Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01581/2017

THE IMMIGRATION ACTS

Heard At: Field House
5th November 2018

Decision & Reasons Promulgated
On 28th January 2019

Before

UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

RB
(anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: **Mr S. Vokes, Counsel instructed by Maya & Co Solicitors**
For the Respondent: **Mr D. Clarke, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of the Democratic Republic of Congo (DRC) born in 1962. He appeals with permission the decision of the First-tier Tribunal (Judge James) to dismiss his human rights appeal. The effect of the First-tier Tribunal decision is that the Appellant is to be deported.

Anonymity Order

2. The Appellant is a foreign criminal and as such would not ordinarily benefit from an order protecting his identity. The appeal turns however on the presence in the United Kingdom of his British child. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders we are concerned that identification of the Appellant may lead to identification of his child and we therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Background and Matters in Issue

3. Before the First-tier Tribunal the parties' respective cases were as follows.

4. The Respondent submitted that it was strongly in the public interest to deport the Appellant. He has criminal convictions in respect of four dishonesty offences and between the years 1998 and 1999 received sentences of imprisonment totalling 6 years and 4 months in prison. In addition he is a serial immigration offender who has never held any form of leave to remain in the 27 years that he has spent in the United Kingdom, and who has shown a flagrant disregard for immigration control in that he re-entered the United Kingdom in breach of a deportation order

5. The Appellant does not deny the Respondent's assertions as to either his criminal record or immigration history. He submits however that in the particular circumstances of his case it would be a disproportionate interference with his Article 8 rights if he were to be removed from the country today. He asked the First-tier Tribunal to place particular weight on the presence in the United Kingdom of his partner and daughter, both British nationals. The salient points to be made about those relationships are that:

   a. The Appellant has been in a relationship with his partner for 15 years;

   b. Their daughter A was born in 2005 and she has always lived with both parents;

   c. In 2015 the Appellant's partner was diagnosed with incurable bone cancer. The medical evidence indicates that her treatment is finished and she must now live with, and manage the condition;

   d. Her illness has meant that it has fallen to the Appellant to act as primary carer for A;

   e. It is submitted that in the circumstances it would strongly be in the child's best interests if her father were to be allowed to remain in the United Kingdom;

f. Neither mother or daughter could safely live in the DRC, nor would it be reasonable to expect them to do so, given A's level of integration here, and her mother's illness.

The Appellant relied on these facts to submit that it would be 'unduly harsh' for A if he were to be removed; he further submitted that the particular circumstances arising from his partner's illness mean that there are 'exceptional' and 'compelling' circumstances over and above that matter.

The Decision of the First-tier Tribunal

6. The 'findings and conclusions' section of the determination begins by setting out the Appellant's history of non-compliance and criminality. It then records and considers the five reasons advanced by the Appellant to demonstrate that there are compelling circumstances in his case.

7. First, he has not re-offended since he re-entered the United Kingdom in November 2001 and there is a low risk of him re-offending. The Tribunal finds this to be a neutral factor since not committing crime is what is ordinarily expected of any resident.

8. Second, the Appellant relied on the fact that at the date of the hearing before the First-tier Tribunal he had lived in the United Kingdom for 26 years. In his first 9 years of residence he was waiting for resolution of his initial asylum claim. The Tribunal was not satisfied that this was a factor that carried any weight at all, given that the Appellant has not had any leave at any point during his residence here.

9. Third, the Appellant had to wait four and half years for his revocation application to be dealt with. The Tribunal was not satisfied that this delay in any way diminished the weight to be attached to the public interest. That was because the Appellant had entered the United Kingdom in breach of the deportation order.

10. Fourth, the Appellant's partner has been diagnosed with IgG kappa multiple myeloma. The determination records at paragraph 32 that she has responded well to treatment and that she has been in remission since 2015. The Appellant's partner gave evidence that she needs help with certain tasks, but she is currently working in a healthcare role at a hospital. The Tribunal does not accept that she would be able to do that work if she was in need of help herself. The Tribunal further notes that there was no evidence produced in respect of whether assistance could be offered by public authorities.

