in this country.
5. On 31st March 1998, the appellant was convicted at Woolwich Magistrates' Court for failing to provide a specimen for analysis, was fined £150 and disqualified from driving for 12 months. On 2nd March 1999, the appellant was convicted at Woolwich Magistrates' Court for driving whilst disqualified without insurance. He received a community service order and was disqualified from driving for two years. On 30th September 1999, the appellant was convicted at Woolwich Magistrates' Court for driving whilst disqualified, using a vehicle whilst uninsured and sentenced to five months' imprisonment and disqualified from driving. On 26th January 2004, the appellant was convicted at Bexley Magistrates' Court of common assault and destroying property for which he was sentenced to 28 days in prison. On 5th December 2004, he was convicted at Bexley Magistrates' Court of having an article with blade in a public place and was fined £500. On 18th December 2007, he was convicted at Woolwich Crown Court of two counts of robbery and one count of attempted robbery, the offences for which he was sentenced on 13th February 2008 to an indeterminate sentence with a minimum term served before consideration of release of three years, which was quashed by the Court of Appeal on 5th November 2012 and replaced with a six year custodial sentence.
6. In relation to the index offences of robbery, the appellant mugged or attempted to mug lone women at night time. The Honourable Mr Justice Pitchers, the sentencing judge, took into account 32 other offences, mostly of theft and robbery when sentencing. The Court of Appeal's decision

replacing the sentence with one of six years' imprisonment is referred to at R v Jamil Hydar [2012] EWCA Crim 2539.

7. Whilst in prison, on 4th October 2008 the appellant made further representations in respect of his asylum claim about which it is unnecessary to make any further comment as the protection claim is not pursued. On 26th September 2009, he was served with notice of liability to deportation to which he responded, and on 28th January 2011 whilst still in prison he submitted further representations on Article 8 grounds, with further representations in March and August 2011. On 22nd December 2011 the appellant was released from prison on parole but detained under immigration powers until February 2012. His licence expired on 8th October 2013.
8. On 26th June 2013, the respondent wrote to the appellant indicating that she intended to make a deportation order unless one of the relevant statutory exceptions applied. She sought submissions from the appellant and no response was received. She refused his asylum claim on 16th October 2013 and on 5th November 2013 issued a deportation order against the appellant. The appellant appealed and the deportation order was withdrawn by the respondent on 22nd October 2014 because of concerns about his nationality. The respondent subsequently wrote to the appellant in March, April and November 2016 and April 2017 to ask him to provide documentation regarding his nationality. No documents were received from him.
9. On 24th January 2018, the respondent wrote once again to the appellant indicating that his deportation was under consideration. He made no representations in response but provided a copy of his sister's British passport. On 23rd July 2018, the respondent decided that the appellant should be deported and it is this decision which is the subject of the appeal before me.
10. On 19th August 2019, First-tier Tribunal Judge Page, ("FtT") having sat at Taylor House, allowed the appellant's appeal. As recorded in the error of law decision, the FtT noted that the deportation order had been made 10 years after what was described as being a first deportation order on 26th September 2008, following which the appellant had not committed any further offences, was compliant with his licence conditions, was in full-time work and with a genuine and subsisting parental relationship with a British citizen daughter, EH, born on 13th February 2008, whom he supported as a non-resident father.
11. This Tribunal regarded the FtT as having erred in law and in setting aside the FtT's decision, identified the three key errors. The first was the FtT had erred in regarding the date on which the period of delay began. This Tribunal referred at §53 of the error of law decision to the case of MG and VC [2006] UKAIT 53, in which, at §6, a senior panel of the AIT said that the "appropriate time to make a decision will be shortly before it is to be carried out: that is to say, towards the end of a prison sentence." In that

context, it would be a wholesale waste of public resources to make decisions which were capable of being appealed to the FtT whilst an individual still had an appreciable part of their sentence to serve. Contrary to the FtT's approach in the current appeal, time did not start to run from the date on which the appellant was sentenced, namely in February 2008. Moreover, in light of the subsequent appeal against the indeterminate sentence it would not have been appropriate for the respondent to make an appealable deportation decision even upon the expiry of the minimum three year term. The decision to order the appellant's release on licence was only made by the Parole Board at the very end of 2011 and it was at that point that the respondent might properly have considered an appealable decision and indeed the better course would have been to await the decision of the Court of Appeal in November 2012. Moreover, whilst the FtT had referred to a deportation order having been made on 26th September 2008, in fact there was no such step. Instead, the respondent had merely notified the appellant that he was a foreign criminal and his deportation was under consideration. The FtT's mischaracterisation of that step represented a second error. The third error identified by this Tribunal at §57 was to uncritically lay all of the responsibility for the delay at the feet of the respondent. The FtT had failed to evaluate the respondent's contention that the appellant had contributed to the delay in the failure to comply with the respondent's request for further information in respect of his nationality. The respondent's first appealable decision which was taken in late 2013 and therefore only a few months after the decision of the Court of Appeal, which was flawed and had been withdrawn. This was followed by the respondent's request on five separate occasions and it was only after that on 24th January 2018 that the respondent issued a further notice to which, once again, the appellant failed to respond. This Tribunal recognised that the appellant's failure to co-operate did not account for the whole of the delay but that it was necessary for the FtT to have considered the respondent's submission, which it had failed to do so.

12. Moreover, the FtT had failed to consider the statutory rubric of Section 117C of the 2002 Act. He had referred to paragraph EX.1 of Appendix FM which had no application to this case. He made a similar error in referring to Section 117B(6) of the 2002 Act. It is also important to note that this Tribunal did not identify any errors by the FtT in considering the appellant's rehabilitation alongside the respondent's delay. In particular, and following a discussion of various authorities, this Tribunal concluded that SU (Pakistan) [2012] EWCA Civ 1069 approved Jackson LJ's obiter observations in MN-T (Colombia) [2016] EWCA Civ 893 to underline the importance of considering the significance of any administrative delay. To the extent that this Tribunal had decided in other authorities that even egregious and unjustified delay was unlikely to tip the balance in an immigrant's favour in the proportionality exercise, that decision was decided "per incuriam" and so should no longer be followed.

The Hearing

13. The hearing was conducted as a hybrid hearing, with the appellant, and his sister ("RH"), attending in person along with the appellant's legal representatives and the Senior Home Office Presenting Officer, whilst the appellant's former partner ("EB") attended via Teams. I indicated to EB that should she have any difficulties in seeing or hearing us then she should let us know straightaway. There were no apparent difficulties in communications and no concerns were raised by either representative. I was satisfied that EB had been able to participate effectively in the hearing.
14. I checked with the representatives the documents that I was being asked to consider and the issues that I was being asked to decide. In terms of documentation, the appellant had produced a single updated bundle to which I will refer as "AB". This included the witness statements of the appellant, EB and RH as well as other statements from witnesses who did not attend, including the appellant's father. I was also referred to two alphanumerical bundles on behalf of the respondent which I refer to as "RB" and "RSB". Both representatives also provided me with skeleton arguments which I discuss later in these reasons briefly but have considered in full.

The issues in this appeal

15. I do not recite the full litigation history of this appeal which at times had raised issues concerning the Immigration (EEA) Regulations 2016 or the EU Settlement Scheme, (see Hydar (s 120 response; s 85 "new matter": Birch) [2021] UKUT 00176 (IAC) suffice it to say that the representatives confirmed now that the only issues were in respect of the appellant's human rights and in particular, by virtue of the length of his sentence, whether the appellant met the requirements of Section 117C(6) of the 2002 Act, namely in the case of the appellant who had been sentenced to a period of imprisonment of at least four years, whether there were very compelling circumstances over and above those described in Exceptions 1 (see sub-Section (4)) or Exception 2 (see sub-Section (5)). Whilst the appellant might not rely upon either Exceptions 1 or 2, nevertheless for the purpose of considering very compelling circumstances, the representatives agreed that I might consider the extent to which the appellant had satisfied the requirements of Exceptions 1 and 2. I explored with the representatives where the areas of dispute lay.
16. The first dispute in respect of Exception 1 was the extent to which the appellant had been lawfully residence in the UK for most of his life. The appellant maintained that he had, whereas the respondent said that the appellant's initial period of residence in the UK was not lawful, as although he had entered the UK with leave on a genuine BOC passport, because it had been issued in error, until the subsequent grant of exceptional leave, the appellant's residence was unlawful. It followed that he was just short of having spent the majority of his life in the UK. The appellant's fallback position was that even if this were correct, which was not accepted, he

only missed having spent the majority of his life lawfully in the UK by a small margin.

17. The next area of dispute was whether the appellant was socially and culturally integrated in the UK. The appellant asserted that he unquestionably was, by reference to having lived for over 20 years in the UK, including more than 10 years since his release from prison after which he had not re-offended and had re-established his life with his daughter. The respondent, for her part, asserted that the appellant's prior criminal offending over such a lengthy period meant that he was not socially and culturally integrated.
18. The third dispute for the purposes of Exception 1 was whether there would be very significant obstacles to the appellant's integration into Sierra Leone, his country of origin. The appellant asserted that there would be very significant obstacles, noting that he had not lived in that country since 1997, had not returned there since and had no friends, family or connections to that country. For her part, the respondent relied upon the refusal letter and the appellant's mother's applications, made relatively recently, on the basis that she lived in Sierra Leone. It was said, therefore, that the appellant continued to retain family connections to Sierra Leone, by which he could then obtain support in re-establishing himself.
19. In respect of Exception 2, the respondent accepted that the appellant had a genuine and subsisting parental relationship with his daughter whom it is unnecessary to name, now aged 15. The respondent further accepted that the so-called "go" scenario, whereby EB and the appellant's daughter would relocate with him to Sierra Leone was unfeasible and the effect would be unduly harsh. In contrast, the respondent maintained that the so-called "stay" scenario, whereby EB and the appellant's daughter remained in the UK with her other, would not have unduly harsh effects on that child.
20. In terms of very compelling circumstances, the appellant relied upon a combination of the circumstances already identified and crucially, the effect of delay in the most recent deportation order on the public interest in his deportation, in three respects. The first was the public weight in deterrence. The second was in relation to the prevention of reoffending. The third related to public revulsion. The public interest in all three had had been weakened because of the delay in pursuing deportation, where the appellant now said that he had fully rehabilitated and the risk of reoffending was low. Moreover, it amounted to very compelling circumstances where, because of the delay, the appellant's family life with his qualifying daughter had strengthened.

