



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00775/2014

THE IMMIGRATION ACTS

Heard at Field House
On 18 June 2015

Determination & Reasons Promulgated
On 10 August 2015

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

GN
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr I. Jarvis, Senior Home Office Presenting Officer

For the Respondent: Mr N. Leskin, Solicitor, Birnberg Peirce & Partners

DETERMINATION AND REASONS

1. The Appellant is a national of Ghana, born on 31 May 1970. She arrived in the United Kingdom on 5 March 1976, aged 5, as the dependant of her father and was granted Indefinite Leave to Remain in 1979. On 11 April 2014, the Secretary of State decided to make a deportation order against her under the provisions of section 32(5) of the UK Borders Act 2007. This was following her conviction at Harrow Crown Court on 13 August 2010 of one count of theft and on the same day at Blackfriars Crown Court of one count of theft, one count of battery and breach of a suspended sentence, in respect of

which the Appellant was sentenced to a total of 21 months imprisonment. The sentencing Judge noted that the offences “*seem to me to have a common matter, stealing from a person in order to fuel your addiction to drugs.*” The Appellant did not appeal against her conviction or sentence.

2. She was then served with an ICD 0350AD liability to deportation letter to which she responded by stating that she had lived in the United Kingdom since the age of 6, her parents were British and she had a daughter, A, born on 30 January 1998 who was being cared for by her step-grandmother, CN. On 5 December 2011, after her release on bail, the Appellant was convicted of theft, possession of an offensive weapon and making false representations to make gain, in respect of which she received a community order for 12 months and a drug rehabilitation requirement, with immediate effect. The Appellant entered residential rehabilitation on 5 December 2011 and completed this on 10 September 2012. It was accepted that she has not used drugs or committed any further offences since.

3. The Appellant appealed against the decision to make a deportation order and her appeal came before First Tier Tribunal Judge Brown for hearing on 13 November 2014, when he allowed the appeal under the Immigration Rules and with reference to Article 8 of the ECHR. The Secretary of State sought and obtained permission to appeal against this decision and following a hearing on 30 January 2015, Upper Tribunal Judge Kopieczek found that the First Tier Tribunal Judge had made a material error of law in concluding that it would be unduly harsh for the Appellant’s daughter either to live in Ghana or to remain in the United Kingdom were the Appellant to be deported [30] and that he further erred in law in failing to apply the correct test *viz* whether there were *very* significant obstacles to the Appellant’s integration into Ghana, the word “very” being more than mere surplusage [32]. A full copy of the decision dated 17 March 2015 is appended to this determination. The appeal was re-listed for hearing by the Upper Tribunal on the basis that the findings of fact by the First Tier Tribunal were to stand, except insofar as those findings are infected by errors of law.

4. The adjourned hearing came before the Upper Tribunal for hearing on 18 June 2015. Mr Jarvis provided us with copies of the decisions in AM (s 117B) Malawi [2015] UKUT 0260 (IAC); AR (Pakistan) [2010] EWCA Civ 816; Bakaray Danso [2015] EWCA Civ 596; Joseph Grant v United Kingdom (Application no. 10606/07) and a copy of the Appellant’s PNC record. Mr Leskin provided us with copies of the Immigration Directorate Instructions “Chapter 13: criminality guidance in Article 8 ECHR cases” and judgments of the Court of Appeal in AQ (Nigeria), TH (Bangladesh), CD (Jamaica) [2015] EWCA Civ 250 and AJ (Angola) [2014] EWCA Civ 1636.

5. In respect of the findings of the First Tier Tribunal that were to be preserved as not infected by error of law, Mr Jarvis accepted that the finding that the Appellant is socially and culturally integrated in the UK is to stand [39] and the finding that the Appellant enjoys a genuine and subsisting relationship with her daughter [20]. Mr Leskin in his skeleton argument at [63] agreed but further drew attention to the following findings: that the Appellant has lived lawfully in the UK for over half her life (now 39 years out of 45) [30] and noted that the evidence before the First Tier Tribunal was not disputed to any extent.

The oral evidence

6. The Appellant's statement was considered to stand as her evidence and she was then cross-examined by Mr Jarvis. The Appellant confirmed her address. She confirmed that she still has involvement with Westcliffe House (where she was in residential rehabilitation) in that she speaks to the therapist, PB. She confirmed that her accommodation was supported housing for those mainly who are homeless; that there was not much room at her mother's house and she felt that she needed more support in her recovery. She confirmed that she sees a counsellor every week at Westminster Drugs Project.

7. She said that her accommodation assists in budgeting and her key worker assists her with her degree, student finance and her wellbeing. They signpost her to various organizations and Westminster Drugs project is one of those. Mr Jarvis asked the Appellant how often she was subjected to drugs testing and she replied that this was random and the last test was at Christmas. The Appellant added that she had chosen that because it keeps her on her toes; that sometimes it is once a month but it is random.

8. She said that since her release from prison in July 2011 she had been living in accommodation where she has support. She said that she has family in London and that her mother lives 10 minutes away from her. She confirmed that her mother and father were originally from Ghana. Mr Jarvis acknowledged that there have been difficulties with the Appellant's father but asked whether her mother had contact with members of the Ghanaian community in London. The Appellant responded that her mother had relatives in London – aunties and uncles but she had no idea whether or not they visited Ghana. She said that her mother had last visited Ghana when her niece O was 1 – she is 4 now and that O lives here – she is her sister's child.

9. In answer to a question by Mr Jarvis, the Appellant stated that her mother had gone to Ghana on holiday for 3 weeks and had stayed in a hotel. She said that she did not know whether or not her mother had visited family members or friends. She denied that her mother talked about Ghana when she was growing up and said that her family is not like that. The Appellant stated that she did not even know she was not her real mother for a while and that there are things they do not say to her. She confirmed that her mother speaks Twi but that she did not speak or understand any Twi. She did not think that her brothers and sisters had any contacts in Ghana.

10. In respect of questions from Mr Jarvis as to how she supports herself, the Appellant stated that she works at McDonalds part time while she does her degree. She said that her family did not supply her with any money and that she had not asked them for money as they would not be able to afford it. She said she had not asked them. Mr Jarvis made reference to the letter from AK at page 12 and asked the Appellant whether she knew what he meant by her hard road and difficulties in her relationship with her daughter. She said that she did not know what he meant by that – if he meant the difficulties in getting to where she is now she understood because of the immigration issue but there was no issue with her and her child. She stated that she sees her daughter, "A", every day; that she lives just around the corner but they did not live together as there is not enough room.

11. Upon re-examination by Mr Leskin, the Appellant stated that she had no sense what Ghana is like as she had not been there since she was 5. Her mother does not really talk about stuff like that with her so she did not know about it. She said that she hardly saw relatives from Ghana – the relatives she sees are from England and live in different parts of London: this was mainly her cousins. Other relatives would come over to her mother's house from their house but she was not told about this and was not there when they came. She was not aware of people from Ghana who have visited. In respect of relatives in London and whether there were Ghanaian aspects to their life she stated that they go to work, come home and watch TV like everyone else. She did not recall how many times her mother went to Ghana on holiday. She did not recall her going to Ghana on holidays when she was growing up and she was always there in the house with them. She said that she had loads of friends who are Ghanaian because she was from Ghana and when asked to describe their way of life she said that they would go to work, go home and watch Eastenders.

