



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

**First-tier Tribunal No:**  
**HU/15952/2018**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 14 May 2023**

**Before**

**UPPER TRIBUNAL JUDGE KAMARA**

**Between**

**JAMIL ASSYNE HYDAR**  
(NO ANONYMITY ORDER MADE)

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr L Youssefian, counsel instructed by TTS Solicitors  
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

**Heard at Field House on 2 February 2023**

**DECISION AND REASONS**

**Background**

1. This is the remaking of the decision and reasons in the appellant's appeal against the respondent's decision to deport him by virtue of section 32(5) of the UK Borders Act 2007, owing to the appellant being a foreign criminal, as defined under Section 117D of the Nationality, Immigration and Asylum Act 2002.
2. The error of law decision of the Honourable Mrs Justice McGowan and Upper Tribunal Judge Blundell promulgated on 14 April 2020, is annexed to this decision and reasons.

3. The appellant was born in Sierra Leone on 10 May 1976. He has British Protected Person status but was erroneously issued with a British Overseas Citizen passport which he used to enter the United Kingdom as a visitor on 6 June 1997. He applied for asylum three days after his arrival. That claim was refused on 6 October 1999, however the appellant was granted exceptional leave to remain, initially for twelve months. That leave was extended in the same capacity until 6 October 2003. Thereafter, the appellant was granted indefinite leave to remain on 30 October 2003.
4. The appellant has acquired a number of criminal convictions between 1998 and 2007. The earlier convictions were summary matters including various driving offences and minor assaults. On 18 December 2007, he was convicted of two counts of robbery and one count of attempted robbery and, following an appeal, he received a 6 year sentence of imprisonment.
5. On 26 September 2009, the Secretary of State served the appellant with notice of liability to deportation, in response to which he sent a series of representations, on Article 8 grounds. The appellant was released from prison on parole on 22 December 2011 and held in immigration detention until February 2012. His licence expired on 8 October 2013.
6. On 26 June 2013, the respondent wrote to the appellant to inform him of her intention to make a deportation order and seeking submissions from the appellant. He did not reply. The respondent refused the asylum claim on 16 October 2013. The deportation order was signed on 5 November 2013. The appellant appealed that decision, however the deportation order was withdrawn on 22 October 2014 because of concerns about the appellant's nationality, it being said that he was a British Protected Person. The respondent wrote to the appellant in March, April and November 2016 as well as April 2017 requesting documentary evidence regarding his nationality. The appellant did not respond to any of those requests. On 24<sup>th</sup> January 2018, the respondent wrote to the appellant to inform him that she was considering deporting him. Ultimately, the decision to deport the appellant was served on him on 24 July 2018 and this is the decision which is the subject of this appeal.
7. The appellant appealed the decision of to deport him and his appeal was allowed by First-tier Tribunal Judge Page in a decision promulgated on 19 August 2019. As indicated above, an Upper Tribunal set aside the decision of the First-tier Tribunal in its entirety for the reasons set out in the decision and reasons annexed. It suffices to say that the matter was adjourned to be remade before the Upper Tribunal with no findings of fact preserved.

#### The decision of UTJ Keith

8. Upper Tribunal Judge Keith allowed the appellant's appeal in a decision and reasons promulgated on 28 February 2022.

9. Following an application by the Secretary of State for permission to appeal to the Court of Appeal, Judge Keith set aside his own decision on 14 July 2022. Following that, Judge Keith invited submissions from the appellant but ultimately declined to set aside his decision of 14 July 2022, by way of a further decision dated 24 August 2022. The outcome of the foregoing is that the appellant's appeal is to be considered afresh and the decision remade, with the Upper Tribunal judge's findings in relation to the appellant's private life preserved in their entirety as they were unchallenged.