11. Fifth, the Appellant has a child. The Tribunal notes the report prepared by an independent social worker and accepts that it was "undertaken in a professional manner" but does not accept its conclusion that the Appellant is his daughter's primary carer, since little detail is provided. The comments made by the child

regarding her father are those you would expect to hear from a young person whose father is facing deportation.

12. At paragraphs 34-35 the Tribunal reaches its overall conclusions. It refers to the 'undue harshness test' and directs itself as follows: "clearly a measure of harshness can be anticipated and for the purposes of s117C(6) I must go over and above that test". The Appellant has breached a deportation order and shown flagrant disregard for immigration law. In the time that he established his family life in the United Kingdom he knew that he had no right to be here. While it is wrong to punish his daughter for his mistakes it is equally wrong that the Appellant should be rewarded with being permitted to remain here by virtue of his non-compliance. Even considered cumulatively the factors identified by the Appellant do not amount to "very compelling reasons"; nor are the circumstances exceptional. For those reasons the appeal was dismissed.

'Error of Law'

13. At a hearing before Judge Bruce on the 3rd July 2018 the Appellant challenged the decision of the First-tier Tribunal on the following grounds:

    (i) The finding that it would not be unduly harsh for A to have her father deported is unsafe because the Tribunal did not begin by making a finding on whether or not it would be in her best interests for her father to remain in this country;

    (ii) The determination does not follow the appropriate structure in terms of the relevant legal framework;

    (iii) The Judge erred in declining to treat the delay as a significant factor. The Appellant made his application for revocation in July 2012 and waited approximately four and half years for a decision. This should have been treated as diminishing the weight to be attached to the public interest. Reliance is placed on the Court of Appeal decision in MN-T (Colombia) v Secretary of State for the Home Department [2016] EWCA Civ 893.

14. By a 'rule 24 response' dated the 28th June 2018 the Respondent indicated that she accepted that ground (i) was made out. The determination does not address A's best interests, and as a result any findings on the 'exception' – i.e. whether it would be unduly harsh on her to deport her father – cannot have been safely made.

15. Before Judge Bruce Mr Clarke resisted the remaining grounds. Whilst he agreed that the determination had not followed an orthodox structure, he did not accept that this was a material error. The Tribunal had considered all relevant factors and it was open to it on the facts to hold that the Appellant had failed to demonstrate compelling, or exceptional factors. As for ground (iii) the Respondent submits that delay can only logically be held to diminish the weight to be attached to the public interest where the individual concerned was waiting to have his status issues resolved. There was no 'waiting' involved in this case since the Appellant has been

well aware, since 1999, that he is subject to a deportation order. The Secretary of State relied on the decision in SU v Secretary of State for the Home Department [2017] EWCA Civ 1069.

16. By a written decision dated the 13th July 2018 Judge Bruce set the decision of the First-tier Tribunal aside in the following terms:

> "I need not deal with ground 1 in any detail at all since the Respondent finds it to be made out. The First-tier Tribunal determination contains no findings at all on which of the possible outcomes might be in A's best interests. Section 55 of the Borders Citizenship and Immigration Act 2009 imposes a duty on all decision makers to consider the welfare of the child in such circumstances. Without a finding of where her best interests lay, the Tribunal's balancing exercise, when assessing 'undue harshness' was incomplete. Without a proper assessment of that, it is difficult to see how the Tribunal could have undertaken a holistic evaluation of whether there were compelling circumstances over and above that matter, or indeed whether the facts were exceptional. This brings me to ground (ii), which must be read with ground (i). Had the Tribunal set out the appropriate legal framework, and adopted a methodical approach to each stage of its enquiry, it would not, perhaps, have omitted to comply with the statutory duty upon it to conduct a careful analysis of A's circumstances. I am satisfied that grounds (i) and (ii) are made out and that they go to the heart of the decision in the appeal. It follows that the determination must be set aside for error of law.
>
> Ground (iii) is without merit. In MN-T (Colombia) the court held that lengthy delay in taking a decision to deport can constitute an 'exceptional circumstance' within the framework of s117C of the Nationality, Immigration and Asylum Act 2002. That was in the context of a woman convicted in 1999 and not notified of her liability to deportation until 2008. This case is quite different. The Appellant was made subject to a deportation order in 1999, very quickly re-entered the country when he knew that he was forbidden by law from so doing, and remained here unlawfully for some 11 years before bringing himself to the attention of the immigration authorities. He was fully aware at all times that he should not have been here. The delay cannot logically be held to lessen the public interest in deporting him. It can only be relevant to the length of time that he has developed his family life and looking at the decision of the First-tier Tribunal I am unable to say that the Tribunal was under any misapprehension as to the length of time that the Appellant has been living with his partner and A".