12. She said that her immediate family would not be able to support her; that her mother did not work; her two brothers worked but they have children and they have to pay rent. She has one sister and she works but she has two children and has to pay her rent. She was asked about Mr K and difficulties with her daughter and she denied that they had difficulties in their current relationship. The Appellant was then asked to explain what it was like to come off drugs. She said that she had worked very hard to change her offending behaviour. The programme she had undertaken was therapeutic. She had had a good look at herself at Weston-super-Mare for 18 months. She said that coming back to London she had to establish with old acquaintances that she was not in that lifestyle anymore. She then said that coming off benefits and budgeting and financing her University was a challenge and that it was difficult to get work. She said that she had a National Insurance number but she always had to prove that she could work and employers do not want to get into trouble.

13. She said that she chose to go into supported housing because the rent was pretty low and the staff were helpful. She said that her immigration status remained a hurdle that she had to overcome. When asked how she intended to use the progress she had made so far she said that she could do volunteer work with ex-offenders so she could show it can be done and that it was possible to break the cycle of offending. She said that she planned on working with ex-offenders when she finished her degree and that she was waiting for her DBS (disclosure and barring service) check to come back so that she could volunteer. She said that SOVA (a charity that helps people steer clear of crime) were aware that she had previous convictions. She concluded by saying that her relationship with A was very good.

14. In response to our questions, the Appellant stated that she did not know if her mother had had visits from relatives from Ghana. She said that she did not see NA, the recovery outreach worker at North Westminster Drugs Project, any longer but now had someone called DM who she sees every week. She continues to speak to NA on the phone although she does not see her. A letter from a Volunteer Coordinator at SOVA dated 15.6.15 was handed up, which stated that it is a charity working in partnership with the London Probation Trust, HMP Belmarsh and London NHS Trusts supporting adult

offenders with lifelong psychological needs to reintegrate successfully into the community. The letter confirmed that the Appellant has completed 24 hours of training with them over 4 days and has 1 day left to go on 23 June before completion and that she is currently awaiting her DBS check before being matched with a client.

15. AK, a supported housing worker at the Appellant's accommodation, was then called to give evidence. He adopted his letter of 15 October 2014 [11-12]. He was asked about a comment in his original letter: "*Ms N has also worked hard to address the consequences of her behaviour on her relationship with her daughter. This continues to be a hard road to travel and not without its emotional blows*" and whether he was referring to her current relationship with her daughter and if not, what he was referring to. He responded that he was commenting on the whole of her past – the Appellant's drug and alcohol problems and periods of time away. He said that his experience of the Appellant over the last 23 months had been up and down and this was the same with all addicts and ex-addicts. He said that she had not gone back to her previous behaviour. When asked whether this meant that continuous support is needed he agreed, stating that it was a matter of knowing where to find it. He agreed that this applied generally as well as to her daughter and he was not aware of any specific problems with her daughter.

16. Upon cross-examination, when asked if he ever saw A himself he said that he may encounter her in the hallway or see her in the Appellant's room. When asked whether he knew how often the Appellant sees A currently he said that she says the contact is frequent. In respect of whether or not there a finite period that the Appellant could stay in her accommodation, given that she has been there for 23 months he said that she is doing a 3 year degree and that they would not push for re-housing whilst she is doing a full time degree. He said that typically people move after 2 years. In respect of where people move on to next, the witness stated that demand on accommodation was so high that most people have to leave the Borough; that there was a clearing house system but this was for rough sleepers and the Appellant is not in that category. He said that she would be likely to go into private residential accommodation and there are organizations that could assist.

17. He was asked to confirm whether the accommodation was strictly drug and alcohol free and the support that was offered in this respect and he responded that it was and whilst they were not specifically drug and alcohol workers they refer to the North Westminster drug project. He said that the Appellant came directly from rehabilitation and so she was engaged with them already. He said that he may provide liaison with workers at Westminster at a case conference. He stated that the Appellant is at University but she does not come from a background that equipped and prepared her for that and he supports her with that. He was asked if he was helping her to adapt and the witness agreed. Upon re-examination, AK confirmed that the Appellant pays her own rent and that she receives an educational grant as a student. She pays £126.50 a week in rent.

18. AN was then called to give evidence. She adopted her statement [6-7], which confirmed that she is the Appellant's daughter, born on 30 January 1998. In cross-examination she said that she and her mother were close and that she could tell her everything and anything and that she guides her. She confirmed that she lived with her

grandmother and that her grandmother has been there for her since her mother went to prison, that she is there to help and provide for her.

19. She stated that she saw her uncles and aunts every day at the house. She said that she knew that they did not have contact with anyone in Ghana. In respect of her mother's cousins she said that everyone in their family is based here and not in contact with Ghana. She was asked about her grandmother's visit fairly recently and whether she knew if she visits anyone in Ghana, to which she responded that she does not visit anyone, she just goes for a holiday. She did not know where her grandmother stays. She confirmed that she does not have contact with anyone in Ghana herself and that she had been living with her grandmother since the age of 9 and that she was now 17. She also confirmed that she visited her mother.

20. Upon re-examination, she said that her mother always come to her if something is bothering her and that she reassures her and tries to get her in a positive instead of a negative state of mind. She agreed that she gives her mother emotional support. In answer to our questions about the impact on her if her mother was not here she responded that her mother has been in prison and that she has turned her life around and that for her mother to be somewhere and have no support, she did not consider that it would be right. The question was repeated and the witness responded that it would have a big effect on her emotionally and in terms of her college work and she did not think she would be able to cope with things. She said that they would spend hours together after college. She would stay with her mother up until 10pm. They talk and watch TV. Sometimes they go out to eat.

Submissions

21. Mr Jarvis relied on his skeleton argument. He submitted that the Appellant has 30 convictions for 56 offences and so has an extensive criminal history. He acknowledged that this may be relatively low level compared to some cases but that there had been significant periods in prison spread fairly evenly over those years: from 1992 up to 2010. In respect of the Appellant's circumstances today, he accepted on consideration of the effect on her child that this would be significant but submitted when one looked at the bigger picture the public interest is significantly weighted against the Appellant, whether it be through contextual assessment of "unduly harsh" or outside the Rules. In respect of the private life aspect at paragraph 399 of the Rules there are various factors that require consideration. Mr Jarvis submitted that it may well be the case that the family do not obviously have contact with Ghana but that it was unlikely that the family have no connection with Ghana as is suggested. He submitted that it was not unreasonable to ask the Upper Tribunal to accept that it is usual human behaviour to maintain contact with the home country and that this was important to the diaspora.

22. He noted that there was no evidence from the Appellant's mother (we reminded Mr Jarvis that there was written evidence from CN at page 8 of the first bundle) but this was not supported by oral evidence and does not say anything about her visit to Ghana. It was further submitted that the burden of proof was on the Appellant and it was reasonable to consider it is likely to be the case that the family has contact with Ghana. There was no

evidence from the family about financial support. Even if this was temporary it was relevant to the practicalities on return to Ghana. The threshold was a demanding one, as set out in the Home Office guidance.

23. In respect of the question as to whether a person could have a private life on return to her country of origin, he submitted that, even if we find the Appellant does not by her family have any connection to Ghana this was not enough to answer the question of whether there are very significant obstacles to integration. He noted that there was new evidence in the bundle regarding education in Ghana, but submitted that this was not particularly material as the issue of whether she can pursue an education in Ghana is not really a question of integration but personal life rather than the essence of private life.

24. In respect of page 87, a Guardian article from 2013 which referred to difficulties in urban areas in Ghana and the need for more affordable housing to be built, he noted that this was just a news report and there was nothing up to date as to what has occurred since then. Whilst there may be slum dwellers there was insufficient information and it does not amount to a material impact on return. In respect of page 89 and the brief email from Mr Lawrence, which gives links relating to unemployment benefits, Mr Jarvis submitted that it does not deal with whether the Appellant herself could have access to benefits in Ghana and that no weight should be placed on the selective series of links contained in the email which showed a lack of neutrality. He submitted that difficulty in finding work was not a very significant obstacle to integration.