### The Hearing

10. The hearing was conducted as a hybrid hearing, with the appellant and both representatives attending in person, and the appellant's sister (RH), and his former partner (EB) attending via videolink.
11. Both representatives confirmed that the issue to be addressed was whether there were very compelling circumstances over and above those described in Exceptions 1 or 2, albeit there would be submissions as to the extent to which the appellant met the requirements of Exceptions 1 and 2.
12. I heard oral evidence from the appellant and his witnesses as well as submissions from both representatives. In their submissions, the representatives relied on their respective skeleton arguments which had been prepared for the hearing before Judge Keith. At the end of the hearing, I indicated that the appeal would be allowed. I give my reasons below.

### Legal Framework

13. The appellant argues that his removal from the United Kingdom would be a breach of the United Kingdom's obligations under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The burden of proof is on the appellant to establish an interference with his rights under Article 8(1) ECHR and the standard of proof is a balance of probabilities. The burden is then upon the Secretary of State to establish to the same standard that the interference is justified under Article 8(2) ECHR.
14. Section 32(4) of the UK Borders Act 2007 ['the 2007 Act'] provides that "the deportation of a foreign criminal is conducive to the public good". Sub-section 5 requires the Secretary of State to make a deportation order in respect of a "foreign criminal," defined as a person who is not a British citizen and who is convicted in the UK of a criminal offence for which they are sentenced to a period of imprisonment of at least twelve months, unless it would be a breach of a person's rights under the European Convention on Human Rights ['ECHR']. Foreign criminals are divided into categories which includes: those with sentences of between one and four years imprisonment (medium offenders) and those sentenced to four years or more (serious offenders).

15. Part 5A of the 2002 Act was introduced by the Immigration Act 2014 with effect from 28 July 2014.
16. When considering whether deportation is justified as an interference with a person's right to respect for private life and family life under article 8(2) of the ECHR, section 117A(2) of the 2002 Act requires decision makers to have regard in all cases to the considerations listed in section 117B, and in cases concerning the deportation of foreign criminals to the considerations listed in section 117C.
17. The relevant parts of section 117C of the 2002 Act, provides:
  - (1) The deportation of foreign criminals is in the public interest.
  - (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
  - (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
  - (4) Exception 1 applies where- (a) C has been lawfully resident in the United Kingdom for most of C's life, (b) C is socially and culturally integrated in the United Kingdom, and there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
  - (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
  - (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

## Discussion

18. In reaching this decision, I have taken into consideration sections 117B and 117C of the 2002 Act, as amended as well as all the evidence and submissions, both oral and written. There was no dispute between the representatives as to the facts of the case. Indeed Ms Cunha made no challenge to the evidence of the appellant or his witnesses. The disagreement between the parties came down to whether the appellant met the requirements of Exceptions 1 and 2 and whether he had established that there were very compelling circumstances over and above those described in Exceptions 1 and 2.
19. I begin my consideration with noting that the appellant can be considered a serious offender owing to the fact that he was sentenced to six years' imprisonment. He carried out a series of robberies on lone women in order to pay for his illicit drug addiction. It is set out in statute that the more serious the offence committed, the greater the public interest in

deportation. Clearly, there is a significant public interest in deporting the appellant from the United Kingdom.

20. The appellant relies on Exception 1 to deportation. At this point, it is useful to recall that Judge Keith preserved his own findings in relation to the appellant's private life.
21. I therefore take those findings as the starting point while taking into consideration the passage of time as well as the oral evidence given at the hearing.
22. The appellant, at the time of the hearing, was aged 46 and 9 months and had been residing in the United Kingdom since 6 June 1997, when he had just turned 21. At [56] of this decision, Judge Keith said the following: '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. ' While it appeared to have been conceded by the appellant's representatives that his length of residence fell short at the time the skeleton argument was drafted in 2021, this was no longer the case before me. The appellant has now been residing in the United Kingdom for well over 25 years and therefore has lived in this country for more than half of his life. The respondent calculates that the appellant would only meet the threshold on 6 March 2023. However, as indicated above, Judge Keith's findings were preserved and there was no evidence before me to suggest that the appellant's entry to the United Kingdom as a visitor in 1997 was anything other than valid, notwithstanding that the authorities erroneously issued the appellant with a British National Overseas passport which he used to leave Sierra Leone. Indeed, the respondent accepts in her skeleton argument that 'the document per-se was valid.' Ms Cunha was unable to explain with any clarity why the appellant's grant of leave to enter as a visitor was not lawful. Following that entry, the appellant promptly applied for asylum within the currency of his leave to enter and was granted exceptional and then indefinite leave to remain, with no gaps in his lawful residence. I conclude that the appellant can meet the requirement in (a) of Exception 1.
23. Judge Keith, at [57] made the following findings in relation to whether the appellant is socially and culturally integrated in the UK as required by subparagraph (b) of Exception 1.