The Re-Made Decision

17. The hearing was resumed for remaking on the 1st October 2018 before this panel. We heard evidence from the Appellant's daughter 'A', and from his partner, 'N'. At the close of their live evidence we indicated to the representatives that we considered it necessary to adjourn the proceedings. Whilst we were given a good deal of medical evidence relating to N there was no recent indication from her Consultant Haematologist about her current prognosis. A letter from the family GP indicated that he was not aware that N had been given a 'life-span prognosis' whereas N herself testified that she had. A short adjournment followed before the hearing was

resumed for final submissions. During the hiatus the decision of the Supreme Court in KO (Nigeria)(FC) v Secretary of State for the Home Department [2018] UKSC 53 became available, so that upon resumption of the hearing the parties were able to address us on the effect of that decision, if any, on our own.

18. We reserved our decision which we now give.

The Legal Framework

19. The legal framework is uncontroversial.

20. On the 12th November 1998 the Appellant was convicted of conspiracy to defraud and sentenced to 5 years imprisonment, with the court making a recommendation that he be deported. The Secretary of State signed a Deportation Order on the 20th September 2001 pursuant to s3(5)(a) of the Immigration Act 1971:

> '(5) **A person who is not a British citizen is liable to deportation from the United Kingdom if—**
>
> **(a) the Secretary of State deems his deportation to be conducive to the public good**; or
>
> (b) another person to whose family he belongs is or has been ordered to be deported'

(**emphasis added**)

21. On the 4th July 2012 the Appellant applied, on human rights grounds, for that Order to be revoked. By the time that a decision was reached on that application on the 16th January 2017[1], Part 5A of the Nationality, Immigration and Asylum Act 2002 was in force, having been introduced by s19 of the Immigration Act 2014. This provided a definition of the term 'foreign criminal':

> '**117D Interpretation of this Part**
>
> …
>
> (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,**

[1] An initial decision to refuse to treat the application to revoke as a 'fresh human rights claim' was challenged by way of judicial review, and subsequently withdrawn by the Secretary of State.

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.'

And set out the public interest considerations to be applied when considering the deportation of a 'foreign criminal':

'**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.'

22. The provisions of s117C are reflected in Part 13 of the Immigration Rules at paragraphs 398 and 399:

'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; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

23. The high threshold of 'compelling circumstance over and above' those identified in paragraphs 399 and 399A is to be applied in two circumstances. First, where a foreign criminal cannot invoke any of the 'exceptions' because he does not have the requisite Article 8 family or private life in the United Kingdom. Second, as in the instant case, where such relationships exist but the foreign criminal has received a sentence of at least four years imprisonment. In respect of the former category of deportee, there are no family members to consider. The term "over and above" can therefore only be

read to mean that the individual must establish a *greater than equivalent* level of detriment to those who can rely on paragraphs 399 or 399A. In respect of the latter category, it is open to the deportee to demonstrate that the 'greater then equivalent' level of detriment is established with reference to those 'baseline' tests in the Rules. Before us Mr Vokes accepted that in this case his starting point must be to show that it would be 'unduly harsh' for A if the Appellant were to be deported. It is for this reason that we must have regard to the recent guidance provided by the Supreme Court in KO (Nigeria):

> "the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in *IT (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more.
>
> [at 23].