25. In respect of the Appellant's relationship with her daughter, A, he stated that it was not the Secretary of State's case that it would not be unduly harsh for A to go to Ghana, thus conceding paragraph 399(a). The question is whether it would be unduly harsh for the Appellant to go and A to remain in the United Kingdom - paragraph 399(b). He noted that there was now a good relationship between them but also between A and her grandmother and that, unusually, it was not her mother but another person who has played a significant role and was a mother figure for support and guidance. No doubt it would be upsetting for A but in the context overall given the Appellant's history in the United Kingdom it would not be unduly harsh in the full context of that picture.

26. With respect to the issues of deterrence and public revulsion, Mr Jarvis reminded us of the cost of offending and imprisonment and noted that the cost of rehabilitation is considerable. He made reference to the judgment of the European Court of Human Rights in Joseph Grant (Application no. 10606/07) and the Court of Appeal judgment in SS Nigeria [2013] EWCA Civ 550 and reminded us that special weight needs to be given to the public interest. He further reminded us that, following AM (Malawi) [2015] UKUT 0260 (IAC) no positive benefit can be taken from the fact that someone can speak English.

27. He further submitted that the Appellant was a drug addict whether in the United Kingdom or in Ghana. It may be said that there are support mechanisms in the United Kingdom not present in Ghana, but there was no evidence that the Appellant could not seek therapy or assistance in Ghana. He submitted that it sets the legal question in the wrong place and whilst relevant in a case like this it is not the most important factor and that, set into that legal construction, however impressed we are with what the Appellant

has done since 2011, it was not enough to outweigh deportation. With regard to paragraph 398(c) of the Rules that there were not very compelling circumstances over and above the Rules. We asked Mr Jarvis, in respect of the judgment in Danso (op cit) upon which he relied, whether there was a material difference between the rehabilitation of a sex offender and a drug addict and he submitted that there was not, that the Court of Appeal had held that no more weight should be given and that, whilst admirable it was not uncommon and so not compelling. It was necessary to look at the question of re-offending in the context of what was done rather than what will happen again. We do know that people recover and stop taking drugs and that is an ongoing task, but it is not so rare or unusual it could be compelling for the test under the Rules.

28. Mr Leskin relied upon his skeleton argument [both before the First Tier Tribunal [66-72] and at pages 64-65 of the updated bundle]. He submitted that it would be unduly harsh for A to remain in the United Kingdom without her mother. He accepted that she is now 17 and a half and the question was whether the effect of her mother being removed would be unduly harsh now. He acknowledged that it was necessary to look not just at the effect on her but also the serious public interest in deportation. He submitted that the issues when put in context are that the Appellant is A's blood relative and her "grandmother" is not a blood relative, given that she is the Appellant's stepmother. Three or four years ago it may not have been unduly harsh as her mother was a drug addict and was unable to look after her.

29. Mr Leskin submitted that the residence order for A was nothing beyond that and that it had expired at the age of 16 as a matter of law. He relied upon the issue of the four year delay by the Secretary of State. He submitted that this was relevant to the proportionality of the decision to deport. In respect of A, he submitted that this was a two way relationship as they rely on and support each other. In respect of the effect on her daughter and how hard it would be for her mother to be able to cope, the effect of how the mother would be able to live and what is happening to her mother would be important for A to know. When one looks at the effect on A one has to look at what is likely to happen to the mother in Ghana.

30. Mr Leskin acknowledged the public interest in deportation and the fact that the Appellant has committed a serious criminal offence but he submitted that she has turned her life around, that she was contributing to public life and intending to do so in the future. He submitted that the fact that she provided a positive benefit to the United Kingdom was relevant to the public interest. She was able to work with people as a peer mentor to help people mend their ways and there are not that many people who can do this and work in that capacity and in that role. He submitted that this was really important as a factor and that Danso and AR (Pakistan) were distinguishable as money had been spent, whereas the Appellant was putting back.

31. Mr Leskin submitted that there were very significant obstacles to the Appellant's integration in Ghana. Mr Jarvis indicated that he accepted that the finding at [31] of the First Tier Tribunal's determination was not infected by error of law and thus it was accepted that the First Tier Tribunal Judge had found there were significant obstacles to

the Appellant's integration into Ghana. However, the question was whether there were very significant obstacles to her integration.

32. Mr Leskin placed reliance on the Home Office guidance "Chapter 13: criminality guidance in Article 8 ECHR cases" at section 5.4.3 and submitted that the Appellant not only has all the problems referred to but is a drug addict and would not have the support upon which she relies not to re-offend. He further relied upon the list of factors at 5.4.6. He submitted that English was spoken in Ghana in addition to 9 other languages so, for example, if the Appellant could only speak English working in a shop and was not familiar with the other languages she would not get a job in retail and could not get a job in a shop. In respect of culture, even if the Appellant goes to Ghanaian parties in the United Kingdom it is not the same as in Ghana. She knows absolutely nothing of Ghana. The Appellant has not even travelled out of the United Kingdom since the age of 7 and that was on a school trip within Europe. She knows nothing of other countries let alone Africa.

33. In respect of her ability to use her education or skills developed in the United Kingdom to integrate, she did a nursery nurse course over 20 years ago but could not now work with children given her convictions, probably in any country. In respect of her training course as a peer mentor there was no evidence she would be able to obtain employment in Ghana, there was nothing to show those sorts of organizations were available in Ghana that did that kind of work. She currently works as a sales assistant in McDonalds which requires certain skill but she does not speak the local languages common in Ghana. Mr Leskin submitted that all of the paragraph 5.4.6. factors are in the Appellant's favour. In respect of paragraph 5.4.9 she has no friends or family members in Ghana. The Home Office have said she can get £750. She has no savings and no one else to help her. He acknowledged that the email from Mr Lawrence was not an expert report.

34. The Appellant would always be an ex addict and the fact that she would not have any support must be taken into account as showing very significant obstacles to her integration. He submitted that she still has considerable support in UK - weekly counselling, supported housing, the support of her family and her daughter gives her emotional and moral support. She would have none of that in Ghana. Mr Leskin referred to pages 117, 122 and 123 of the bundle, an NHS report "Road to Recovery." He further referred to the Patel report at 125-129, the summary recommendations at 12; 131 at [26] and page 140 at 4.58 and 4.61. He submitted that it was extremely likely that the Appellant would relapse into drug use because she would not have support and she would not be able to integrate into that country. He noted that drugs were available in Ghana and drug use was increasing: 2014 United States State Department report at pages 150 - 152. He further referred to the Guardian article about housing: 86-88 at 87; employment at page 94-97 and page 110 at paragraph 67 and page 111 in respect of corruption; education at page 83 regarding studying and fees. It was necessary to take account of the length of time the Appellant has lived in the United Kingdom.

35. Mr Leskin further submitted that there were exceptional circumstances meriting consideration outside the Immigration Rules. He referred us to the decisions in AJ Angola and AQ (Nigeria), TH (Bangladesh), CD (Jamaica). It was exceptional where somebody

has lived here for 39 years out of 45 years having come here at the age of 5 years of age. Responsibility for the Appellant must to some extent be in the United Kingdom as it is in the United Kingdom where she has grown up and has come to use drugs and commit offences. This was not to condone it in any way but there must be some responsibility and also in terms of spending the money to rehabilitate her. The Appellant has come an incredibly long way since coming out of prison and since going into rehabilitation and is now going to University.