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.

24. The respondent rightly accepts that offending, serious as it is, does not, without more, break integrative links and I heard no submissions to the effect that I should depart from Judge Keith's conclusions on integration. Considering the matter as at the date of the hearing, the appellant retains strong relationships with his daughter, her brother, his own sister and his former partner. He remains clean of drugs and has not re-offended in the eleven years since he was released from immigration detention. He still

has a home and is gainfully employed. If his offending broke the links he had established since his arrival in the United Kingdom twenty-five years ago, those links have been emphatically re-established.

25. Judge Keith had concerns in relation to whether there would be very significant obstacles to the appellant's integration in Sierra Leone. In finding that there would be no such obstacles, weight was placed on issues raised by the respondent in the decision letter as well as the appellant's failure to engage with those issues.
26. The issues raised in the decision letter are set out below.

- "60. It is noted that your mother is Fanta Assyne Hydar born on 23<sup>rd</sup> 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 8<sup>th</sup> 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 24<sup>th</sup> 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 21<sup>st</sup> 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 24<sup>th</sup> 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".

27. Judge Keith made the following findings.

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.

28. During their oral evidence before the Upper Tribunal, the appellant and his sister were asked about the issues raised in the decision letter regarding

the whereabouts of their parents. Their evidence was consistent with one another and with their written evidence and was subject to no challenge in Ms Cunha's submissions. In essence, the appellant's parents fled Sierra Leone for Guinea at the time of the war. While his father had eventually relocated to the United Kingdom, his mother had relocated to Gambia. The appellant told me that it had been some years since he saw his mother and this had been during her visit to the United Kingdom when she had visited his father. Both the appellant and his sister confirmed that their father was unwell. The appellant's evidence is also consistent with the most recent visa application which was made by his mother in 2017 in which she stated that she lived in Gambia.

29. Ultimately, owing to the passage of time as well as the inconsistent information given in the visa applications, I can place no weight on the purported situation in either 2012 or 2017 in terms of reaching a conclusion as to whether the appellant's parents would be able to provide him with support in Sierra Leone in 2023. Furthermore, the appellant's mother, presuming that she remains living, is approaching the age of seventy and there is no recent evidence of her whereabouts.
30. In *Kamara* [2016] EWCA Civ 813 the following was held:

The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.

31. I have carefully considered whether the appellant would be enough of an insider to integrate, applying *Kamara*. On one side the appellant lived in Sierra Leone for the first twenty-one years of his life, has a skilled trade as a mechanic and I find that given his age when he left he would still be able to communicate in the Krio language. On the other hand, the appellant is now a middle aged man who left his country at a time of war and who has been absent from Sierra Leone for a quarter of a century. In addition, he continues to suffer from sciatica and he was in significant discomfort during the course of the hearing. I accept that his father is elderly, unwell and living in Camberwell and that his mother was last known to be living in Gambia. There is no evidence of any other relatives currently living in Sierra Leone. In these circumstances, I accept that the appellant would not have the assistance of any relatives in order to integrate. The appellant has no home, family or friends to ease any transition and the outlook would be bleak. Nonetheless, considering all relevant matters cumulatively, I conclude that while there are real obstacles to the appellant's integration, they fall short of being very significant. Accordingly, the appellant narrowly misses out on being able to satisfy Exception 1 to deportation. Nonetheless, I attach substantial weight to the extent of his ability to meet this Exception.