The appellant's evidence

21. The appellant adopted his written witness statement, the gist of which I summarise and on which he was cross-examined. The appellant reiterated his immigration history and the circumstances of his offending. In

particular, the index offences had been committed in circumstances where he had become addicted to crack cocaine. He had on occasion taken drugs before the breakdown of his relationship with EB in 2007 but when his relationship with EB had broken down, his addiction rapidly spiralled out of control and he had robbed his victims in order to fund that addiction. He was deeply apologetic and ashamed of his actions and following his sentence for his index offence had overcome his addiction. He had also attended anger management and various training courses whilst in prison.

22. While in prison, the appellant had also kept in constant contact with his daughter, speaking to her every day on the telephone and also with some visits, albeit infrequent by her and EB. The difficulties in visits were compounded when he had moved prisons many miles away. Upon release from prison he had re-established a strong bond with his daughter. He lived near to her and all of his family members lived in the UK. He did not have any friends or family in Sierra Leone. He spent four or five days each week with his daughter and even more days during his days off work. They spoke on a daily basis and during his day off he would drop off and pick up his daughter from school and sometimes they went shopping with one another. He also took his daughter's half-sibling, in respect of whom he is not the father, to school and sometimes they all went out together. He supported his daughter both emotionally and financially, giving EB money directly to look after their daughter, paying for ballet lessons, buying her clothes and other school essentials as well as pocket money. She had been barely five years old when he was released and now was 15 years old and doing very well at school. If he were deported, the appellant would not be able to provide the support that he did and this would, in his view, cause her significant harm. He also believed that EB would struggle financially.
23. The appellant also asserted that he was now culturally integrated in the UK, having found a job as a mechanic to take care of his daughter. He also went to the gym regularly and met up with his friends and family at work. He had not reoffended since being released from prison over a decade ago.
24. In oral evidence, the appellant was asked about his other relatives. He had a sister who lived in the Netherlands and a brother who lived in Scotland. He was not particularly close to his brother in Scotland, and when asked about his mother believed that she lived somewhere in Africa but had not seen her for around four or five years which was the last time that she had been in the UK. He did not know whether his daughter could visit him in Sierra Leone and did not know where he would live.
25. In terms of his other wider relatives, his grandparents, both paternal and maternal, had died. He believed that he was close to his mother but she had never told him where she lived. All he knew was that it was in Africa. He accepted that both he and she spoke English and also Patois. He had

never known his grandparents and when asked how he knew they were dead said he had assumed this.

26. He had applied for asylum on the basis of incorrect advice given to him by his cousin and she herself probably did not understand all of the details.
27. The appellant also did not know the precise details about his daughter's half-sibling's father (who was not a resident father) and the extent to which that other father contributed to family arrangements. He did not like to ask and just had dealings with his child and the half-sibling. He attempted to assist EB in whatever she needed him to do. He accepted that he occasionally had disagreements with EB as reflected in a WhatsApp message at page [17] AB.
28. When asked about his father and where he lived and whether it was in the UK, the appellant once again was unsure. He thought he might live in the UK but he lived his own life. He was not aware why he had not attended the Tribunal hearing today and did not know whether his father had any relatives in Sierra Leone.
29. The appellant accepted that the index offence had been committed after his daughter was born and that becoming a parent had not stopped him offending but he reiterated his remorse and the fact that he had been a crack cocaine addict at the time. He worked regularly, having trained as a mechanic. He was asked whether he had worked as a mechanic for an uncle before he had left Sierra Leone in 1997 as per the respondent's refusal decision. He accepted that he had worked for the uncle but disputed that he had been able to work as a mechanic. Rather he simply helped him out. He obtained alternative work since his release by adding his details onto the "CV-Library" website although accepted he had not added details of his criminal convictions.

EB's witness evidence

30. The appellant had been in prison from October 2007 until February 2012. Prior to this, EB had met the appellant in 2000 and they had lived together for around seven years. The appellant had been imprisoned shortly after the birth of their daughter (who was born on 1st February 2007). He had initially been in prison in Belmarsh and during that time the daughter had been taken to see him, two or three times, but six months later he was then transferred to HMP Blundeston, more than 100 miles away and so visits became less frequently. However, throughout that time, the appellant had called them almost every day and had talked about his daughter all the time, read her books and always asked about her. He had constantly apologised for his actions and not being physically there. He had changed a lot whilst he was in prison and was a lot calmer. The bond between the appellant and his daughter in particular had strengthened since his release. He allowed his daughter to stay with him wherever possible and because EB worked shifts, sometimes the appellant helped her to look after their daughter during the weekends as well. She had

spare keys to his house. He bought most of her clothes and toys as well as various items such as a bicycle, dresses, and her school uniform. Overall the appellant contributed around £350 every month to her household needs in addition to EB's own salary. She accepted that she paid the rent on her property but that he provided a substantial amount by way of top-up. He also ensured that their daughter did her homework when she stayed with him.

31. EB believed that the appellant's absence would have a significant impact on their daughter and I was referred to a letter from their daughter reiterating her desire for her father to be permitted to stay in the UK. He had been very good, stable, continuous and reliable presence in their daughter's life since his release and the consequence of his removal would be analogous to EB herself being removed from the UK. He had always been in his daughter's life since release when she was only five years old and she had only ever known him for the conscious period of her life as being there. She excelled academically at school and he had paid for extra tuition. EB said that as a single mother, with another child, she would not otherwise be able to afford such tuition. He also importantly played an emotional, not just a financial role.
32. EB said that she would not be comfortable allowing their daughter to travel to visit him in Sierra Leone alone in circumstances where she herself had never visited the country. She herself had no family in the UK who could assist her as both of her parents had passed away and she was not in touch with her younger brother and her younger sister was mentally unwell. When she was asked about the note of an Immigration Officer whilst the appellant was in prison referring to her parents and five siblings (the note was dated 2011) she said that since that time her parents had passed away and she had never had five siblings.
33. In terms of the support played by her other child's father, he was non-resident and when he was working he provided some financial benefits, but did not actively engage in the way that the appellant did. The inability of EB or her daughter to visit the appellant in Sierra Leone was illustrated by the fact that they had not travelled in 10 years. She herself was not from Sierra Leone. Her family was from Ghana.
34. In terms of financial support, she confirmed that she worked part-time to enable her to be at home when her children left for school and on their return. She received working tax credits and child benefit and expressed reluctance about her ability to work full-time. She had worked full-time when her former partner (not the appellant) had been in a relationship with her and he had not worked but instead had carried out the primary childcare role.
35. EB accepted that their daughter had thrived at school but it was not just down to her intelligence but also hard work and the appellant's involvement.

RH's evidence

36. RH came to the UK in 1994 and had three children, all of whom were British citizens, as was she. She had no ties with Sierra Leone and they had no family members or relatives at all in Sierra Leone. She and the appellant maintained a strong family relationship. She confirmed that he was a good father to his child and a good uncle to her three children.
37. She believed that her father still lived in the UK but had no contact with her mother. When asked why she had no contact with her mother, RH just indicated that their contact had declined over the years and she did not know where her mother lived. RH could not say exactly how many years ago their relationship had declined. She had a sister in the Netherlands with whom she got on well but the sister had not given evidence or provided a witness statement because she was busy or perhaps had not been asked. RH confirmed that she occasionally visited her niece and EB from time to time but they lived in different parts of London. She would always support her brother, the appellant. She disputed that they had any family or friends in Sierra Leone. She was unable to comment that when her mother lived in Sierra Leone. She did not know anything about that. Her father had not attended the hearing today as he was not well. She believed that the appellant had a good relationship with their father and would go and see him when they needed help. When asked if she would remain in contact with and provide financial support to the appellant in the event of his deportation, she would certainly keep in contact with him but she believed she would struggle to provide him with any financial support. She had her own children and responsibilities.
38. RH believed that her brother had worked as a mechanic in Sierra Leone before he entered the UK, working for his uncle. When they lived as a family in Sierra Leone, RH and the appellant's mother had not worked but their father had worked in construction. She did not know whether there was any family property remaining in Sierra Leone anymore. She did not believe that there was and had no desire to visit Sierra Leone again as she had a family with young children.

The respondent's closing submissions

39. Dealing first with the appellant's private life, the appellant had not been in the UK lawfully for most of his life. Whilst he had entered the UK with leave on a British Overseas Passport, that had been erroneously issued. Therefore his leave could only be counted as starting on the date that exceptional leave to remain was granted on 6th October 1999 at the age of 23, four months and 26 days. He was now 45 years old and eight months old, meaning that he could only reach the threshold of more than half of his life in the UK on 6th March 2023. Whilst the passport on which he entered the UK was lawfully issued, the leave was not. The respondent relied upon the authority of CI (Nigeria) v SSHD [2019] EWCA Civ 2027 at §§38 to 40, 43 to 47 and 51, for that proposition. In oral submissions, Ms Cunha also referred to the authority of Hussein and Another (Status of

passports: foreign law) [2020] UKUT 00250 which confirmed that the passport was not evidence of lawful leave. The appellant had known that his leave was not lawful at the time.