36. He referred to [22] of AR Pakistan where the Appellant came to United Kingdom in his mid 20's. In the Appellant's case most of the money that needed to be spent has been spent already and now she is trying to pay that back by doing voluntary work. Danso [is distinguishable not just because he was a sex offender [at 20] which is not the case here but he was still in prison. In terms of future risk this is low as opposed to medium in the Appellant's case. Although there is no report on re-offending, it was submitted that time has shown itself and everyone says that she is making great progress: University report at 73 and the report of NA at 74-75. All of this distinguishes her case from the other cases that turn on their particular facts eg Joseph Grant.

37. In respect of the section 117 factors, Mr Leskin submitted that the Appellant speaks English and is financially independent. In respect of the impact of the delay it should be noted that the Appellant was in the United Kingdom lawfully and the judgment in EB Kosovo [2008] UKHL 41 applied. Mr Leskin took us to page 34 of the Appellant's bundle which is an extract from the GCID case notes starting on 14.1.11. He drew our attention to the fact that the Secretary of State had the gone to the Children's Champion three times and first two times decided not to deport the Appellant on the recommendation of the Children's Champion. It was not until 2014 that they made the decision to deport her. They accept the Appellant is integrated into the United Kingdom. Mr Leskin submitted that if the Appellant were a threat and the public revulsion was such that she should be deported, why has she been allowed to remain for an additional 3 years?

38. Mr Jarvis addressed the role of delay and submitted that there had been no delay in EB Kosovo terms, which was concerned with dysfunctionality and systemic collapse. He submitted that the GCID case record sheets show what happens behind the scenes and this is an organic process. The Secretary of State wanted to be clearer and conducted a nationality interview. There had been repeated contacts with the Children's Champion. The Secretary of State understood her legal duty and wanted to establish facts and make sure an action affecting a child is reviewed regularly. The reason it happened on a number of occasions is by June/July 2012 at 43 the law changed. There was a process of attempting to make the right decision. He did not deny that the relationship between the Appellant and her daughter had strengthened but the legal landscape had changed in the interim, which is relevant to context as is the strengthened public interest.

39. Mr Leskin submitted that the law changed in July 2012 and the caseworker concluded in October 2012 not to pursue deportation: page 54. There were no further changes in the law before the decision to deport was subsequently taken. Neither party was aware of whether or not there had been any further response from the Children's Champion. Mr Leskin requested that if minded to allow the appeal that the Appellant

should again be granted ILR otherwise it would seriously effect her education and studies and part of the reasons why she should be here. He drew our attention to Schedule 4 of the Immigration & Asylum Act 1999 at paragraph 21(5) and the power to give directions to give effect to a determination. Mr Jarvis submitted that in light of the decision in IT (Sierra Leone) [2010] EWCA Civ 787 we could only make a direction to give effect to our decision, so this would not apply.

The issues

40. We note that the evidence was not disputed before the First Tier Tribunal and Mr Jarvis did not seek to dispute any of the oral evidence put forward at the hearing before us, therefore, we proceed on the basis that the evidence put forward by the Appellant, her daughter, A and her support worker, AK is credible. We note the findings preserved from the First Tier Tribunal determination *viz* that the Appellant is socially and culturally integrated in the United Kingdom and that she enjoys a genuine and subsisting relationship with her daughter. The issues we are required to determine are therefore:

- (i) whether it would be unduly harsh for the Appellant to be deported to Ghana and for her daughter, A, to remain in the United Kingdom. The Respondent has accepted that it would be unduly harsh for A to live in Ghana [paragraph 399(ii)(a)(b)];
- (ii) whether there would be very significant obstacles to the Appellant's integration into Ghana [paragraph 399A];
- (iii) if neither (i) and (ii) apply, whether there are very compelling circumstances that outweigh the public interest in deportation.

The relevant legal provisions

41. The relevant provisions of the Immigration Rules are as follows:

"A398. These rules apply where:

- (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
- (b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

- (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
- (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
- (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported

399A This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.”

42. Sections 117A-D of the Nationality Immigration & Asylum Act 2002 provide as follows:

“PART 5A

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), “the public interest question” means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

- (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –
- (a) are less of a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
- (a) are not a burden on taxpayers, and
 - (b) are better able to integrate into society.
- (4) Little weight should be given to –
- (a) a private life, or
 - (b) a relationship formed with a qualifying partner,
- that is established by a person at a time when the person is in the United Kingdom unlawfully.
- (5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
- (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –
- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
 - (b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

- (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
 - (c) 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.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part –

“Article 8” means Article 8 of the European Convention on Human Rights;

“qualifying child” means a person who is under the age of 18 and who –

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

“qualifying partner” means a partner who –

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 – see section 33(2A) of that Act).

(2) In this Part, “foreign criminal” means a person –

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who –

(i) has been sentenced to a period of imprisonment of at least 12 months...”

43. The Immigration Directorate Instructions Chapter 13: criminality guidance in Article 8 ECHR cases, Version 5.0 28.7.14 provides at 3.5:

3.5 Unduly harsh

3.5.1 For general guidance on considering whether the effect of deportation would be unduly harsh, see section 2.5.

3.5(a) The public interest

3.5.2 When considering whether the effect on a child of deporting a foreign criminal is unduly harsh, the strength of the family life claim, including the best interests of the child, must be balanced against the public interest in deportation. As a general principle, the greater the public interest in deporting the foreign criminal, the more harsh the effect of deportation must be on the child before it is considered unduly harsh.

3.5.3 See sections 2.3 and 2.5 for guidance on how to consider the public interest in the context of the unduly harsh assessment...

3.5(c) Would it be unduly harsh for the child to remain in the UK without the foreign criminal?

3.5.10 To answer this question, it is first necessary to establish whether the child would be able to remain in the UK when the foreign criminal is deported.

3.5.11 The following is a non-exhaustive list of relevant factors to consider in order to determine whether a child could remain in the UK in the care of another person or whether the child would have no choice but to leave the UK with the foreign criminal:

- whether the child has a legal guardian, a family member who has a legal obligation to care for the child (for example, responsibility or a residence order) or an existing relationship with a family member;
- whether someone other than the foreign criminal is the child's primary or joint-primary carer and whether that person normally has day-to-day care and wider welfare and developmental responsibility for the child;
- whether the person who cared for the child while the foreign criminal was in prison would be able to care for the child when the foreign criminal is deported;
- whether it is reasonable to expect the other person to fulfil the role of primary carer (e.g. whether he has fulfilled that role in the past, whether he is able to care for the child, whether he cares for any other children or has done so before);
- whether there are any factors which undermine the ability of that person to act as the primary carer of the child or would suggest he is unsuitable (e.g. criminal convictions, concerns expressed by social services, etc.).

3.5.12 Whether or not another person would have to make a choice about working full-time or part-time or not at all and might need to arrange suitable childcare is not likely to be a determinative factor in his ability to care for the child, particularly in the case of someone with a legal responsibility towards the child, and particularly where family life was formed in full knowledge that the foreign criminal may not be able to remain in the UK (because his immigration status was unlawful or precarious, or because he was liable to deportation). All parents and guardians have to make difficult choices about how to balance their working lives and their parental responsibilities.

3.5.13 It is not appropriate to conclude that a child can remain in the UK in the care of another person who is himself liable to removal or deportation. If there is someone who would be able to care for the child in the UK but for having no immigration status then that person's status should be resolved before it can be determined whether it would be unduly harsh for the child to remain in the UK without the foreign criminal. Decision-makers must check whether the person has an outstanding application for leave to remain in his own right. If he does, decision-makers should liaise with the other caseworking unit to ensure that the application is decided before the foreign criminal's claim is considered. If the person is granted leave to remain then this will factor into the consideration of the unduly harsh question.