24. This makes it clear that 'undue harshness' is a high test. Any child who loses a parent will likely suffer detriment as a result, but here "one is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent". That underlines that the public interest in deporting a criminal who has received a sentence of four years or more is substantial indeed. It is likely that only a very few cases would meet that threshold, and it is in that context that the courts have adopted the use of the term 'exceptional': Huang v Secretary of State for the Home Department [2017] UKSC 11. To succeed the Appellant need not show unique or extraordinary facts, simply that the circumstances are, unusually, so compelling as to outweigh the very substantial public interest in his removal from this country.

25. Because this was an application to revoke an existing deportation order, the Rules provide that additional requirements must be met. Paragraphs 390-391A of the Immigration Rules state:

> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
>
> (i) the grounds on which the order was made;
>
> (ii) any representations made in support of revocation;

(iii) the interests of the community, including the maintenance of an effective immigration control;

(iv) the interests of the applicant, including any compassionate circumstances.

390A. **Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors**.

391. **In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course**:

(a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or

(b) **in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time**,

Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, **or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.**

391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

26. The rules understandably underline the very great public interest in deporting persons who have entered the United Kingdom in breach of a deportation order:

399D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances.

In SU the Court of Appeal held that this test of "very exceptional circumstances" (at paragraph 399D) was more stringent than that the "very compelling circumstances over and above those described in paragraphs 399 and 399A" in paragraph 398.

27. Drawing this together, we direct ourselves that it is for the Appellant to show the following on the balance of probabilities:

i) That it would be 'unduly harsh' for his daughter A if he were to be deported;

ii) That there are in the case very compelling circumstances over and above that matter;

iii) There are, further, very exceptional circumstances such that the (re-)deportation should not be implemented.

The Evidence

28. In respect of the Appellant himself the evidence before us was limited. Beyond the bare facts of his convictions the Secretary of State was unable, due to the passage of time, to supply the Tribunal with any further information about the offending behaviour. There are four convictions, all arising from offences committed in 1997-1998. The first was on the 8th May 1998 at Oxford Magistrates Court: the Appellant was convicted of 'going equipped to cheat' and sentenced to 28 days imprisonment. On the 12th November 1998 Snaresbrook Crown Court sentenced the Appellant to 5 years in prison for the offence of 'conspiracy to defraud'. The Court made a recommendation that the Appellant be deported. On the same date the Appellant received a concurrent sentence of 9 months imprisonment for 'obtaining property by deception'. Finally, on the 8th January 1999 the Appellant was again brought before Snaresbrook Crown Court to receive a further sentence of 6 months imprisonment for 'obtaining property by deception'. Mr Clarke accepted that there was nothing to indicate that the Appellant had committed any further criminal offences after 1998.

29. Following the 'error of law' hearing in July 2018 the parties agreed that the Appellant had first entered the United Kingdom in 1991, when he fraudulently obtained leave to enter by using a Cameroonian passport to which he was not entitled. He claimed asylum and subsequently made an application for leave to remain as a spouse. Both applications were ultimately rejected and his asylum appeal dismissed in November 2000, paving the way for his deportation on the 15th October 2001. The Appellant illegally entered the United Kingdom approximately one month after he was deported to the DRC. He has remained here ever since. It is therefore the case that apart from that one month in 2001, the Appellant has lived in this country for 27 years: he has not, at any time, had lawful leave to do so.

30. The Appellant's partner N is a British citizen of Congolese origin. We were not told how long she has lived in this country but from her medical records we assume it to have been approximately 16 years. It is not in dispute that N and the Appellant have been in a relationship akin to marriage since 2003. Apart from a brief period when the Appellant was taken into immigration detention, they have cohabited since then. They have one child together, a daughter A, who was born in 2005. It is N's evidence that she did not know that the Appellant was 'illegal' until the relationship had already commenced: by the time she found out they were already committed to each other and she didn't want to give up the relationship.