32. The next question to be considered is whether the effect of deportation would be unduly harsh upon the appellant's daughter, as required by Exception 2. In *HA (Iraq)* [2022] UKSC 22 and *KO (Nigeria)* the Supreme Court endorsed what the Upper Tribunal said in *MK* (section 55 – Tribunal options) [2015] UKUT 223 (IAC) [at 46] that unduly harsh 'does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher.' The Supreme Court also endorsed the finding of the Court of Appeal in *HA* that undue harshness should not be evaluated with reference to the distress that 'any child' might face when their parent is deported as to apply such a notional comparator would be contrary to s55 of the Borders, Citizenship and Immigration Act 2009.
33. The focus of the appellant's case is the likely emotional impact on E owing to the appellant's central role in E's life since he was released from prison in 2012. Even prior to his release, the appellant had built a relationship with E during visits and opportunities to read to her. E's mother, EB, gave compelling evidence regarding the appellant's parental involvement since his release which includes seeing E several times a week, collecting her from school, maintaining continuous contact with her, consistently paying a significant sum each month for all her expenses which covers her private tuition as well as ensuring that E's brother is not left out by taking him out, buying him items and ferrying him to football matches. EB stated that she 'thanked God' for the appellant's warm relationship with E. She described the appellant as a gentle father who spoils E, is present, knows everything about her and always maintains communication. EB, who works part-time as a carer, explained that she did not think they would be able to manage financially without the appellant's help. More importantly, when asked how she thought E would feel if the appellant were to be deported she stated that she would be 'devastated' and that such an outcome would be 'catastrophic.'
34. EB described incidents when she had called on the appellant to help her with protecting and guiding E in the last year or two regarding issues arising during her teenage years and that owing to that bond, she was 'coming along nicely' with her studies. EB also spoke of the financial impact on E in that, his deportation would have a 'huge effect.' She said that it was only because of the appellant's financial support that she could afford what they had at the moment and without it she would struggle with rent and Council Tax as well as the expenditure for E. She added that she received no consistent maintenance from the father of her son.
35. There was no challenge to EB's evidence. I found that she gave a credible account of the appellant's involvement in E's life. I accept her evidence of the likely feeling of devastation this would have on E, given the very close relationship he has with E. Taking E's interests as a primary consideration, I am satisfied that it is in her best interests for the appellant to remain in



the United Kingdom to enable their relationship to continue in the same vein. While the harm envisaged to E caused by the appellant's deportation is of an emotional nature, this is no less significant than other forms of harm, applying *MI (Pakistan)* [2021] EWCA Civ 1711[159]. Furthermore at 49 of *MI* the the court rejects the notion that evidence of psychological injury would be required

There is no requirement for such harm to amount to recognised psychiatric injury before it can be considered relevant to meeting the "unduly harsh" test.

36. Owing to the vintage of the decision letter, the question of undue harshness was not addressed by the Secretary of State. Ms Cunha's arguments both oral and written contended that the deportation of the appellant would not be unduly harsh on E. By contrast, it was accepted at [31] of Ms Cunha's skeleton argument that it would be unduly harsh for E to accompany the appellant to Sierra Leone.
37. Ms Cunha did not dispute that the appellant had a genuine and subsisting relationship with E. Indeed, there was ample evidence from EB, both oral and written to that effect which supported the appellant's account of what I found to be an exceptionally close relationship to his daughter, as well as close relationship with E's brother.
38. Ms Cunha suggested that in the future, the effects of the appellant's deportation could be mitigated once E is of an age where she can travel independently. It is the position at the date of the hearing which is relevant given that E has just turned sixteen. I heard credible evidence to the effect that E's mother would not permit her to travel alone to Sierra Leone. I further accept that EB and E are not in a financial position to travel to Sierra Leone so that E can visit the appellant.
39. It is the case that it was only after his release from prison in 2012, that the appellant established a strong bond with E. The deportation of the appellant now will abruptly sever that family life which has been built up over more than a decade since his release from prison. E has been raised by two parents who are equally committed to her care and upbringing and the removal of the appellant from the equation exposes her to a series of emotional and financial difficulties. Considering all the circumstances including but not limited to E's extremely close relationship with her father and the fact that she is unlikely to see him again until she is a self-supporting adult, I find that the deportation of the appellant would be akin to bereavement for E. I attach very significant weight to the devastating emotional harm likely to caused to E and find that this renders the deportation of the appellant unduly harsh.
40. That the appellant narrowly missed meeting Exception 1 and met Exception 2 is insufficient for him to succeed in his appeal owing to the length of his prison sentence. He must demonstrate that there are very compelling circumstances over and above the Exceptions to deportation, albeit the ability to meet the Exceptions must be considered in conjunction with other factors, applying *NA (Pakistan)* [2016] EWCA Civ 662 at [32].