40. Even if notwithstanding the submission the appellant had lived in the UK for most of his life lawfully, he was not socially and culturally integrated. The key to this was whether and how deeply the appellant had been integrated in the UK to begin with, referring once again to CI (Nigeria), at §62. The appellant had not been educated in the UK and it was not the case that his only language was English, and indeed he had been interviewed in criole in his asylum interview in 1997. His case was not analogous to those who had been born or arrived in the UK during their infancy whereas he had arrived as an adult.
41. Whilst the respondent accepted that previous offending on its own could not break integration, integration was consistent with being a law-abiding citizen (see the authority of Binbuga v SSHD [2019] EWCA Civ 551 at §49 to 60). Although the appellant's offending had stalled during incarceration that was not indicative of further integration particularly with the threat of potential deportation hanging over the appellant. Rehabilitation courses might be rehabilitative and indicate a change of character but were of limited value in the overall integrative assessment (see the authority of Mustapha Jallow v SSHD [2021] EWCA Civ 788).
42. Social ties including relationships between the appellant and his daughter and EB might be an integrative factor in his favour but they are of little weight when considering the overall loose integrative nature of how the appellant had chosen to live his life in the UK. He had had an increasingly serious pattern of offending, leading to a lengthy custodial sentence, as a result of aggravating features, as per the sentencing remarks and in particular the appellant targeting lone women at night.
43. Finally, in relation to very significant obstacles to integration in Sierra Leone, the lack of family was not sufficient to outweigh the appellant's ability to integrate as an insider and prosper. He had left Sierra Leone as an adult and would be able to recognise cultural norms which would assist in integration. His ability to work in the UK notwithstanding his criminal past was testament to his ability to integrate in the future in Sierra Leone.
44. Ms Cunha also invited me to consider the difficulties in the appellant's evidence about the whereabouts of his mother. The appellant's assertion that she had disappeared out of the blue was not plausible. Whilst RH got on well with their father she claimed to not know where their mother was but this was also similarly implausible. Moreover, the situation in Sierra Leone had improved significantly since the appellant left that country.
45. In relation to family life, the test of what would be an unduly harsh effect on the appellant's child in the event of the appellant's deportation was a high one. Whilst the respondent accepted that the appellant and his daughter had a strong relationship, there was no evidence that her best

interests would be affected by the appellant's absence or that communication could not continue from abroad. Given the improvement of the situation in Sierra Leone, the appellant could reassure EB so that their daughter could visit him. Moreover, whilst the appellant provided for his daughter's financial wellbeing and to an extent, emotionally, these would be consequences that were undesirable or inconvenient rather than unduly harsh. Moreover, EB was their daughter's main carer and she knew what their daughter's needs were. Whilst it was accepted that the appellant played an important role, his absence could be compensated for and with the assistance not only of EB but RH and, potentially EB's other former partner who had a common interest in supporting EB and her family.

46. In addition, the appellant's daughter was now aged 15 and her private life was developing more independently. This was in contrast to a very young child.
47. In relation to the issue of delay, the respondent reiterated that this was at least in part the appellant's fault. The facts were different from those in MN-T (Colombia) as in this case, the appellant had never had any expectation that he would not be deported.

The appellant's submissions

48. The appellant had entered the UK aged 21 in 1997 and had been granted leave to remain on 4th October 1999, aged 23. He had been lawfully resident continuously since this date, a period of 22 years. Even taking the respondent's case at its highest he was therefore only six months shy of satisfying the first element of Exception 1. The narrow margin by which he missed that requirement and particularly the fact that the application was made in 1997 and a decision on it was delayed by some two years was a relevant consideration. However and importantly, the appellant's period of residence prior to the grant of exceptional leave to remain was lawful. Whilst it was now suggested that the appellant had been issued a passport by mistake, this did not render his leave unlawful. The issue of the passport by mistake did not make his entry illegal. Moreover, in the appellant's case he had entered lawfully and then made an application within three days of his arrival. Referring to the well-known case of Akinyemi v SSHD [2019] EWCA Civ 2098, there needed to be a broad approach to whether the appellant satisfied the requirement of Exception 1, which should be answered by asking whether his residence in the UK had been in breach of UK law. It had not. Instead, by reference to the first headnote of the Hussein case, possession of a passport would ordinarily lead to an assumption that the person was a citizen of that state. The appellant's fallback position was in any event that he had lived in the UK for the majority of his life even it were contested that a small part of that was not when his residence was lawful.
49. Dealing with the second question of Exception 1 of whether he was socially and culturally integrated, the appellant's offending alone could not

break his integration, not least given his length of residence in the UK. It would border on the perverse to conclude that he was not socially and culturally integrated. He had close relationships with his siblings in the UK and had worked regularly during his residence.

50. Turning to the final question within Exception 1 of the obstacles to his integration in Sierra Leone, he had lived in the UK since 1997 and had not returned to Sierra Leone since. He had arrived in the UK at a relatively young age and his evidence was that he had no family members. Even if it transpired that his mother was in fact living in Sierra Leone, it mattered not in circumstances where he had no dealings with her and practically speaking she would not be able to provide him with any support. It would be speculative to suggest that she might do so.
51. In relation to Exception 2, it was undisputed that the appellant had a close relationship with his daughter and an ongoing relationship with his former partner. The nature of his parenting role had already been discussed. Whilst it was acknowledged that "unduly harsh" was an elevated threshold, the appellant submitted that that test was met. Any severance of the relationship with the appellant would unquestionably be harmful to their daughter. She had developed a close bond with her father in the period since his release in early 2012 and in particular in the period in which the respondent had delayed issuing the deportation order. Had there been no delay, then the appellant would have been deported when their daughter was only 5 and she would not have grown up to nurture a relationship with her father. Moreover, given her extremely close relationship with him and the fact that she was unlikely ever to see him again, deporting him would be akin to a bereavement, see §59 of HA (Iraq) v SSHD [2020] EWCA Civ 1176. In terms of the delay, whether the appellant had or had not partly caused the delay was not relevant when looking at the situation from the daughter's perspective. Exception 2 was not only met by "a mile" but there were very compelling circumstances over and above that exception.
52. In respect of very compelling circumstances, the appellant accepted that there was considerable force in the public interest to deport foreign criminals and the appellant's period in prison clearly indicated the seriousness of his offence. The public interest comprised deterrence, prevention of reoffending and expression of societal concern. However, taking this into account, the delay affected all three factors. It had allowed the appellant to rehabilitate. Public revulsion or concern was correspondingly reduced as was the prevention of reoffending if, as here, the appellant had lived in the UK for a further six years after his release from prison at the date of the deportation order.
53. In terms of the delay, the appellant rejected any contention that he had contributed to that delay. He had finished his custodial sentence in early 2012. The decision to deport him was made in November 2013 but withdrawn in October 2014 because the respondent had failed to consider his nationality. That could not be the appellant's fault. The respondent's

first request for information was a year and a half later in March 2016. This was already four years since the end of the appellant's custodial sentence and itself constituted a very significant delay. The appellant accepted that he did not respond to the request but the delay caused as a result of this was insignificant. The second request for information was on 26th April 2016 during which the appellant was given 20 working days to respond. Whilst he did not reply the 20 working days had expired, the respondent was then fully entitled to make a decision and any delay beyond that could not properly be described as the appellant's fault. It was the respondent's choice to delay making a decision on the appellant's deportation. The appellant's contribution to the delay was therefore only between March and May 2016, a period of two months.

54. The appellant's case was on "all fours" with the reduction of the public interest in deportation as described by Jackson LJ at §41 of MN-T. The combination of the delay, which reduced the public interest in deportation whilst also increasing the appellant's deepening bond with his daughter, together with his undoubted rehabilitation, (he was initially assessed upon release by the Parole Board in 2012 as having a low risk of reoffending and had not reoffended), when considered as a whole, amounted to very compelling circumstances which ultimately made refusal of the appellant's human rights claim disproportionate.

Discussion and conclusions

55. I adopt the structure of the representatives' submissions by referring to Exceptions 1 and 2 in turn and then consider the very compelling circumstances, if any, which pertain to the appellant's situation.

Exception 1

56. Dealing with the question of whether the appellant has lived in the UK for most of his life, I accept Mr Youssefian's submission that the appellant's entry to the UK upon his BNO passport was not a nullity and he had leave to enter and remain in the UK. Whilst I accept Ms Cunha's proposition that possession of a passport does not of itself denote leave to enter or remain in a country, even if, as appears it is now accepted, the appellant's BOC passport was issued in error, that does not render the legal consequence of his passport a nullity, which in this case was the ability to enter the UK, with leave for a limited period, without a visa. Neither Hussein nor CI (Nigeria) support the proposition that having been granted leave to enter and remain for a time-limited period, that leave was retrospectively a nullity. Even if I am wrong on this and the period did not count towards lawful residence, I would have placed significant weight on the further period of lawful residence in the UK.
57. I turn next to the question of whether the appellant is socially and culturally integrated in the UK. I take into account that offending does not of itself break integrative links. I do not belittle in any way the seriousness of the appellant's offending over a prolonged period in a pattern of

escalating seriousness. There was, I conclude, a brief period before his eventual arrest for the index offences in 2007 when he was in fact homeless, which seriously weakened his integrative links. However, I take into account that after 2000, and despite his escalating offending, he continued to have close relationships with, for example, RH and also continued to work regularly as a car mechanic and warehouse person (see the pre-sentence report at page [K2] RSB). He has continued to work regularly since his release from prison. Whilst I also note the limited weight that may be placed on rehabilitation I do take into account the sustained work which forms the backdrop of his rehabilitation and in circumstances where he has been clean from drugs since his release as well as the lack of offending. All in my view demonstrate that the appellant was and remains socially and culturally integrated into the UK, notwithstanding the significant period of his offending which ended in 2007 upon his conviction for the index offences.

58. I turn to the question of very significant obstacles to his integration in Sierra Leone. It is this element of Exception 1 that I am not satisfied is met. Whilst in other respects, the appellant's evidence and that of EB and RH was consistent, and plausible in particular in relation to his close relationship with his daughter, the evidence with regard to family members in Sierra Leone was confused and did not engage with the issues that the respondent had raised in the refusal letter. It is worth reciting this part of the refusal decision:

"60. It is noted that your mother is Fanta Assyne Hydar born on 23rd September 1953 ... she is a national of Sierra Leone.....

61. Your mother is currently alive and living in Sierra Leone. It is noted that since 2004 she has applied for a visitor visa on six occasions. In her application dated 8th December 2009 she indicated that she lived with her husband Assyne Hydar (the offender's father), that her address was 18 Robert Lane, Goderich, Freetown, Sierra Leone, that she lived at this address for over 10 years and that she is a national of Sierra Leone.

62. In her application dated 24th September 2012 she indicated that she lived with her husband ... and that she had lived at this address for 10 years and she is a national of Sierra Leone.