3.5.14 If the only way a child could remain in the UK if a foreign criminal is deported would be in the care of social services or foster care that is not already in place (excluding care provided by a family member or a private fostering arrangement), it will usually be unduly harsh for the child to remain in the UK without the person who is to be deported, unless there is evidence that the child's best interests would be better served in such care than in the care of the foreign criminal. However, consideration must be given to the age of the child and how long he is likely to remain in care.

3.5.15 If it is established that the child is able to remain in the UK when the foreign criminal is deported, the following is a non-exhaustive list of relevant factors to consider when assessing whether it would be unduly harsh for the child to continue living in the UK without the presence of the foreign criminal:

- whether there are any reasons (related to the foreign criminal's offending history, or other reasons) why it would be in the child's best interests to be separated from the foreign criminal;

- the age of the child;
- how in practice the child would be affected by the foreign criminal's absence;
- whether there is credible evidence that the foreign criminal's presence is needed to prevent the child from being ill treated, his health or development being significantly impaired, or his care being other than safe and effective;
- the extent of any practical difficulties the remaining parent or guardian would face in caring for the child alone (if he is not already effectively caring for the child alone);
- whether there is credible evidence that the child would lose all contact with the foreign criminal, e.g. because telephone and internet contact would not be possible and there would be no possibility of visits either to the country of return or a third country. If so, whether this is unduly harsh will depend on the severity of the foreign criminal's conduct, the nature of the relationship the foreign criminal has with the child, and the impact on the child of the loss of contact.

3.5.16 Where a child's parents or guardians have a choice about whether the child leaves or remains in the UK, it will not be appropriate for the decision to deport to prescribe any particular outcome for the child. It is the responsibility of the family to decide for themselves whether the child will accompany the foreign criminal overseas or whether to make suitable arrangements for the child to remain in the UK based on where they think the child's best interests lie. The decision to deport requires the child's parents or guardians to make this decision.

And *inter alia* at 5.4:

"5.4 Would there be very significant obstacles to the foreign criminal's integration into the country to which he is proposed to be deported?"

5.4.6 Decision-makers will need to consider the specific obstacles raised by the foreign criminal. They will also need to set these against other factors in order to make an assessment in the individual case. Relevant considerations include:

- familiarity with language and culture in the country to which the foreign criminal is to be deported;
- whether the foreign criminal has lived in the country to which he is to be deported, how long for, and how old he was when he left or last visited;
- whether the foreign criminal has family or friends in the country to which he will be deported to whom he should be able to turn for support to help him integrate into society on return;
- whether the foreign criminal or his family has hosted visits in the UK by family and friends from the country of return, or whether the foreign criminal has visited family or friends there;
- whether the foreign criminal has ties which could be strengthened on return even if they are not very strong ties at the date of decision;
- whether the foreign criminal received education or worked in the country to which he will be deported, or whether he has received education or developed skills in the UK which he could use to integrate into society on return;
- whether the foreign criminal has previously demonstrated an ability to integrate in a new place, e.g. if he came to the UK as an adult.

5.4.7 The degree of private life a foreign criminal has established in the UK is not relevant to the consideration of whether there are very serious obstacles to integration into the country to which he is to be deported.”

Our findings

Undue harshness

44. It is accepted that the Appellant falls within paragraph 398(b) of the Rules given her sentence of 21 months. The starting point is that the public interest requires the deportation of the Appellant unless it can be shown that paragraph 399 or 399A applies.

45. It is accepted that the Appellant has a genuine and subsisting relationship with her British daughter, A, who was born on 30 January 1998 and is thus over 17 years of age. The evidence is that A lived with her mother until she was 9 years of age. During that time the Appellant went to prison once or twice for short periods of time, when A would stay with her maternal step-grandmother, CN. In 2010, the Appellant agreed that CN should obtain a residence order in respect of A because of her drugs use. During the 18 months the Appellant spent in rehabilitation in Weston-super-Mare, from 5 December 2011 until 10 September 2012, they did not see each other but spoke daily on the telephone. Since the Appellant was released back into the community they have seen each other regularly and Mr Leskin described their relationship as “two way” as they rely on and support each other and we accept this. However, we note that this is distinct from a relationship of dependency by a daughter on her mother.

46. We note the Home Office guidance as set out in the IDIs at Chapter 13. Whilst we do not consider that we are bound by the guidance in the IDIs, we do consider that they contain useful guidance as to how, in the generality of cases, the question of “undue harshness” should be assessed and the IDIs inform our assessment in this appeal. Paragraph 3.5.2 notes that the strength of the family life claim including the best interests of the child, must be balanced against the public interest in deportation. It also sets out a general principle, that the greater the public interest in deporting the foreign criminal, the more harsh the effect of deportation must be on the child before it is considered unduly harsh. This involves the conduct of a proportionality exercise, weighing on the one hand, the severity of the offence(s) and length of sentence as part of the public interest consideration against the best interests of the child affected by the decision.

47. Paragraph 3.5(c) at 3.5.11 sets out a non-exhaustive list of relevant factors to consider in order to determine whether a child could remain in the UK and these include consideration of alternative carers. We note that A’s step grandmother, CN, had a residence order in place to care for her since the age of 9 and that A continues to live with CN. Therefore, alternative care arrangements are already in place for A’s care. We further note that A’s father, RO, has been diagnosed with schizophrenia and whilst she is in contact with him regularly, he has never been able to care for her.

48. Paragraph 3.5.15 sets out relevant factors to consider in respect of assessing undue harshness and these include: the age of the child; whether the foreign criminal’s presence is needed to prevent the child from being ill-treated or her health or development being

impaired; the extent of any practical difficulties the remaining guardian would face in caring for the child alone; whether there is credible evidence that the child would lose all contact with the foreign criminal eg because telephone and internet contact would not be possible and there would be no possibility of visits.

49. We have had regard to section 55 of the Borders, Citizenship & Immigration Act 2009 and the statutory guidance “Every Child Matters” published in November 2009 and the need to safeguard and promote A’s best interests as a child in the United Kingdom. In light of the fact that A is now over 17 years of age, together with our finding that she does not have a relationship of dependency upon her mother, having lived with and been dependent upon her step-grandmother since the age of 9 years of age, that whilst removal of the Appellant would, of course, be harsh we do not consider it would be unduly harsh for A to remain in the United Kingdom whilst her mother is deported to Ghana. We make this finding having had regard to all the evidence and circumstances before us and bearing in mind the public interest.

Very significant obstacles to the Appellant’s integration into Ghana

50. We now turn to consider the issue of whether the exception to the public interest in deportation as set out at paragraph 399A of the Rules applies. This is a three part test. It is not disputed that the Appellant has been lawfully resident in the United Kingdom for most of her life, having arrived at the age of 5 as the dependent of her father who had Indefinite Leave to Remain. The First Tier Tribunal Judge found that the Appellant was socially and culturally integrated into the United Kingdom and this finding is preserved. The Judge also found that there were significant obstacles to the Appellant’s integration into Ghana but he did not consider whether there were very significant obstacles.