41. It is trite law that it will be only be rare cases where a foreign national offender will be able to show the existence of very compelling circumstances and that the public interest in deporting offenders will almost always outweigh considerations of private or family life in such a case , applying *Hesham Ali* (Iraq) [2016] UKSC 60 at [46]. However, the weight to be attached to the public interest must be approached flexibly, applying *Akinyemi* [2019] EWCA Civ 2098, at [39]

The correct approach to be taken to the 'public interest' in the balance to be undertaken by a tribunal is to recognise that the public interest in the deportation of foreign criminals has a *moveable* rather than fixed quality. It is necessary to approach the public interest flexibly, recognising that there will be cases where the person's circumstances in the individual case reduce the legitimate and strong public interest in removal. The number of these cases will necessarily be very few i.e. they will be exceptional having regard to the legislation and the Rules. I agree with the appellant that the present appeal is such a case.

42. I have taken into consideration the very high threshold involved as well as that the term compelling was approved as meaning circumstances which have a 'powerful, irresistible and convincing effect in *Garzon* [2018] EWCA Civ 1225.
43. In making an assessment of this extremely demanding test, I have undertaken a wide-ranging holistic evaluation of all relevant factors including those assessed in the context of the Exceptions to deportation, including an application of the principles in the Strasbourg authorities.
44. I have carefully considered the nature and seriousness of the index offence committed by the appellant as well as his earlier offending which I set out below.
45. The appellant began committing criminal offences within a year after his arrival in the United Kingdom. During 1998, the appellant was convicted for failing to provide a specimen for analysis, was fined £150 and disqualified from driving for 12 months. During 1999, he was convicted of driving whilst disqualified without insurance for which he received a community service order and was disqualified from driving for two years and in the same year he was again convicted for driving whilst disqualified, using a vehicle whilst uninsured and sentenced to five months' imprisonment and disqualified from driving. During 2004, the appellant was convicted of common assault and destroying property for which he was sentenced to 28 days in prison. Also in 2004, he was convicted of having an article with blade in a public place and was fined £500. In terms of the index offence, on 18 December 2007, the appellant was convicted of two counts of robbery and one count of attempted robbery and he was initially sentenced, on 13 February 2008, to an indeterminate sentence with a minimum term served before consideration of release of three years. In relation to the index offences of robbery, the appellant mugged or attempted to mug lone women at night and I have taken into consideration that the sentencing judge, took into account thirty-two other offences, mostly of theft and robbery. The indeterminate

sentence was quashed by the Court of Appeal on 5 November 2012 and replaced with a six year custodial sentence. The offences committed by the appellant are undoubtedly of a very serious nature.