63. The last application she made was on 21st June 2017. In this application she indicated that she is a Sierra Leone citizen and again stated that she lived with her husband, Assyne Hydar. However on this occasion she claimed to have lived in ... Gambia for the past eight years. Obviously this is in direct contradiction to her previous application on 24th September 2012 ... it is unclear why she has made this statement. However it is noted that she was refused entry to the UK from Coquelles [in northern France] in 2015 and that it has been previously stated that she has properties in Gambia ...

64. It is considered that the above shows that your mother and father are settled and normally resident in Sierra Leone".

59. Notably the appellant's father has not provided oral evidence and whilst RH referred to him as travelling and unaware of his precise whereabouts and the application for a hybrid hearing had referred to him as being unwell and suffering from cancer, the position is unclear. It is also not in my view plausible that both the appellant and RH despite apparently having had a good relationship with their mother are unaware of where she lives. They are also similarly unable to comment on why she had made applications referring to being co-resident with their father and they do not dispute the accuracy of the letters. I conclude that the witnesses have not been candid about the ongoing family connections that exist within Sierra Leone. I find that notwithstanding the period of time that the appellant has been absent from Sierra Leone, on RH's evidence and as confirmed by the appellant in earlier evidence although he attempted to distance himself from this, he trained as a mechanic working for his uncle in Sierra Leone prior to coming to the UK. I conclude that he would be able to integrate as an insider, noting the well-known authority of SSHD v Kamara [2016] EWCA Civ 813, using his skills as a mechanic, a role that he has carried out for many years in the UK and also prior to his entry, and in circumstances where he has relatives, specifically his father and mother who would provide him with support at least in the short term to enable him to re-establish ties in Sierra Leone. Therefore, notwithstanding his having spent most of his life in the UK, and being socially and culturally integrated in this country, I am not satisfied that there are very serious obstacles to his integration in Sierra Leone.

Exception 2

60. I turn to the question of whether the effect of deportation would be unduly harsh upon the appellant's daughter. It is already accepted that the appellant has a close, committed and important role in his daughter's life, a qualifying British citizen. His daughter appears to be excelling and this is not a case where, for example, his absence would derail her educational or other social stability. She lives in a close and loving extended family unit. Nevertheless, I accept that the effect of the appellant's deportation would most likely be that she would not see him in person for many years until possibly as an adult. EB's evidence is that she has not travelled for 10 years with her daughter and bearing in mind her relatively limited finances as a lone mother I accept as realistic that there would be insufficient funds to do so. I similarly accept as realistic EB's concerns about sending their daughter to a country she has never visited before without EB and even with the good relationship between EB and the appellant it is unrealistic to expect her to allow such travel alone to meet the appellant in Sierra Leone, a country about which she knows nothing. The effect of deportation would therefore be akin to a bereavement as described in HA (Iraq). I accept Mr Youssefian's submission that the question of delay in these circumstances is therefore relevant. It is important for the reasons identified by this Tribunal in its error of law decision to consider the length of delay which should not start until the appellant's release from prison in 2012. I further however accept Mr Youssefian's position that from the appellant's daughter's perspective, it

matters not the extent to which either the appellant for a particular period of months or ultimately the respondent caused the delay rather, and crucially it was during this period that the appellant's daughter has developed that close bond with him. She was an infant when he was imprisoned and only five years old when he was released. In the period from that time until the eventual deportation order in 2018 that relationship has deepened and embedded. That is a factor that in my view must be relevant to rendering the effect of deportation unduly harsh.

61. Even if I am incorrect on the relevance of the cause for delay from the daughter's perspective, I further accept Mr Youssefian's submission that it is only for a limited period of months for which any delay can be ascribed as being the fault of the appellant. He cannot be blamed for the withdrawal of the initial deportation order in October 2014 and the further request for information a year and a half later in March 2016. As Mr Youssefian points out this already resulted in a delay of four years since his custodial sentence had ended. Whilst there was undoubtedly a period when the appellant did not respond I accept the submission that the respondent was fully entitled to have issued a further deportation decision after the expiry of the 20 working day limit indicated in the respondent's second request for information of 26th April 2016. In essence, the lack of response from the appellant was not one that ultimately explains the vast majority of the delay between the appellant's release from early custodial sentence in early 2012 and the eventual decision to deport the appellant of 23rd July 2018. The overall delay is therefore a period of more than six years, which was a crucial period in which the appellant developed his relationship with his daughter. While I accept that the appellant may have always expected that deportation was a possibility, the continuing delay at least raised the hope that it would not, for an extended time during what was such an important period of the appellant's daughter's life. In the circumstances, I am prepared to accept that the effect of deportation would be unduly harsh upon the appellant's daughter.
62. However, even if Exception 2 is met, that of course is not sufficient in this case given the period of the appellant's prison sentence. However, I further accept Mr Youssefian's submission that there are, in this rare case, very compelling circumstances. The public interest is in the appellant's deportation. His offending was serious and of escalating seriousness. I remind myself of the nature of his index offences, which was to identify lone women in particular, as potential victims. I am conscious of the high test of very compelling circumstances. Nevertheless, the feature of the circumstances rendering them very compelling is both the effect of delay of deportation upon the relationship between the appellant and his daughter, as already discussed, and his rehabilitation which, I accept directly impacts upon the public interest in his deportation.
63. During the six year period since the appellant's release from prison and the date of the deportation order, he has been clean from drugs and it is clear from the sentencing remarks of the judge that the increasing seriousness of his offending was in the context of being addicted to crack

cocaine. Moreover and notwithstanding Ms Cunha's point that the threat of deportation has hung over the appellant's head, the Probation Service report at the time in 2012 which recommended his release on licence indicated that he was a low risk of reoffending and this is reflected in how events have transpired. The delay therefore impacts on public revulsion; deterrence and prevention of offending. I am satisfied therefore that this is one of those rare cases where there are very compelling circumstances over and above Exception 2, such that the appellant meets Section 117C(6) of the 2002 Act.

64. Considering the wider Article 8 analysis by reference to Section 117B, the appellant has spent the majority of his life in the UK. He speaks English and is financially independent (although these are neutral factors) and while Section 117B(6) does not apply (as this is a deportation case) given the unviability of his qualifying daughter's relocation with him to Sierra Leone and the unduly harsh effect of deportation on her, I am satisfied that deportation would breach his rights under Article 8 ECHR.

Notice of Decision

65. The appellant's deportation would breach his rights under Article 8 ECHR. The appellant's appeal therefore succeeds.

66. No anonymity direction is made.

Signed J Keith

Date 31st January 2022

Upper Tribunal Judge Keith

TO THE RESPONDENT **FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have decided to make a fee award of £140.

Signed J Keith

Date 31st January 2022

Upper Tribunal Judge Keith

ANNEX - ERROR OF LAW DECISION



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/15952/2018

THE IMMIGRATION ACTS

Heard at Field House
On 3 March 2020

Decision & Reasons Promulgated

.....

Before

**THE HON. MRS JUSTICE MCGOWAN
UPPER TRIBUNAL JUDGE BLUNDELL**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAMIL ASSYNE HYDAR

Respondent

Representation:

For the Appellant: Mr Tufan, Senior Presenting Officer
For the Respondent: Mr Youssefian, instructed by TTS Solicitors

DECISION AND REASONS

1. Jamil Hydar is a British Protected Person (“BPP”) who was born in Sierra Leone on 10 May 1976. On 19 August 2019, his appeal against the Secretary of State’s refusal of his human rights claim was allowed on Article 8 ECHR grounds by a judge of the First-tier Tribunal. The Secretary of State was subsequently granted permission to appeal against that decision by an Upper Tribunal Judge.
2. In order to avoid confusion, we will refer to the parties as they were before the First-tier Tribunal; Mr Hydar as the appellant and the Secretary of State as the respondent.

Background

3. The appellant entered the United Kingdom as a visitor on 6 June 1997. The entry clearance was endorsed in a British Overseas Citizen ("BOC") passport in the appellant's name. (The Foreign and Commonwealth Office later confirmed to the respondent that this passport was issued in error.) The appellant claimed asylum on 9 June 1997 and was interviewed in connection with that claim later that month. His asylum application was refused on 6 October 1999 but he was granted Exceptional Leave to Remain for twelve months "in order to allow the Secretary of State to monitor the situation in Freetown". On 24 April 2003, the appellant was granted further leave to remain until 6 October 2003. On 3 October 2003, his then solicitors applied for Indefinite Leave to Remain on his behalf. The application was supported by the appellant's original BOC passport, amongst other documents. On 30 October 2003, he was granted Indefinite Leave to Remain.
4. The appellant began committing criminal offences in the United Kingdom less than a year after his arrival in the country. There were summary driving offences in 1998 and 1999. In 2004, he received further convictions in the Magistrates' Court for offences of violence. Then, on 18 December 2007, the appellant was convicted at Woolwich Crown Court of two counts of robbery and one count of attempted robbery. In each offence, the appellant snatched or attempted to snatch women's handbags. The sentencing judge (Pitchers J) took into account 32 other offences, mostly of theft and robbery, and imposed a sentence of imprisonment for public protection with a minimum term of three years. The Court of Appeal subsequently held that the sentencing judge had erred in imposing a sentence of IPP and replaced that sentence with one of determinate imprisonment for six years: R v Hydar [2012] EWCA Civ 2539.
5. Whilst in prison, on 4 October 2008, the appellant made further representations in support of his protection claim. On 26 September 2009, he was served with a notice of liability to deportation, to which he responded a few days later. On 28 January 2011, whilst still in prison, he submitted further representations on Article 8 ECHR grounds. More representations were sent in March and August that year.
6. On 22 December 2011, the appellant was released from prison on parole but he was detained under immigration powers in February 2012. His sentence was varied by the Court of Appeal on 5 November 2012. His licence expired on 8 October 2013.
7. On 26 June 2013, the respondent wrote to the appellant's then solicitors, indicating that she intended to make a deportation order unless one of the exceptions in the UK Borders Act 2007 ("the 2007 Act") applied. She sought submissions from the appellant regarding the Refugee Convention and the ECHR. No response was received. The appellant's asylum claim was refused on 16 October 2013. It was decided to deport the appellant and, on 5 November 2013, a deportation order was signed against him. The appellant appealed but the decision under appeal was withdrawn by the respondent on 22 October 2014. The respondent subsequently wrote to the appellant in March, April and November 2016 and April 2017 to ask him to provide documentation regarding his nationality. No documents were received from the appellant.
8. On 24 January 2018, the respondent wrote again to the appellant, indicating that his deportation was under consideration once more. The appellant made no representations in response but he did provide a copy of his sister's British

passport on 14 May 2018. On 23 July 2018, the respondent decided that the appellant should be deported from the United Kingdom since none of the statutory exceptions to deportation were considered to apply. It was against that decision that the appellant appealed to the First-tier Tribunal.