51. We were taken by Mr Leskin to the Immigration Directorate Instructions at [5.4.6.] [set out in full at [43] above]. These set out the Respondent’s view of considerations relevant to consideration of whether there would be very significant obstacles to integration in the country of proposed deportation and comprise: familiarity with language and culture; whether the foreign criminal has lived in the country to which she is to be deported, how long for, and how old he was when she left or last visited; whether the foreign criminal has family or friends to whom she should be able to turn for support to help her integrate into society on return; whether the foreign criminal or her family has hosted visits in the UK by family and friends from the country of return, or whether the foreign criminal has visited family or friends there; whether the foreign criminal has ties which could be strengthened on return even if they are not very strong ties at the date of decision; whether the foreign criminal received education or worked in that country or whether she has received education or developed skills in the UK which she could use to integrate into society on return; whether the foreign criminal has previously demonstrated an ability to integrate in a new place, e.g. if she came to the UK as an adult.

52. We find, on the basis of the evidence before us that whilst English is spoken in Ghana, the Appellant is unfamiliar with the other local languages and her knowledge of Ghanaian culture is limited; whilst she lived in Ghana for the first five years of her life she has not lived there nor visited for the last 39 years; she does not appear to have either

friends or family in Ghana. There are extended family members there but we do not consider that she could turn to them for support in assisting her to integrate into society given that they are her stepmother's relatives and she has had no contact with them at all. There is no evidence before us that the Appellant's relatives in the United Kingdom would be willing or able to provide her with financial support if she were to be deported because they are unable to do so given their own financial circumstances. Given the Appellant's age when she left Ghana and the fact that all her immediate family members are long term residents of the United Kingdom and now British citizens we do not consider that she has retained any ties with Ghana. The Appellant was neither educated in Ghana nor has she worked there, given her young age on departure. Whilst she is at the end of the second year of an MSc in Criminology she has limited skills and education she could use to integrate, given she has not yet completed her degree and has very limited employment experience.

53. We note from the Immigration Directorate Instructions at [5.4.1.] that when assessing whether there would be "*very significant obstacles to the foreign criminal's integration into the country to which he is proposed to be deported*", the starting point is to assume that the foreign criminal will be able to integrate into his country of return, unless he can demonstrate why that is not the case. The onus is on the foreign criminal to show that there would be very significant obstacles to that integration, not on the Secretary of State to show that there are not. This is a fact specific consideration. We took a careful note of Mr Jarvis' submissions on this issue and of the evidence in respect of education, housing and employment within the Appellant's bundle. We have also considered all the factors put forward on the Appellant's behalf by Mr Leskin individually and cumulatively and we consider that the Appellant has shown, for the reasons set out at [52] above, in line with the Immigration Directorate Instructions at [5.4.6], that there would be very significant obstacles to her integration in Ghana, particularly given her very long lawful residence with Indefinite Leave to Remain in the United Kingdom of 35 years and the very young age of 5 at which she arrived.

54. We also consider that she would endure significant hardship in trying to establish herself in Ghana if she were to be deported. Whilst she has made serious progress in respect of her rehabilitation, we note AK's evidence that she would require ongoing support, which she currently receives. Her deportation to Ghana would also remove her support network and render her vulnerable to falling back on her drug addiction, which would also materially interfere with her ability to integrate into society there. For these reasons we conclude that there would not just be significant obstacles but very significant obstacles to her integration.

55. We have also considered sections 117A-D of the Nationality, Immigration & Asylum Act 2002. In respect of section 117B(2) and (3) we note that the Appellant speaks English and is able to support herself and pay the rent on her supported housing through part time working in McDonalds whilst she continues with her degree. In respect of sections 117B(4) and (5) we note that the Appellant entered lawfully and was granted Indefinite Leave to Remain in 1979, a status she retained until deportation action was commenced against her and consequently her private life was developed in that context. Having regard to the decision of the Vice-President in AM (S117B) Malawi however, the Appellant

can obtain no positive right to a grant of leave to remain from either s117B (2) or (3) and her private life is considered precarious under section 117B(5) from the time she commenced on a course of criminal conduct secondary to her drug addiction. However, on the facts of this case the Appellant also established family life with her stepmother from the age of 5 years and with her daughter over the past 17 years. We find that the same conclusion results from an analysis of section 117(C) of the NIAA 2002: Exception 1 set out at section 117C(4) applies. On the facts of this case the outcome under the Immigration Rules and upon consideration of section 117(C) is the same

56. We have also considered the case law submitted by both parties and we note that in AQ (Nigeria), TH (Bangladesh), CD (Jamaica) (25.3.15) Lord Justice Pitchford reiterated that MF (Nigeria) held that the amended Rules represent a complete code and the Article 8 proportionality assessment takes place within it and not outside or separate from it. Lord Justice Sales in AJ (Angola) held at 40 that the requirement that deportation appeals be assessed under the new Rules and through their lens is important as it seeks to ensure uniformity of approach and a safeguard to equal treatment within the scope of Article 8 but also seeks to ensure that decisions are properly informed by the considerable weight to be given to the public interest in the deportation of foreign criminals so as to promote public confidence in this sensitive area. Having found that the exception contained in paragraph 399A of the Rules applies, no additional proportionality assessment is, therefore, required within the Rules.

57. In light of our findings at [53] and [54] above, it is not necessary for us to go on to consider whether there are very compelling circumstances that outweigh the public interest in deportation *cf.* MF (Nigeria) v Secretary of State for the Home Department. We find that paragraph 399A of the Rules applies.

58. Mr Leskin requested that if we were minded to allow the appeal we recommend that the Appellant retains her previous status of Indefinite Leave to Remain. However, as Mr Jarvis pointed out, in light of IT (Sierra Leone) v Secretary of State for the Home Department, this is outside our jurisdiction as the issue of the length of leave to be granted is a matter for the Secretary of State.

59. The appeal is allowed because an exception to the automatic deportation provisions of the UK Borders Act 2007 applies ie. the Appellant's deportation would involve a breach of her human rights under Article 8 of the ECHR, applying the Immigration Rules with reference to paragraph 399A.

Decision

60. The decision of the First Tier Tribunal involved the making of an error on a point of law. That decision is set aside and the decision is re-made, allowing the appeal.

Anonymity

61. Given that these proceedings involve a child, we make an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Consequently, this determination identifies the Appellant's daughter and those associated with her by initials only, in order

to preserve her anonymity.

Deputy Upper Tribunal Judge Chapman

24 July 2015

Appendix: decision and reasons of Upper Tribunal Judge Kopieczek dated 17 March 2015:



IAC-FH-NL-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00775/2013

THE IMMIGRATION ACTS

Heard at Field House
On 30 January 2015

Promulgated

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Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GN

Respondent

Representation:

For the Appellant: Mr I Jarvis, Home Office Presenting Officer

For the Respondent: Mr N Leskin, Solicitor instructed by Birnberg Peirce & Partners

DECISION AND REASONS

1. The appellant in these proceedings is the Secretary of State. It is convenient however, to refer to the parties as they were before the First-tier Tribunal.
2. The appellant is a citizen of Ghana, born on 31 May 1970. A decision was made on 11 April 2014 to make a deportation order against her under the provisions of Section 32(5) of the UK Borders Act 2007. Her appeal against that decision came before First-

tier Tribunal Judge K W Brown on 13 November 2014 whereby he allowed the appeal under the Immigration Rules and with reference to Article 8 of the ECHR.

3. The decision to make a deportation order followed the appellant's convictions for two offences of theft and an offence of battery. In respect of those offences she received a total sentence of nine months' imprisonment. A suspended sentence of twelve months' imprisonment imposed on 24 July 2008 was activated to run consecutively, making a total sentence of 21 months' imprisonment.