46. I remind myself that the deportation of criminals is in the public interest not only for reasons of the protection of the public, the prevention of crime but also the wider policy considerations of deterrence as well as to mark the public's revulsion at an offender's conduct, applying *Danso* [2015] EWCA Civ 596 at [20].
47. Considering factors which appear on the appellant's side of the balance sheet, the appellant has now been residing in the United Kingdom for over twenty-five years, having lawfully entered and extended his stay. A period of fifteen years have elapsed since the appellant's conviction and more than a decade has passed since the appellant's release from prison without any further offending. Upon his release from prison in 2012 the appellant was assessed by the Parole Board as having a low risk of reoffending. The appellant has proved that he has rehabilitated not only because he has not offended over a long period of time but because he is supporting himself and his child from gainful employment and plays a meaningful role as a father.
48. Nonetheless, rehabilitation cannot in itself constitute a very compelling circumstance and, applying *Velasquez Taylor* [2015] EWCA Civ 485 at [21], I note that a case is likely to be rare in which rehabilitation could make a significant contribution.
49. The Court of Appeal in *CI(Nigera)* and *Garzon*, treated rehabilitation as a relevant factor capable of attracting some weight and that approach was endorsed by the Supreme Court in *HA (Iraq)* at [58]:

In a case where the only evidence of rehabilitation is the fact that no further offences have been committed then, in general, that is likely to be of little or no material weight in the proportionality balance. If, on the other hand, there is evidence of positive rehabilitation which reduces the risk of further offending then that may have some weight as it bears on one element of the public interest in deportation, namely the protection of the public from further offending

50. I find that the appellant's case is one of those rare occasions where there is sustained evidence of positive rehabilitation. The appellant, while genuinely remorseful, has explained that he carried out the offences of robbery offences while he was addicted to crack cocaine in order to fund his drug habit. The appellant is now clean of drugs and supports himself from his employment as an auto technician. He is also an involved and responsible parent to his daughter. None of these developments are of a short-term nature and I accept that this evidence of positive rehabilitation is deserving of some weight, albeit solely in terms of reducing the weight to be placed on the protection of the public from further offending.
51. Mr Youseffian's submissions focused on the delay in the respondent making the decision to deport the appellant, which, he argued, allowed the

appellant to rehabilitate, had strengthened his family life with his daughter and reduced the weight to be placed on the issues of public revulsion and the prevention of reoffending.

52. The period of delay in this case dates from November 2012 when the Court of Appeal substituted an indeterminate sentence for one of six years imprisonment. The decision to deport the appellant was made on 23 July 2018. For the following reasons, I accept that the appellant did not make any significant contribution to the delay. While a decision to deport the appellant was initially made on 5 November 2013 it was withdrawn on 22 October 2014 after the appellant lodged an appeal. Nothing further was heard from the respondent until March 2016, when she sent the appellant a letter requesting representations. At this point over three years had passed since the outcome of the appellant's appeal against sentence, which is in itself a very significant delay.
53. The appellant has been candid in accepting that he did not respond to the respondent's request for representations. Nor did he respond to a second request for information sent on 26 April 2016 in which he was given 20 working days to respond, following which a decision would be made. The respondent could have made a decision after the 20 day period elapsed but did not do so for a further 2 years and 3 months. I calculate that the appellant's contribution to the delay of five years and 8 months in the respondent making a decision to deport him, was three months at most.
54. I consider that the public interest in the appellant's deportation is reduced somewhat owing to this delay. In this I am guided by what was said on this topic at [42] of *MN-T(Colombia)*[2013] EWCA Civ 893.

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.

55. While the appellant's circumstances are not entirely on all fours with that of the claimant in *MN-T*, I find that the delay reduced the public interest in deportation whilst also increasing the appellant's deepening bond with his daughter, together with enabling him to demonstrate rehabilitation. Ms Cunha argued, in her skeleton argument, that weight had been attached to the delay in assessing the exceptions and this nullified the weight to be attached to the matter in respect of section 117C(6). This is simply not the case and in any event I note what was said in *Reid* [2021] EWCA Civ 1158 at [59] that 'delay will usually be of little or no significance' as a factor making deportation unduly harsh to the qualifying child. The findings above relating to Exception 2 take into account the effect of the delay on the appellant's relationship with his daughter but are made without



2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is “sent’ is that appearing on the covering letter or covering email

## 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

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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 13<sup>th</sup> 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