The Appeal to the First-tier Tribunal

9. The appeal came before Judge Page ("the judge"), sitting at Taylor House, on 18 July 2019. The appellant was represented by a solicitor, the respondent by a Presenting Officer. The judge received slim bundles of documents from both parties and he heard oral evidence from the appellant. At the end of the hearing, he reserved his decision.
10. The judge's reserved decision was issued on 19 August 2019. It is structured in the following way. At [1]-[11], the judge set out the appellant's immigration and offending history. At [12]-[14], the judge summarised the thrust of the respondent's decision and, at [15], he described the grounds of appeal advanced by the appellant in the following way:

He does not appeal on asylum grounds but under Article 8. His appeal is pursued on the ground that the respondent's decision is disproportionate under Article 8 for the following reasons. It was made ten years after the respondent's first deportation order on 26 September 2008. Since then the appellant has not committed any further offences. He was compliant with his licence conditions after being assessed as posing a more than minimal risk of harm to the public. He is in full time work. Moreover, he has a genuine and subsisting parental relationship with his daughter [EH], born on 13th February 2008, a British Citizen, and is supporting her. His overarching ground of appeal is that there is no public interest in deporting him after all this time; particularly when his daughter's best interests are considered.
11. The judge directed himself regarding the burden and standard of proof at [16] before turning, at [19], to the respondent's certification of the appellant's protection claim under section 72 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Whilst he noted that the appellant was not relying on international protection grounds, he discharged that certificate on the basis that the appellant had rebutted the statutory presumption that he posed a danger to the community. The judge then turned to the appellant's Article 8 ECHR claim.
12. At [20], the judge stated that the appellant maintained before him that he met the requirements of paragraph EX1 of Appendix FM of the Immigration Rules. He set out that paragraph of the Rules in full. He considered the appellant's antecedents and the appellant's remorse for his criminality, together with his current activity, including his work for Halfords as a technician. The judge then set out the written evidence of EB, who is EH's mother. She confirmed the role which the appellant played in their daughter's life, including spending regular time with her and providing money for their upkeep. That evidence was tested to a limited extent in cross examination, a summary of which the judge provided at [21].
13. In submissions, the Presenting Officer said that there was nothing approaching the very compelling circumstances which were required if the appellant was to overcome the public interest in deportation. His rehabilitation was merely a

factor to be taken into account. His daughter was a qualifying child but the sentence of six years imposed by the Court of Appeal gave rise to a strong public interest in the appellant’s deportation. The Presenting Officer accepted that the delay in processing the deportation order was because of the appellant’s citizenship. This had led, she accepted, to the decision under appeal being made nearly ten years after the first deportation decision was made and the order signed: [22].

14. In his closing submissions, the appellant’s solicitor accepted that there had been a strong public interest in deporting the appellant when he was first convicted but he submitted that the circumstances had changed. The judge summarised his submissions in the following rhetorical question at the end of [23]: “In circumstances where the appellant was rehabilitated, fully employed, contributing to society and caring for his daughter, what, he asked, was the public interest in deporting him to Sierra Leone after all this time?”
15. At [25], the judge stated that he would make reference to the applicable law. He identified the salient provisions of the 2007 Act and went on to note that it was contended by the appellant that an exception applied in his case because his removal would be contrary to Article 8 ECHR. The judge then found that communication between the appellant and his daughter would not be completely lost if he was deported; they could remain in contact by Skype and phone calls.
16. At [27]-[30], the judge returned to the legal framework imposed by the 2007 Act and Part 13 of the Immigration Rules. At [32]-[40], he made reference to a range of authorities from MF (Nigeria) [2013] EWCA Civ 1192; [2014] 1 WLR 544 to AS (Afghanistan) [2019] EWCA Civ 417; [2019] Imm AR 759. Amongst the self-directions he took from those authorities was that it is ‘settled law that the scales are heavily weighted in favour of deportation and something very compelling which will be exceptional must be shown to outweigh the public interest in deportation.’: [33] Similar directions appear at [34] and [37].
17. At [35]-[36], the judge noted that the appellant’s Article 8 ECHR claim was based on his daughter’s wish to have her father living locally and in her life. He noted that there was also the ‘unusual feature’ that it had taken the respondent ten years to settle on a course of action, during which the appellant had demonstrated that he was rehabilitated and established a parental relationship with his daughter who was eleven years old at the date of the hearing before the FtT. At [36], he queried whether the respondent’s prevarication was capable of amounting to an exceptional circumstance. At [37], he considered what had been said by the Court of Appeal in MF (Nigeria) and SS (Nigeria) [2013] EWCA Civ 550; [2014] 1 WLR 998 about the circumstances which might be capable of satisfying that test.
18. At [38], the judge concluded that it was ‘plainly’ in the best interests of the appellant’s daughter for him to remain in the United Kingdom. He noted that the Parole Board had considered him to present a low risk of reoffending in its assessment in December 2011. He continued:

The appellant has lived up to this expectation, he has become rehabilitated after pursuing and completing many courses in prison to address his substance misuse fuelled offending. If this appeal had been before me nine or ten years ago I doubt whether the appellant would have a case to argue that his deportation was disproportionate given the circumstances of his daughter. She would have been a

baby then. However, I have found it difficult to find any public interest in deporting the appellant now that he is rehabilitated, in full time employment, and playing a full parental role in the life of his daughter. I make this finding after taking her best interests as my starting point. I take a balance sheet approach to his appeal under Article 8, as I am entreated to do by the judgement of the Lord Chief Justice in AS v SSHD [2019] EWCA Civ 417.

19. At [39], the judge returned to the question of whether there was something very compelling in the appellant's case which sufficed to swing the outcome in his favour. He rejected the submission that the appellant had a legitimate expectation that he would not be removed from the UK but he considered that the very compelling factor was "to be found in the respondent's decision making process which has left this appellant in a position of uncertainty since he was released from prison and the decision to withdraw the deportation order was made before it was reinstated."
20. At [40], the judge stated that he had been guided by what had been said by the Supreme Court in Agyarko [2017] UKSC 11; [2017] 1 WLR 823, as to the circumstances in which a deportation decision or removal decision might be disproportionate. At [41], the judge set out much of Part 5A of the Nationality, Immigration and Asylum Act 2002, although he omitted s117C. He returned to AS (Afghanistan) at [42], directing himself that he should take into account the 'pros' and 'cons' of deportation. He then undertook that exercise at [43]-[44], which we must reproduce in full:

[43] I accept the evidence that the appellant has given and the letter from the appellant's daughter's mother Elsie Bamgboye, this raises the question as to whether the respondent's maintenance of the deportation decision, a decision made again after nearly ten years, is proportionate to the legitimate aim of deportation, especially when it is evident that the various case workers that have considered this case have denied the appellant the certainty as to what his position would ultimately be. Then came the turnabout once it appeared that the appellant did not have any status as a British protected person, akin to British citizen, who could be deported. I am unable to see any public interest in deporting the appellant after this history, given the progress that he has made and the contribution he is now making in society as an employee in the motor trade working for Halfords as a technician, earning and paying taxes and supporting his former partner and their daughter. There is no assessment now to say that the appellant poses a danger to the public and he has become rehabilitated and put his serious criminal offending behind him.

[44] On balance, after considering everything I find that the balance tips in favour of the appellant's protected right to family life and the protective right to family life of his daughter and not the respondent's public duty to deport foreign criminals - particularly when that public duty is being sought to be exercised now some ten years after the initial decision to deport the appellant was made. These are unusual circumstances - exceptional circumstances in my view - given the indecisiveness of the Home Office that has proceeded the respondent's latest decision in this appeal. However, in finding that there are exceptional circumstances that would make the appellant's deportation to Sierra Leone unduly harsh after all this time - particularly unduly

harsh to the appellant's daughter, the appellant should not treat this decision of the Tribunal as an insurance policy against deportation should he engage in criminal activity in the future. There are plainly exceptional circumstances on the totality of the evidence before me for the appellant to succeed outside of the Rules, applying the judgment of the Supreme Court in Agyarko in that "exceptional" means circumstances in which the decision would result in unjustifiably harsh consequences for the individual such that the decision would not be proportionate. I found there is more to be found in the balancing exercise above on the side of the appellant and his child. The respondent has not demonstrated that the decision made now, in the circumstances it has been made again some ten years later, notwithstanding that the appellant could not meet all the requirements of the Immigration Rules, is proportionate.

The Appeal to the Upper Tribunal

21. The respondent's grounds of appeal are not properly delineated into separate heads of challenge to the judge's decision. That is unacceptable. As Hickinbottom LJ stated in Harverye [2018] EWCA Civ 2848, grounds of appeal should be "a tight formulation of the propositions advanced, and not a discursive draft of submissions." The application for permission to appeal contains ten paragraphs of text, from which we extract the following grounds:
- (i) The judge failed to give clear reasons for his conclusion that the high threshold in s117C(6) was reached.
 - (ii) In concluding that the delay was capable of reducing the public interest, the judge overlooked the appellant's contributions to that delay.
 - (iii) The judge erred in law in concluding that delay was capable of diluting the public interest.
 - (iv) The judge erred in law in attributing significance to the appellant's rehabilitation.
22. Permission was granted to argue each of these points. Skeleton arguments were subsequently filed and served in compliance with directions.