Submissions

4. Mr Leskin raised a preliminary issue in terms of the grant of permission to appeal against the decision of the First-tier Tribunal. He submitted that because of the paucity of detail in the grant, it was not in fact a valid grant of permission. I was referred to the decision in MR (permission to appeal: Tribunal's approach) Brazil [2015] UKUT 00029 (IAC). It was submitted that the appropriate course is for the application for permission to appeal to be considered again by the First-tier Tribunal so that a valid decision can be made.
5. So far as that preliminary issue is concerned, I indicated at the hearing that in my judgement permission to appeal had validly been granted. My reasons for having come to that view are set out below.
6. So far as the substantive challenge to the First-tier Judge's determination is concerned Mr Jarvis, in summary, submitted that with regard to paragraph 399A of the Immigration Rules, the judge's assessment at [30] to the effect that the appellant was socially and culturally integrated in the UK was flawed. I was referred to the IDI's entitled "Chapter 13: criminality guidance in Article 8 ECHR cases" version 5.0 dated 28 July 2014 ("the IDI's"), in particular at paragraph 5.3.6. There it states that criminal offending will also often be an indication of lack of integration. Reference is also made in that paragraph to the relevance of the nature of the offending. It was submitted that the First-tier Judge had failed to engage with the fact that for 20 years the appellant had been involved in criminality and her offending had been associated with her addiction to illicit drugs. Although it appeared that the appellant's behaviour had improved since 2011, the rules required something more than that.
7. It was also argued that a further error of law is evident from [31] where the judge said that there were "significant obstacles" to the appellant's integration into Ghana when the appropriate test is that there should be "very significant obstacles". The matters referred to by the judge did not reveal very significant obstacles to her integration into Ghana. In the last sentence of [31] it is evident that the judge had no basis for concluding that the appellant's removal could 'challenge' the appellant's current attitude of mind to overcome "the significant problems of the past".
8. Similarly, the conclusion at [33] that the appellant has a genuine and subsisting relationship with her daughter, 'A', aged 16 years, was not one that was sustainable on the evidence. The consequence of the appellant's criminality and her drug-taking

had been that her daughter was being cared for by her 'grandmother', albeit that the grandmother 'C' is not in fact a blood relative of A. The relationship between the appellant and A was not a typical relationship between parent and child. Considerations such as who was caring for the child and making important decisions in her life should have been considered. The child's grandmother was providing day-to-day care for her.

9. Furthermore, the conclusion that it would be 'unduly harsh' for A to remain in the UK without the appellant failed to take into account the appellant's offending.
10. Mr Leskin submitted that the judge was entitled to find that there was a genuine and subsisting relationship between the appellant and her daughter. It was not necessary for her to live with her daughter and the rules do not require that no other person could be caring for the child for there to be a genuine and subsisting parental relationship. I was referred to the appellant's and her daughter's witness statements in terms of the nature and extent of their relationship. Mr Leskin submitted that it was not necessary for the judge to set out all the evidence which he had taken into account.
11. In relation to whether the appellant's removal would be 'unduly harsh' on the appellant's daughter, at [33] the judge did consider the matter more widely, including with reference to her daughter's carer not being an actual blood relative and with reference to what was said by the Children's Champion about the effect on her daughter of her removal. Furthermore, there is no basis for the proposition that in considering the phrase "unduly harsh" the judge had to consider the appellant's criminality. Otherwise, proportionality would have to be considered twice.
12. I was referred to the decision in AH (Sudan) [2007] UKHL 49 on the meaning of the expression 'unduly harsh'. Although that was a case about internal relocation, it was submitted that there was no reason why the phrase 'unduly harsh' should mean anything more in relation to deportation.
13. On the question of whether the appellant is socially and culturally integrated in the UK, notwithstanding her convictions, the European cases are relevant but the fact is that the appellant was nevertheless integrated into that part of society that she was involved in when she was offending. She had now in any event given up the use of illicit drugs, had undertaken a course and was a mentor. She was now of benefit to the country and it could not be said that she is not socially and culturally integrated.
14. Mr Leskin made reference to the IDI's and to the several factors that are set out at 5.4.6. The decision in Ogundimu [2013] UKUT 00060 (IAC) was also referred to with reference to the expression "no ties".
15. In reply, Mr Jarvis submitted that the expression 'unduly harsh' had to be considered within the context of the Immigration Rules. The decision in AH (Sudan) does not assist, because in deportation cases there are additional factors to be considered over and above those in refugee cases.

16. So far as integration is concerned, the European cases on the point talk about 'core values' of society and that is no different from the situation in the case of this appellant. It could not be said that she had integrated where she was associating with people committing the same sorts of crimes as she had committed. The Home Office guidance was further referred to.

My assessment

17. In considering paragraph 399 of the Immigration Rules the First-tier Judge was required to consider under paragraph 399(a) whether the appellant has a "genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK". In the Secretary of State's grounds it is argued that the appellant had not established such a parental relationship with her daughter. It is noted that the appellant's stepmother has a residence order in respect of A and takes care of her daily needs. It is said that there is nothing to establish that the day-to-day management of A's needs has transferred to the appellant or that she is now acting in the capacity of a parent. It was further submitted at the hearing before me that it was a consequence of the appellant's criminality and drug taking that her daughter has been cared for by C, the appellant's stepmother.
18. In the first place, I note that the decision letter of page 5, with reference to paragraph 399(a) states that "It is accepted that you are in a genuine and subsisting relationship with [A] a child who is under the age of 18 for reasons given below...". Furthermore, it is not apparent in the record of the submissions made to the First-tier Judge on behalf of the respondent that that position was resiled from on behalf of the Secretary of State.
19. In addition, whilst it is true that the appellant's offending and drug taking has caused the separation from her daughter, and a residence order having been made in favour of the appellant's stepmother, it goes without saying that parental relationships vary in their nature. There was nothing in the evidence before the First-tier Tribunal which indicated that the appellant had lost contact with her daughter. On the contrary, at [20] of the determination it is recorded that the evidence was that the appellant sees her daughter most days. At [22] the appellant's daughter's evidence is recorded as being to the effect that she has a close relationship with her mother.
20. In those circumstances, I am satisfied that Judge Brown was entitled to conclude as he did at [33] that the appellant does have a genuine and subsisting parental relationship with her daughter.
21. It is worth stating that it was conceded on behalf of the appellant that the First-tier Tribunal was required to determine the appeal in accordance with Section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), being an amendment introduced by Section 19 of the Immigration Act 2014. It was also accepted that the "new" Immigration Rules which came into force on 28 July 2014 were applicable. So much is clear from the skeleton argument at [5] that was before the First-tier Tribunal.