31. N was diagnosed with cancer in October 2015, more specifically 'IgG kappa multiple myeloma with significant kappa light chain ISS Stage III'. We were provided with a good deal of medical evidence concerning this diagnosis, and N's treatment, dating from 2015 to the present day. It is not necessary that we refer to, or summarise here, all of that material, save to mention the following, to which we were specifically referred in submissions:

    i) A letter from Dr Ashutosh Wechelekar, Honorary Consultant and Reader in Medicine and Haematology at University College London Hospital to Dr Rabin on the 26th October 2015 in which it is confirmed *inter alia* that N suffered from acute heart failure soon after receiving her first couple of doses of chemotherapy.

    ii) Correspondence between Dr Rabin, doctors at UCLH and N's GP in May-June 2016 discussing her treatment and her plans to visit the DRC. At that stage she had completed six cycles of chemotherapy but was expressing reluctance to continue because she was experiencing nausea and fatigue. There had been a successful initial stem cell harvest but N wanted to travel before continuing with that treatment. Dr Rabin had told her that any delay was not advisable.

    iii) A letter from Dr Maria Cuadrado, Specialist Registrar in Haematology at UCLH dated 5th October 2016 to N's GP. Dr Cuadrado records that N had gone on her trip to the DRC without first attending the North Middlesex hospital as planned to receive further chemotherapy. Dr Cuadrado writes:

        > "[N] explained to us that it had been a personal decision because she believes that as the myeloma is going to come back, she would prefer to wait for it rather than have more chemotherapy or transplant. She is worried about the side effects and she doesn't understand why she should go through that if she is currently in remission. We explained to her that the best treatment she should have now that the myeloma is in remission is an auto-transplant because even if the disease is going to come back anyway, with the transplant we are going to delay the relapse and to prolong the good response. This is the standard treatment currently given".

    iv) A letter from Dr Rabin to N's GP dated 22nd November 2016 in which Dr Rabin states that he had a long talk with N trying to persuade her to have stem cell therapy, but she refused.

    v) A letter from Dr Rabin dated the 24th January 2017 in which Dr Rabin informs N's GP that she continues to refuse further chemotherapy.

    vi) A letter from N's GP dated 28th August 2018 which confirms that N has reported various symptoms over the preceding three years, primarily tiredness/lack of energy, bone, hip and lower back pain. As far as the GP is aware N's only support comes from the Appellant, who helps her by carrying shopping, attending hospital appointments with her, and when necessary he assists her with self-care such as bathing and dressing. N continues to be monitored by the haematology clinic where she also receives three-monthly

renal assessments (when admitted to hospital in October 2015 she presented with an acute renal injury).

32. It will be noted that none of this material gave us a particularly clear picture of what N's prognosis might be. It was for that reason that we adjourned the hearing on the 1st October 2018 in order to receive further information from her lead clinician, Dr Neil Rabin, Consultant Haematologist at the North Middlesex University Hospital. Dr Rabin provided the following update on the 10th October 2018. He confirmed that N is suffering from a type of cancer that has "good treatment but no cure". She is currently in remission but Dr Rabin expects her myeloma to relapse within the next year to 18 months. Life expectancy would be in the range of 5 to 10 years. Asked to comment on N's refusal to accept stem cell therapy Dr Rabin writes:

> "The significance of this is I would imagine that her myeloma would come back sooner than other patients who went ahead with the stem cell transplant. As said, I would imagine her myeloma would come back within the next year to 18 months. There would be good and effective treatment at this stage. As mentioned before, there is no cure for her myeloma".

Dr Rabin does not specify what the "good and effective treatment" might be once the cancer returns, but the parties agreed that in light of Dr Cuadrado's letter [at 31(iii) above] he is likely referring to chemotherapy and/or stem cell transplant, which Dr Cuadrado refers to as "standard treatment".

33. N confirmed Dr Rabin's evidence that she is not currently receiving any formal medical treatment. Her last round of chemotherapy had been completed in Spring 2016. After that the doctors did discuss 'stem cell transplant' with her but she is reluctant to do this and as Dr Rabin mentions in his latest letter, she has so far refused. N believes that 98% of people who have this therapy die after it. She is afraid. She has also been told that she will need to have further, intensive chemotherapy if she goes for the stem cell treatment. She does not want to do this. She felt very unwell when she had chemotherapy and in fact at one point suffered heart failure as a result. She has read online that chemotherapy is actually poison and she does not want to do that to her body. She has ordered natural remedies on the internet and is taking those. At the moment, her interaction with her clinicians is limited to appointments once every three months. Although Dr Rabin continues to try and persuade her to try stem cell therapy he has also told her that if she did it she would become very ill and have to stay in hospital. She just wants to be at home.