Submissions

23. Mr Tufan submitted that the judge had fallen into error in failing to consider, firstly, whether the appellant's deportation would be unduly harsh on the appellant's daughter. The authorities showed that such a staged approach was required. In light of KO (Nigeria) [2018] UKSC 53; [2018] 1 WLR 5273 and PG (Jamaica), it would not have been open to the judge to conclude that the effects on the appellant's daughter would have been unduly harsh. PG (Jamaica) [2019] EWCA Civ 1213 was also relevant to the question of delay: [39]-[40] refer.
24. The appellant intended to rely on MN-T (Colombia) [2016] EWCA Civ 893 in order to support the reasoning of the judge with regard to delay but it was clear that the decision in SU (Pakistan) [2017] EWCA Civ 1069; [2017] 4 WLR 175 had underlined the particular circumstances which prompted the decision in MN-T.
25. It was not clear why the judge had cited Agyarko in his decision, when that decision of the Supreme Court was concerned with non-deportation cases, in

which the public interest considerations and the statutory framework were altogether different.

26. For the appellant, Mr Youssefian accepted that there was a ‘structural frailty’ in the judge’s decision, in that he had failed to consider whether the appellant’s deportation would be unduly harsh on his daughter; that being the first of the stages required by the authorities. The judge had nevertheless undertaken a ‘balance sheet’ enquiry in deciding the ultimate question, of whether there were very compelling circumstances. He had made reference to it being ‘unduly harsh’ on the appellant’s daughter to deport the appellant, at [44], and he had undertaken an assessment of her best interests at [38]. The reality, in a case of this nature, was that the respondent’s delay had enabled the appellant to develop a relationship with his daughter. The fact that their relationship had been allowed to deepen and develop during the respondent’s intransigence was a relevant factor in considering the extent of the public interest in the appellant’s deportation.
27. The Secretary of State had cited the decision of the Upper Tribunal in RLP (Jamaica) [2017] UKUT 330 (IAC) in support of her submission that delay was not capable of diluting the significant public interest in deportation but that decision had been reached *per incuriam* the decision of the Court of Appeal in MN-T. The decision in MN-T concerned circumstances in which there might properly be thought to be a much greater public interest in the deportation of the appellant. MN-T had received a sentence of eight years’ imprisonment for supplying one kilogram of cocaine. She had been unsuccessful in her appeal against the ensuing deportation order but the respondent had taken no steps to enforce her deportation. In this case, the respondent had failed even to take the necessary administrative steps to begin the process of deportation. No authority had been cited in RLP to support the conclusion reached, and that decision was at odds with what had been said in MN-T. MN-T was also to be read in light of the decision in Akinyemi [2019] EWCA Civ 2098, in which the Court of Appeal had stated that the public interest in deportation could be reduced, in a small number of cases, in light of the individual circumstances of the case.
28. The respondent had submitted that the judge had erred in attaching weight to rehabilitation but the decision in Taylor [2015] EWCA Civ 845, showed that it was for the FtT to decide how much weight to place on rehabilitation. The reality, in this case, was that the respondent’s appeal was based on disagreement as to the weight attached by the judge to various matters. It had been open to the judge to attach weight to delay and to rehabilitation, and the respondent’s extreme delay enabled the judge to conclude that the appellant had rehabilitated completely. On examination of the factors set out by Jackson LJ at [42] of MN-T, each of those factors was present in this case. The respondent’s delay was particularly relevant to the best interests of the appellant’s child. MN-T remained good law, and had not been overtaken by subsequent authorities, including KO (Nigeria).
29. In summary, Mr Youssefian submitted that the accepted structural difficulties with the FtT’s decision did not justify it being set aside. In substance, the judge had reached a sustainable decision in the appeal and his decision should stand.
30. Mr Tufan did not reply. We reserved our decision.

Analysis

31. As will be apparent from our summary of the competing submissions, much of the oral and written advocacy in this case was directed to the third of the respondent’s grounds of appeal, and we turn to that ground first, largely in acknowledgement of the cogent and determined submissions made by Mr Youssefian.

Ground (iii) – administrative delay and deportation

32. The respondent submits, with reference to the decision of the Upper Tribunal in RLP (Jamaica) that delay is not capable of diluting the public interest in deportation. RLP was a case in which the index offence had been in 2001 but it had taken the respondent until 2012 to decide to deport the appellant. There had been earlier ‘conventional removal notices’ against which the appellant appealed, unsuccessfully, to the Immigration Appellate Authority. His appeal was dismissed on all grounds in 2003. There was then a period of seven years in which the respondent took no action, after which the appellant claimed asylum for a second time. That claim was processed slowly but was ultimately refused by the respondent, who then took a decision to deport the appellant. Unfortunately, the delays continued during the appellant’s appeal and four years passed before the case finally came before McCloskey J and Deputy Upper Tribunal Judge Mandalia (as he then was).
33. The previous President set out the lengthy chronology at [1]-[8] and a series of ‘lessons to be learned’ at [9]. At [10]-[24], he set out the reasons for dismissing the appellant’s appeal. Paragraphs [10]-[15] were directed to confining the decision in Bah [2012] UKUT 196 (IAC) to the legal framework in force at the time of that decision, which is the subject of the first paragraph in the judicial headnote. At [16]-[22], the Upper Tribunal considered the factual and legal framework which applied, in circumstances in which the sentence for the index offence was four years’ imprisonment. Having noted that the test was whether there were very compelling circumstances over and above those described in paragraphs 399 and 399A of the Immigration Rules, it noted that the submission made by the appellant’s counsel was “that this test is satisfied by reason of the extreme delay on the part of the Secretary of State during the period 2002 – 2012, the hallmarks whereof were incompetence and maladministration.”
34. The Upper Tribunal rejected that submission for the following reasons:
- [23] We reject this argument. On the one hand, the delay on the part of the Secretary of State can only be characterised egregious, is exacerbated by the absence of any explanation and is presumptively the product of serious incompetence and maladministration. However, on the other hand, the case against the Appellant is a formidable one: the public interest favours his deportation; the potency of this public interest has been emphasised in a series of Court of Appeal decisions; the Appellant’s case does not fall within any of the statutory or Rules exceptions; the greater part of his life was spent in his country of origin; there is no indication of a dearth of ties or connections with his country of origin; he is culturally and socially integrated there; his family life in the United Kingdom is at best flimsy; and most of his sojourn in the United Kingdom has been unlawful and precarious. We take into account all of these facts and factors in determining whether very compelling circumstances have been demonstrated. This is a self-evidently elevated threshold which, by its nature, will be overcome only by a powerful case. In our judgement the maladministration and

delay of which the Secretary of State is undoubtedly guilty fall measurably short of the mark in displacing the aforementioned potent public interest in the Article 8(2) proportionality balancing exercise. We conclude that the Appellant's case fails to surpass the threshold by some distance.

35. It was that paragraph which resulted in the second part of the judicial headnote, which was as follows:

In cases where the public interest favouring deportation of an immigrant is potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in the underlying decision making process is unlikely to tip the balance in the immigrant's favour in the proportionality exercise under Article 8(2) ECHR.

36. In his written and oral submissions, Mr Youssefian submitted that this part of the decision in RLP, and the resulting part of the headnote, was decided *per incuriam* the decision of the Court of Appeal in MN-T (Colombia) [2016] EWCA Civ 893 and that the two decisions could not be reconciled. We consider him to be correct in both aspects of that submission. There is no reference to MN-T (Colombia) in RLP (Jamaica), although the latter case was heard months after the decision in the former case was handed down. The appellant in RLP was represented by counsel, although it seems she made no reference to authority in support of her submission about the respondent's delay. The basis for that omission might be for the reason given by Mr Tufan when a copy of the decision in MN-T was produced by Mr Youssefian.
37. Mr Tufan had noted the reference to the decision in Mr Youssefian's skeleton but he had been unable to locate it on Bailii. We have also been unable to find it on Bailii. Whether it slipped through Bailii's net because the neutral citation on the copy produced by Mr Youssefian - [2013] EWCA Civ 893 - is plainly wrong for a decision which was issued in June 2016, we do not know. Whatever the reason, it seems that MN-T might not have been available to practitioners without access to subscription services such as Westlaw, on which it certainly does appear. It is clear that the decision was not drawn to the attention of the Upper Tribunal in RLP.
38. MN-T was a case in which the index offence was of supplying a large quantity of drugs of class A. The claimant had received a sentence of eight years' imprisonment for that offence in 1999. She had been released from prison on licence in 2003. Five years later, the respondent initiated deportation proceedings. The claimant's subsequent appeal was dismissed in March 2009. The respondent took no steps to deport her notwithstanding that victory. More than three years later, the claimant made further representations on Article 8 ECHR grounds. Unmoved by those representations, the respondent made a further deportation order and the claimant appealed again.
39. In allowing the appeal on Article 8 ECHR grounds, the FtT attached weight to a number of matters, including the time the claimant had spent in the UK, her rehabilitation since her release and the delay on the part of the respondent. The Upper Tribunal held that the FtT had made various errors of law in that decision and Upper Tribunal Judge Moulden directed that the decision on the appeal would be remade in the Upper Tribunal, although he undertook that task on the basis of the facts found by the FtT. The claimant's appeal was once again allowed, with

Judge Moulden attaching significance to the respondent’s inaction, amongst other matters.

40. The respondent sought and was granted permission to appeal to the Court of Appeal on five grounds. For present purposes, we need only concern ourselves with the fourth of those grounds, which was that the Upper Tribunal had misdirected itself in law in considering the delay in the claimant’s case: [24] refers.

41. In considering the respondent’s fourth ground of appeal, Jackson LJ (with whom Sales LJ, as he then was, agreed) reminded himself of Lord Bingham’s judgment in EB (Kosovo) [2008] UKHL 41; [2009] 1 AC 1159. Jackson LJ noted that it was submitted by the respondent that the Upper Tribunal had taken account of delay twice, thereby ‘double-counting’. He rejected that argument, holding that the Upper Tribunal had held that delay was relevant in the claimant’s case in both of the first two ways identified by Lord Bingham: [39]-[40]. Jackson LJ then added this:

[41] I should perhaps add this in relation to delay. As a matter of policy now enshrined in statute, the deportation of foreign criminals is in the public interest. The reasons why this is so are obvious. They include three important reasons:

- (1) Once deported the criminal will cease offending in the United Kingdom.
- (2) The existence of the policy to deport foreign criminals deters other foreigners in the United Kingdom from offending.
- (3) The deportation of such persons expresses society's revulsion at their conduct.