22. In consequence, the judge was required to make an assessment of whether it would be 'unduly harsh' for the appellant's daughter to live in Ghana, that is to say going there with the appellant, or to remain without the appellant in the UK.
23. At [33] Judge Brown concluded that it would be unduly harsh for A to live in Ghana with the appellant and that it would also be unduly harsh for her to remain in the UK without the appellant. The judge's reasons for coming to that view were that the appellant's stepmother is not a blood relative of A, albeit that there is a residence order. In addition, the advice of the Children's Champion was that the appellant's deportation would have a profound and negative impact on her daughter's long-term development and is likely to cause her daughter distress in the short-term. Judge Brown went on to conclude that it was not in the public interest that the appellant should be separated from her daughter "by reason of the implementation of the Deportation Order".
24. However, in my judgement there is merit in the submissions made by Mr Jarvis to the effect that the assessment of whether it would be unduly harsh requires, in effect, a contextual analysis. That is in the sense that the appellant's criminal offending and the public interest in deportation need to be considered when assessing the issue of undue harshness.
25. Mr Leskin sought to resist that submission, for example by submitting that there was nothing in the Immigration Rules which stated that "unduly harsh" must be given that contextual analysis. He submitted that if a proportionality assessment was required in this respect then proportionality would be looked at twice, in effect.
26. I am satisfied however, that whether an appellant's deportation could be considered to be unduly harsh within the meaning of the Immigration Rules and under Section 117C(5) of the 2002 Act does require a contextual analysis. It is not simply a question of making a judgement about the harshness of the deportation to the child, on its own terms, in a self-contained way. The qualifying adjective "unduly" does involve an assessment of the 'harshness' of the effect of deportation on the child with reference to the criminality in question.
27. It is useful to set out s.117C in full. It provides as follows:

"117C Article 8: additional considerations in cases involving foreign criminals

 - (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

(c) 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.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

28. Although Exception 2 under s.117C(5) relates to cases of imprisonment for terms of under four years, the range of criminality within that bracket could be considerable. Thus, on the analysis contended for on the appellant's behalf, it would make no difference if an appellant were sentenced, say, to a term of imprisonment of 12 months after having pleaded not guilty to an offence, or whether the person was sentenced to a term of imprisonment of four years after a guilty plea at the earliest possible opportunity, with the consequent significant discount in sentence from what would otherwise have been the appropriate term. The fundamental underlying public interest, in relative terms, would have no part to play in the assessment of undue harshness unless it was permissible to take into account the criminality of the parent. It could not viably be contended therefore, that because the 'undue harshness' test only applies within a specified bracket of offending in any event, the public interest is already inherent within the assessment.
29. Whilst I do not conclude that a wholesale repetition of the public interest considerations needs to take place at the stage of considering undue harshness, an assessment of that issue does at least require recognition that the public interest has a significant part to play, and that that public interest is to be judged in part by the offending.
30. That being the case, I am satisfied that Judge Brown erred in law in concluding that it would be unduly harsh for the appellant's daughter either to live in Ghana or to remain in the UK were the appellant to be removed. There is no recognition in the judge's conclusions in this context of the public interest taking into account the appellant's offending. That error of law is such as to require the decision to be set aside.
31. At [29] the judge referred to paragraph 399A and the requirement under 399A(c) that there should be "very significant obstacles" to the appellant's integration into Ghana. At [31] he stated that in his view "there are significant obstacles" to the appellant's integration. He noted that she had not lived there since the age of 5 and that there was no evidence of any familial connections there. He concluded that she had no

knowledge of Ghanaian culture and that she is unaware of her ability to continue with her education, concluding that the likelihood is that in the short term she would be unable to do so because she would need to find some form of employment to enable her to survive. He also found that there was a strong possibility that “the appellant’s current attitude of mind to overcome the significant problems of the past could be challenged”, although accepting that there was no specialist evidence before him in relation to that issue.

32. Whilst undoubtedly some of the matters identified are issues which could potentially have a bearing on the question of the appellant’s integration into Ghana, I am satisfied that Judge Brown erred in law in failing to focus on the threshold that the appellant has to meet, i.e. *very* significant obstacles to her integration into Ghana. Put simply, he did not apply the correct test, concluding that there were “significant obstacles” but not referring in his conclusions to the requirement that there be “very” significant obstacles. It cannot be said that the word “very” is mere surplusage. The appellant has to establish firstly, that there are obstacles to her integration into Ghana; and that those obstacles are not only significant but very significant. That involves a conclusion that something more than mere hardship must be established.
33. The judge's earlier correct identification of the requirement of “very significant obstacles” is not sufficient to reveal that he was aware that the appellant had to establish more than “significant obstacles”.
34. I do not consider that it could be said that the matters identified by Judge Brown at [31], or indeed elsewhere in the determination, are such as would indicate that any error of law in this respect was immaterial. There will be the need for an assessment of whether it could be said that there are “very significant obstacles” to the appellant’s integration into Ghana.
35. In relation to the question of whether it would be unduly harsh for the appellant’s daughter to be separated from her, or for her to remain in the UK without the appellant, as I indicated at the hearing I do not find the decision in AH (Sudan) of much assistance, that case being concerned with the question of internal relocation in the context of asylum. It may well be that some factual considerations in both types of case may overlap, but as a guide to the assessment of undue harshness within the context of deportation, the decision in AH (Sudan) does not assist.
36. In terms of Judge Brown’s conclusion that under the Immigration Rules and under Section 117C the appellant has established that she is “socially and culturally integrated in the United Kingdom”, I bear in mind the submissions made on behalf of the respondent, in summary to the effect that the extent of the appellant’s offending reveals that she is not integrated in that way. There is some parallel here with the European cases on removal of EEA nationals convicted of criminal offences, albeit that I was not referred specifically to any of them.
37. Mr Leskin argued that although the appellant had been committing crimes up to 2011, she was “integrated” into that part of society or that culture in which she was

involved in her offending. I reject that argument. The question of integration in these circumstances requires an assessment of the extent to which a person subscribes, adheres to or accepts, the norms and values of the society in which they live. By its very nature, committing criminal offences is indicative of a person who does not subscribe to those norms or values.

38. Nevertheless, I am not satisfied that there is any error of law in the judge's assessment in this regard. Whilst it is true that for a considerable period of time the appellant was involved in repeated offending, on the basis of the evidence that was before Judge Brown her offending started in 1989, according to the decision letter. No complete record of her offending history has been provided, as Judge Brown pointed out at [3]. On the assumption that her offending started in 1989, it is important to bear in mind that she arrived in the UK in 1976, aged 5. There would at least have been some integration between her arrival and her becoming involved in offending when aged about 18. Furthermore, the evidence before Judge Brown was that there has been no offending since December 2011, a period of three years prior to the hearing before the First-tier Tribunal. Perhaps more significantly, the evidence is to the effect that the appellant has started a degree course and at the time of the hearing was in her second year of study. She is said to then have been free from drugs, and in employment. At [19] there is reference to her having spent several weeks working with North Westminster Drug and Alcohol Service as a peer mentor. Furthermore, she has a daughter born in the UK, at the time of the hearing aged 16.
39. In my judgement all that evidence was a sufficient foundation for the judge to have concluded that the appellant is socially and culturally integrated in the United Kingdom.
40. However, for the reasons I have given, the judge did err in law in other respects, those errors of law being such as to require the decision to be set aside. I indicated to the parties that if that was my conclusion I was of the view that there would need to be a further hearing for the decision to be re-made. This is not a case in which it is appropriate for the matter to be remitted to the First-tier Tribunal.
41. The appeal will therefore be re-listed for further hearing before the Upper Tribunal. The parties are to note the directions given below.

DIRECTIONS

1. If either party wishes to adduce further evidence, the requirements of rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 must be complied with.
2. In relation to any witness whom it is proposed to call to give evidence, a witness statement must be filed and served no later than 14 days before the next date of hearing, the witness statement to stand as evidence-in-chief such that there is no need for further examination-in-chief.
3. In relation to any other evidence relied on by either party, it must be filed and served no later than 14 days before the next date of hearing.

4. The respondent is to use her best endeavours to furnish the Tribunal with a full record of the appellant's criminal offences.
5. The findings of fact made by the First-tier Tribunal are to stand, except insofar as those findings are infected by the errors of law. The parties will be expected to be in a position at the next hearing to make submissions as to what findings of fact can be preserved.

Anonymity

Given that these proceedings involve a child, I make an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Consequently, this determination identifies the appellant's daughter by initials only, in order to preserve her anonymity.

Upper Tribunal Judge Kopieczek

17/03/15