34. N stated her written evidence that she depends on the Appellant for care. He helps her with household duties such as shopping and cleaning but he also looks after her. When she is experiencing cramps he lifts her up so that she is in a more comfortable position. She constantly suffers from pain in her hips and lower back, but sometimes she is seized with crippling leg pains. On some days she can manage, but on others she is debilitated and must go to bed. The Appellant looks after N and manages the household when she is exhausted. In her statement N explains that when the pain is severe it is very distressing for A to witness. She becomes upset seeing her mother in this state and is only calmed down with her father's reassurance.

35. N confirmed that despite her fatigue she is still working – she has to. She has been employed at Chase Farm hospital for 9 years. In her statement it says that she has had to give up 'jobs' because of being ill but in her oral evidence she said that this is incorrect. In fact she has changed jobs only once. She was previously working about 16 hours as a cleaner but was finding that too difficult to manage so she has now got a job as a 'healthcare assistant'. She sits in the outpatients' ward and she does "obs" (i.e. recording observations) such as taking blood pressure. She started her training last year in September and has been doing that since then. She works around 4 days per week. There is another mistake in her statement where it says she only does 4 hours. Altogether she does about 16 hours, in 4 hour shifts. Her employers know that she is sick so she is not required to do any heavy tasks such as lifting. She travels there by bus as she is no longer able to drive. She was unable to say how many days she has been off as a result of illness this year but said that when she is sick she calls them and lets them know. She said that the Appellant is not working. When she refers to his 'work' in her statement she means the work he does at home. This includes things like the housework, taking her to appointments, going to the school if necessary and helping her when she is cramping.

36. Mr Clarke asked N if she had investigated whether she would be able to get help "from the community" if the Appellant were to be deported. She said that she had applied for 'PIP' (personal independence payments) but had been refused.

37. N was asked by Mr Clarke about a trip to Congo she took in 2016. She explained that she went because Dr Rabin had made it clear that she "didn't have a lot of years to come" and she wanted to see her children again. She has two adult sons in Kinshasa, and at the time, her daughter E was also there. N decided that although she considers the DRC to be dangerous, she would be happy to die there if it meant she could see her children again. She used another name (a name she was previously known under there) and did not go out. Mr Clarke put it to her that in her statement she had said that she was afraid of living in the DRC but had not disclosed that she had taken this trip. N agreed and said that maybe the omission was her mistake; she had however told the Judge at the (First-tier Tribunal) hearing that she and A had gone there. She wasn't trying to conceal anything. Asked to explain the name she is using now N said that the component parts of her name (as it is known to the British authorities) are her Christian name, her tribal name and her grandmother's name. N confirmed that when she was in the DRC the Appellant was still in the United Kingdom. In his absence she was assisted by female relatives such as her sisters and cousins. N stated that since that trip her elder daughter E has come to the United Kingdom and now lives with N, A and the Appellant. She was granted indefinite leave to enter on the 8th May 2017 and is learning English. She was born in 1999: "she looks 12 but she is actually 19".

38. In response to questions put by the Tribunal N said that her two adult sons remain living in Kinshasa. They are now aged 27 and 25. She also has sisters living there, her stepmother and cousins. Outside of the city she has a number of other relatives: uncles, aunts and cousins.

39. There is no dispute that the Appellant has a genuine and subsisting parental relationship with his daughter A. This much was confirmed by the Appellant and his partner N, but before us the most significant evidence in respect of that relationship came from A herself, and from independent social worker Diana Harris.