[42] If the Secretary of State delays deportation for many years, that lessens the weight of these considerations. As to (1), if during a lengthy period the criminal becomes rehabilitated and shows himself to have become a law-abiding citizen, he poses less of a risk or threat to the public. As to (2), the deterrent effect of the policy is weakened if the Secretary of State does not act promptly. Indeed lengthy delays, as here, may, in conjunction with other factors, prevent deportation at all. As to (3), it hardly expresses society's revulsion at the criminality of the offender's conduct if the Secretary of State delays for many years before proceeding to deport.

42. Mr Tufan submits that MN-T is to be read in light of the subsequent decision of the Court of Appeal in SU (Pakistan) [2017] EWCA Civ 1069; [2017] 4 WLR 175. As David Richards LJ stated at [2], that was the first case in which the Court of Appeal had considered the correct approach to the revocation of a deportation order where it had been implemented but the deportee had, in breach of the order, returned to the UK and had established a private and family life during the subsequent period of unlawful residence.

43. SU had been sentenced to 42 months’ imprisonment for offences of fraud and had been recommended for deportation by the trial judge. His appeal against the resulting deportation order was dismissed in 1998 and he was deported in October that year. He returned to the UK unlawfully in 2000 and, in 2003, he applied for leave to remain on Article 8 ECHR grounds, relying on a relationship he had formed after entering the UK in breach of the deportation order. Although

she refused a subsequent application, the respondent failed to take any action on the 2003 application. In February 2014, she decided that she should first consider whether to revoke the deportation order, which she refused to do. The FtT allowed the appeal on Article 8 ECHR grounds, attaching particular significance to the respondent’s delay. The respondent appealed unsuccessfully to the Upper Tribunal. So it was that she brought a second appeal to the Court of Appeal.

44. There were four grounds of appeal and it is only the court’s resolution of the fourth ground with which we are presently concerned. Counsel for the Secretary of State submitted that the FtT had ‘failed properly to assess, in accordance with authority, the impact of the Secretary of State’s delay in dealing with the respondent’s position’: [39]. The resolution of that complaint appears at [53]-[61] of David Richards LJ’s judgment, with which Sir Geoffrey Vos C and Asplin J agreed. The inadequacy of the FtT’s treatment of EB (Kosovo) [2008] UKHL 41; [2009] 1 AC 1159 was considered at [54]-[56]. At [57], David Richards LJ held that it was of particular importance in weighing the effect of delay to have regard to the fact that the appellant had been deported and had illegally entered the UK in breach of the deportation order, whereas the asylum seeker in EB (Kosovo) was in a very different position. He considered the Secretary of State’s complaint to be well-founded, and that it formed part of a larger picture of a failure to carry out the balancing exercise in accordance with the applicable regime: [58].
45. At [59], David Richards LJ noted that counsel for the appellant relied upon the obiter observations of Jackson LJ in MN-T which we have set out above. He stated that the observations of Jackson LJ in [41]-[42] of MN-T were ‘well made’ but, he added, they had not been made “in the context of a person who had unlawfully re-entered the country in breach of a deportation order and they clearly do not obviate the need for the decision-making Tribunal to apply the relevant provisions and legal principles.” The concluding words of that sentence related to the other errors in the decisions of the FtT and the Upper Tribunal including, in particular, a failure to consider or apply s117B(4) of the 2002 Act.
46. We consider SU (Pakistan) to approve Jackson LJ’s obiter observations in MN-T but also to underline the importance, in any such case, of considering the significance of any administrative delay on the part of the Secretary of State against the guidance given by Lord Bingham at [14]-[16] of EB (Kosovo) and the statutory framework which appears in Part 5A of the 2002 Act as a whole. To the extent that the Upper Tribunal decided in RLP that “*even egregious and unjustified delay ... is unlikely to tip the balance in the immigrant’s favour in the proportionality exercise*”, we accept Mr Youssefian’s submission that the decision was decided *per incuriam* MN-T (Colombia) and that it should no longer be followed. In light of the decisions of the Court of Appeal to which we have referred, it cannot be seen as representative of the current state of the law. It follows that we reject the respondent’s third ground of appeal.

Ground (iv) - rehabilitation

47. We also accept Mr Youssefian’s submissions in response to the respondent’s fourth ground of appeal. By this ground, the respondent contends that the judge erred in attaching weight to the appellant’s rehabilitation. On the unusual facts of this case, however, we do not consider the judge to have erred in attaching weight to rehabilitation.

48. The law on the significance of rehabilitation in deportation appeals was reviewed by the Upper Tribunal (Lane P, sitting with Upper Tribunal Judges Gill and Coker) in RA (Iraq) [2019] UKUT 123 (IAC); [2019] Imm AR 780, at [31]-[33]. Having cited Danso [2015] EWCA Civ 596 at [32], the President said this:

[33] As a more general point, the fact that an individual has not committed further offences, since release from prison, is highly unlikely to have a material bearing, given that everyone is expected not to commit crime. Rehabilitation will therefore normally do no more than show that the individual has returned to the place where society expects him (and everyone else) to be. There is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance (see SE (Zimbabwe) v Secretary of State for the Home Department [2014] EWCA Civ 256, paragraphs 48 to 56). Nevertheless, as so often in the field of human rights, one cannot categorically say that rehabilitation will never be capable of playing a significant role (see LG (Colombia) v Secretary of State for the Home Department [2018] EWCA Civ 1225). Any judicial departure from the norm would, however, need to be fully reasoned.

49. That approach chimes, in our judgment, with the analysis undertaken by the Senior President of Tribunals (with whom Nicola Davies and Maylon LJ agreed) in Akinyemi [2019] EWCA Civ 2098, at [50] in particular. In that paragraph, the Senior President explained, with reference to Hesham Ali [2016] UKSC 60; [2016] 1 WLR 4799, that 'the strength of the public interest will be affected by factors in the individual case, i.e. it is a flexible or moveable interest not a fixed interest.' One of the factors mentioned by Lord Kerr JSC at [164] of Hesham Ali was 'the success of rehabilitation'. Whilst that factor is unlikely, given the strength of the public interest in deportation, to have a significant bearing on the assessment of whether there are very compelling reasons which outweigh the public interest in deportation, it cannot be said that it is never a relevant factor.
50. We note that the approach of the judge in this case, in standing the significance of the appellant's rehabilitation alongside the respondent's delay, was also the approach adopted by Judge Moulden in MN-T (Colombia). When evaluating the correctness of that approach, which was the subject of the respondent's first ground of appeal to the Court of Appeal, Jackson LJ said this:

[35] I agree that rehabilitation alone would not suffice to justify the Upper Tribunal's decision in this case. If it had not been for the long delay by the Secretary of State in taking action to deport, in my view there would be no question of saying that "very compelling circumstances over and above those described in Exceptions 1 and 2" outweighed the high public interest in deportation. But that lengthy delay makes a critical difference. That lengthy delay is an exceptional circumstance. It has led to the claimant substantially strengthening her family and private life here. Also, it has led to her rehabilitation and to her demonstrating the fact of her rehabilitation by her industrious life over the last 13 years. This is one of those cases which is on the borderline. The Upper Tribunal might have decided either way. The Court of Appeal would not have reversed the Upper Tribunal's decision if the Upper Tribunal had decided that because of the high public importance the claimant must be deported. In the event the Upper Tribunal decided this matter in favour of the claimant. This was, in my view, an evaluative decision within the range which the Upper Tribunal

was entitled to make. I therefore conclude that the Upper Tribunal was entitled to hold that there were in this case very compelling circumstances over and above those described in Exceptions 1 and 2, which outweighed the high public interest in deportation. I therefore reject the first ground of appeal.

51. In light of the decisions above, we consider that it was open to the judge as a matter of law to attach weight to the appellant's rehabilitation on the unusual facts of this case.

Ground (ii) - the actual delay in this case

52. We turn to the respondent's second ground of appeal, by which it is submitted that the judge overlooked material matters in concluding that the relevant period of delay had reduced the weight which was otherwise to be accorded to the public interest in deportation. We consider there to be merit in this ground of appeal. It is clear from the judge's decision that he considered the respondent to have been 'indecisive' for ten years. The decision is replete with references to that period of time. As we understand it, the judge considered the respondent's delay to have been so lengthy because she failed to settle on a course of action between the date of the appellant's conviction for the index offence on 12 February 2008 and the final decision to refuse his asylum and human rights claims, which was taken on 23 July 2018.
53. In so concluding, the judge fell into error regarding the date on which the period of delay began. No sensible Secretary of State would have reached an appealable decision concerning the appellant's deportation at the start of his custodial sentence. So much is clear from MG & VC [2006] UKAIT 53, at [6], in which a senior panel of the AIT said that "the appropriate time to make the decision will be shortly before it is to be carried out: that is to say, towards the end of a prison sentence". That was said in the context of the deportation of an EEA national but nothing turns on that; it would be a wholesale waste of public resources to make decisions which are capable of being appealed to the FtT whilst an individual still has an appreciable part of their sentence to serve. Contrary to the judge's approach in this appeal, therefore, time did not start to run from the date on which the appellant was sentenced.
54. In light of the nature of the sentence imposed by Pitchers J, we do not consider that it would have been appropriate for the respondent to make an appealable deportation decision even upon the expiry of the minimum three year term of imprisonment. Because the appellant had been sentenced to a term of imprisonment for public protection, he was only eligible for release when that course was deemed appropriate by the Parole Board (the statutory framework was set out by Lord Phillips at [2] of R v Smith [2011] UKSC 37; [2011] 1 WLR 1795). The decision to order his release on strict licence conditions was only made by the Parole Board at the very end of 2011, and it was at that point that the respondent might properly have considered making an appealable decision.
55. The better course, however, would have been to await the decision on the appellant's appeal to the Court of Appeal, since the outcome of that appeal was obviously material to the consideration of his deportation. It was only in November 2012 that the Court of Appeal concluded that Pitchers J had erred in imposing an indeterminate sentence for public protection, and substituted a determinate sentence of six years' imprisonment. It was at that point, in our

judgment, that the respondent should have considered whether to make an appealable deportation decision. The culpable period of delay was therefore at least nearly five years shorter than the judge thought to be the case.