40. In November 2015 when she was just 11, A wrote a letter to the Respondent in which she described her father as "very good and caring, protectable, understanding and he is always there when I need him". On the 9th August 2018 A, now 13, wrote a second letter, this time to the Tribunal. In it she details how much he helps her mother, and how afraid she is of her mother's cancer returning. She describes how, when her mother was particularly bad, she wasn't even allowed to see her. Her mother became so fragile she thought that she had already lost her. Throughout this time it was her father who was there to support her:

> "When I started secondary school in September 2016 I felt suicidal and I became depressed. Because my dad was my best friend he helps me with everything. We talk about everything and he advice me all the time"

In the same statement A explains that she is afraid of living in Congo because of what she has seen on the television about how violent it is there. She says that the weather is nice there, although the people and the environment are not. Here, she and her parents are happy:

> "We don't have a lot of money, but we're a happy family. We play games together like scrabble, dominos, cards also we go walking and my dad tells me stories, so my dad is the best dad in the world"

In response to Mr Vokes' first question in chief A confirmed that she had written both of these letters herself and that she wished to adopt them as her evidence.

41. A was asked some supplemental questions. Asked how often her mum becomes unwell, she said very often. Her mother will be fine and will suddenly suffer very painful cramping, particularly in her legs. For instance, the day before the hearing she had suffered such an attack. The cramps usually last for a short while, like 2 minutes, but they are so bad that she is exhausted afterwards. She usually just goes to bed and sleeps after an event like that. After a few hours she will wake up and call out, and A and the Appellant attend to her. Mr Clarke then asked A some questions arising from her letter. He read to her the part where she says that her mother is now "somewhat recovered" and asked what she meant by that. A said that she was here thinking of the period towards the end of her time at primary school and going into year 7 when her mother was receiving chemotherapy. She was really ill then. A was asked if her mother was taking any treatment, or receiving any further medication; she said that she did not know. A stated that at home her father does the housework as her mother is too tired. He takes her mother to shower, and if she has cramps he helps her exercise her legs. If she can't move, he lifts her up, to ease her mobility.

42. A was asked about the trip that she and her mother made to the DRC in July 2016. They had gone for about a month to stay with relatives. They had stayed at an

uncle's house and had not really gone out much. When her mother was unwell, or needed help dressing and bathing she was assisted by A's sister. N's stepmother was also there.

43. A confirmed what she said in her statement about feeling very depressed at the time that she moved to secondary school. She said that she had not told anyone at school about this. As far as she is aware none of her teachers know that her mum is ill, but she does intend to speak to the school counsellor about this. Her first appointment was scheduled for the week after the hearing. This had been arranged by the school nurse.

44. Diana Harris is an independent social worker who assessed the family on a single visit lasting just over three hours in October 2017. In addition to her own observations of, and conversations with, the family members, she had access to documents including medical records, letters from A's school and the Respondent's refusal letter. She also received information from, and was able to interview, three family friends. Ms Harris also used diagnostic tools such as the Department of Health 'Adolescent Wellbeing Scale' and the 'Welfare Checklist – section 1 of the Children Act 1989'.

45. The central conclusion reached by Ms Harris was that on every measure it was strongly in A's best interests for her father to remain living with her their home in London. The 'Adolescent Wellbeing Scale' indicated that A was suffering from depression and Ms Harris recommended that referral be made to an appropriate mental health professional. She expressed concern that A's mental health could be adversely affected if her father were to be deported. At her age and stage of development enforced change can, in the short term, include anxiety, depression, self-harm or eating disorders. In the longer term such disruption would be likely to have an impact on her education, reducing her self-esteem, self-confidence and emotional well-being. This would have a detrimental impact on her long-term life choices and chances.

46. Ms Harris observed a close interaction between the Appellant and A, and recorded the opinion of family friends that she was closer to him than to her mother. That the Appellant has been A's 'primary carer' is borne out by the letters from A's schools (primary and secondary) which have him named as the parent contact; the primary school confirmed that it was he who would bring A to and from school. When A experienced bullying at her primary school, over a number of years, it was the Appellant who addressed the matter with the school. Ms Harris adds that N is not confident in English (her first language is Lingala, then French) and for this reason it has always been the Appellant who undertakes external interactions such as attending parents' evenings.