56. The judge also concluded that the respondent had made a deportation order against the appellant on 26 September 2008, only to withdraw that order at a later stage. As was clear from the front page of the respondent's bundle and the first paragraph of the decision under appeal, however, the respondent took no such step on that date. What she did, instead, was to notify the applicant that he was a foreign criminal and that his deportation was under consideration. That preliminary step provided the appellant, quite properly, with an opportunity to make representations if he considered that any of the statutory exceptions to deportation applied to him. The judge's mischaracterisation of the steps taken by the respondent in 2008 represented his second error.
57. The judge's third error was that he uncritically laid all of the responsibility for delay at the feet of the Secretary of State. Whilst it was clear, and it was accepted in terms by the respondent in the decision under appeal, that there had been delay on her part, it was part of her case that the appellant had contributed to that delay. The judge failed to evaluate that contention in any meaningful way, despite the fact that he noted in the introductory paragraphs of his decision various ways in which the appellant had failed to comply with requests made lawfully by the respondent for further information. It seems that the Home Office's first appealable decision, which was taken in late 2013 (and therefore only a few months after the decision of the CACD), was flawed, in that inadequate consideration had been given to the appellant's nationality (whether BPP, BOC or otherwise). Before the appeal could be heard, therefore, the respondent withdrew the decision under appeal, with the consequence that the appeal was treated as withdrawn. As the judge noted, the appellant was then requested by the respondent to provide further evidence about his nationality on five separate occasions, none of which elicited any response from him. It was after that, on 24 January 2018, that the respondent issued the appellant with a further notice that he was liable to deported, and invited him to make representations against that course. Again, he failed to respond.
58. Whilst the appellant's failures to cooperate with the Secretary of State in these regards do not account for the whole of the delay between his sentence in the Court of Appeal and the appealable decision which was finally taken by the respondent in July 2018, they were clearly said by the respondent to be material to the delay, and it was for the judge to consider that submission. He demonstrably failed to do so.
59. In summary, we find the respondent's second ground of appeal to be made out. The judge's consideration of the extent of the respondent's delay was inadequate in a number of respects.

Ground (i) - adequacy of 'very compelling circumstances' assessment

60. We also consider the respondent's first ground of appeal to establish an error of law on the part of the judge. By this ground, the respondent contends that the judge failed to give adequate reasons for concluding that there were very compelling circumstances which outweighed the public interest in the appellant's deportation. It is to be recalled that the judge was engaged, when considering that question, in undertaking a balancing exercise in which the scales were

heavily weighted in favour of deportation. As we have explained above, there were aspects of the judge’s evaluation of the matters on the appellant’s side of the balance sheet which were open to him and there were aspects in which he fell into legal error.

61. The most significant error into which the judge fell in undertaking that balancing exercise, however, was to overlook the statutory imperatives in section 117C of the 2002 Act. It is a signal feature of the judge’s decision that this provision is not mentioned on a single occasion. It is odd, to put it at its lowest, that the very section in which Parliament mandated additional considerations in cases involving foreign criminals was omitted from the judge’s otherwise complete replication of Part 5A of the 2002 Act at [41] of his decision. At no point in his decision did he demonstrate awareness of the fact that Parliament has stated in s117C(1) that the deportation of foreign criminals is in the public interest. Nor did he take account of the mandatory consideration in s117C(2): that the more serious the offence committed by a foreign criminal, the greater is the public interest in their deportation. The judge’s self-directions at [25]-[28] refer to the 2007 Act and section 55 of the Borders, Citizenship and Immigration Act 2009. There is also reference, throughout the decision, to the relevant provisions of Part 13 of the Immigration Rules and to decisions such as MF (Nigeria), SS (Nigeria) and LC (China) [2014] EWCA Civ 1310; [2015] Imm AR 227, in which the Court of Appeal considered the scheme established by statute and the Immigration Rules prior to the insertion of Part 5A of the 2002 Act by the Immigration Act 2014. At no point in the judge’s decision, therefore, did he demonstrate any awareness of the fact that the statements of policy which appear in Part 13 the Immigration Rules have since July 2014 enjoyed what was described by Lord Wilson in Quila [2011] UKSC 45; [2012] 1 AC 241 as the imprimatur of democratic approval.
62. It did not suffice, in our judgment, for the judge to refer to the relevant paragraphs of the Immigration Rules and to the authorities in which that old scheme had been considered. As Jackson LJ explained at [31] of MN-T (Colombia), any Tribunal embarking on the balancing exercise required in such a case ‘must accord substantial weight to the policy enshrined by the legislature in statute that the deportation of foreign criminals is in the public interest. The same point was made by Leggatt LJ (with whom the SPT and Hickinbottom LJ agreed) at [20] of CI (Nigeria) [2019] EWCA Civ 2027:

Paragraphs 398-399A of the Immigration Rules state the practice to be followed by Home Office officials in assessing a claim that the deportation of a foreign criminal would be contrary to article 8. Paragraphs 398-399A are in very similar terms to section 117C(3)-(6) of the 2002 Act. However, as the Court of Appeal pointed out in NE-A (Nigeria) v Secretary of State for the Home Department [2017] EWCA Civ 239, para 14, although the Immigration Rules are relevant because they reflect the responsible minister’s assessment, endorsed by Parliament, of the general public interest, they are not legislation; by contrast, Part 5A of the 2002 Act is primary legislation which directly governs decision-making by courts and tribunals in cases where a decision made by the Secretary of State under the Immigration Acts is challenged on article 8 grounds. The provisions of Part 5A, taken together, are intended to provide for a structured approach to the application of article 8 which produces in all cases a final result compatible with article 8: see NE-A (Nigeria), para 14; Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58; [2018] 1 WLR 5536, para 36. Further, if in applying section 117C(3) or (6) the

conclusion is reached that the public interest "requires" deportation, that conclusion is one to which the tribunal is bound by law to give effect: see Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803; [2016] 1 WLR 4204, para 50; NE-A (Nigeria), para 14. In such a case there is no room for any further assessment of proportionality under article 8(2) because these statutory provisions determine the way in which the assessment is to be carried out in accordance with UK law.

63. We are not satisfied that the judge considered or applied section 117C of the 2002 Act properly or at all. It is clear from his decision as a whole, and from [37] in particular, that his assessment was informed by the Immigration Rules, and not by the statutory provisions by which it should have been informed. Indeed, it appears the judge might even have been confused about the provisions which did apply. At [20], he set out paragraph EX1 of Appendix FM of the Immigration Rules, which was of no application in a case of this nature. At [22], he made reference to "s117(6) of the Immigration Rules", which was presumably intended to be a reference to s117B(6) of the 2002 Act, although that subsection was evidently of no application, given the appellant's liability to deportation. That confusion carried through, it seems, into the authorities to which the judge made reference. He stated at [40] and [44] that he was 'guided' by the decision of the Supreme Court in Agyarko but we cannot see the relevance of that authority. Agyarko was not concerned with the deportation of a foreign criminal but with an ordinary human rights claim. The public interest considerations at stake in such a case, and the guidance given by the Supreme Court on the approach to the type of case under consideration do not translate into the deportation context.
64. In fairness to Mr Youssefian, he was constrained to accept that there was what he described as a 'structural failing' in the judge's decision. That was the way in which he described the judge's failure to adopt the approach required by NA (Pakistan), at [37], and CI (Nigeria), at [93]-[94]. Pursuant to the guidance in those cases, the proper course was for the judge to consider whether (but for the length of his sentence), the appellant would have been able to satisfy either of the statutory exceptions to deportation in s117C(4) or s117C(5) of the 2002 Act, before then considering whether there were very compelling circumstances over and above those exceptions which outweighed the public interest. The first of those steps necessarily informs the second. In particular, the judge should have considered whether the consequences for the appellant's daughter would have been unduly harsh, before proceeding to consider his conclusion in that regard as part of the holistic exercise required by s117C(6). He failed to undertake that enquiry. We are not persuaded that any such enquiry can be inferred from the references to undue harshness in [44] of the judge's decision. He stated that 'there are exceptional circumstances that would make the appellant's deportation to Sierra Leone unduly harsh after all this time - particularly unduly harsh to the appellant's daughter' but there was no consideration of undue harshness as defined at [23] of KO (Nigeria) before he reached that conclusion. Despite the attractive way in which Mr Youssefian attempted to support the judge's conclusions, we are unable to infer that there was a correct process of reasoning in the mind of the judge, or to conclude that the ultimate conclusion that there were very compelling circumstances could survive notwithstanding the many failings on the part of the judge.
65. In the circumstances, we consider that the respondent has established errors on the part of the judge which must result in his decision being set aside. The judge

failed, in summary, to engage adequately or at all with the statutory framework in section 117C of the 2002 Act and he omitted material matters from his consideration of the delay in the respondent settling upon a course of action in the appellant's case. Given the manifest importance of the first error, and given the significance attributed by the judge to delay, we have come to the clear conclusion that his decision as a whole is flawed and must be set aside. The matter will be retained in the Upper Tribunal, for the decision on the appeal to be remade *de novo*.

66. Standard directions will accompany the notice of hearing. In addition to those directions, we direct that the respondent shall, no later than 28 days after the date on which this decision is sent to the parties, file and serve a tabular chronology of events from the date of the appellant's conviction before the Crown Court to the date of the decision which was under appeal before the FtT. That chronology must be cross referenced to a legible bundle of all documents described in the chronology.

Notice of Decision

The decision of the First-tier Tribunal was erroneous in law and is set aside in its entirety. The decision will be remade by the Upper Tribunal with no findings of fact preserved.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

The First-tier Tribunal made no anonymity direction. It gave no reasons for taking that course. We do not consider there to be any reason for an anonymity order in respect of the adults in this case. So as to protect the best interests of the appellant's daughter, however, we do order as follows. Unless and until a Tribunal or court directs otherwise, the appellant's daughter is granted anonymity. No report of these proceedings shall directly or indirectly identify her. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.



MARK BLUNDELL
Judge of the Upper Tribunal (IAC)

14 April 2020