47. Ms Harris also expressed concern that if the Appellant were to be removed from the home A would end up performing the chores and household tasks currently undertaken by her father; she would in effect end up caring for her mother. Ms Harris notes that A has a very limited support network, consisting of her parents,

and members of her mother's family who live close to them in London. She sees this aunt, and her cousins, regularly. A also has siblings in the DRC but she has only ever spoken to them "on special occasions". A told Ms Harris that she is fearful of her father going to live in the DRC.

48. In her 'summary of conclusions' Ms Harris finds that both N and A will experience feelings of grief and loss should the Appellant be removed from the household. This is likely to impact on their coping mechanisms and mental health and put strain on N's parenting ability.

Discussion and Findings

49. The Appellant's task is an extremely difficult one. Not only must he show that his deportation would be unduly harsh for his daughter, but he must prove that there are very compelling, and indeed very exceptional, circumstances beyond that which mean that the deportation order, properly imposed and implemented in 2001, should not now be maintained. It is self-evident that the overwhelming presumption in such cases must be that the order is upheld and enforced. The right of the Secretary of State to identify and remove persons with no right to reside in this country is clear; the deportation of foreign criminals is at the heart of that duty to maintain immigration control and protect the public. Any attempt to subvert that process must be strongly resisted. That is our starting point.

50. In respect of the Appellant himself it is accepted that he has lived in this country for 27 years. He has not been convicted of a crime since 1999. As Mr Vokes sensibly acknowledged, neither this long residence or lack of re-offending would come close to making this deportation disproportionate. The case for the Appellant therefore centres not on himself, but on his family, his partner of 15 years N, and his 13 year-old daughter A.

51. Every family is different. It cannot be said, for instance, that it will uniformly be contrary to a child's best interests to deport a criminal parent. Where for instance a child has limited or no contact with that parent – or perhaps shouldn't have – it cannot be assumed that there will be any degree of 'harshness' involved in deportation. Even where parents live with their children the 'best interests' calculus may be marginal. Where however there is no reason to doubt the quality of the relationship, it will usually be contrary to the child's best interests if that parent is removed. Following the 'error of law' decision in this appeal the Respondent has accepted that this is such a case.

52. That deportation can be contrary to the best interests of the child is expressly accepted within the statutory scheme. We read the guidance in KO to mean that where, for instance, a child will be left feeling sad, confused, or abandoned, that is a degree of harshness that is to be expected, and is deemed acceptable by parliament, taking into account the strong public interest in deporting foreign criminals. As such the view expressed by social worker Ms Harris, that N and A would experience

"feelings of grief and loss" were the Appellant to be deported, does little to advance his case. Those are the ordinary emotions one would expect to find in an ordinary family: in Secretary of State for the Home Department v AJ (Zimbabwe) and VH (Vietnam) [2016] EWCA Civ 1012 Elias LJ used the term 'commonplace' in this context.

53. What we find here, however, is not an ordinary family. This is a family that has already been subject to significant stress in the past few years: since 2015 they have lived with the knowledge that N is extremely unwell. Although N has tried to shield A – and the Appellant – from the reality of her situation, A has demonstrated that she is well aware of the extent of her mother's illness. It is the impact of that awareness with which we begin our consideration.

54. In her letter to the Tribunal N writes of her constant fear for her mother. Seeing her frailty and dramatic weight loss following the initial diagnosis it was to her father that she turned for comfort: "I thought she was already dead and I was crying and my dad was there to help me". It is in this context that we read the evidence that it is the Appellant with whom A has formed the strongest bond. A herself describes how at the age of 11 she was feeling "suicidal" as a result of the stress that she was under, but her father was at that time her "best friend". We find that this recent history of family trauma is enough to lift this child, and her emotional response, out of the 'ordinary'. We are satisfied that for A, who has lived for three years with this threat of losing her mother, the prospect of also losing her father is "severe" and "bleak". Her circumstances are not commonplace. We are accordingly satisfied that it would be "unduly harsh" for A if her father were to be deported.

55. We need not consider the alternative proposition in paragraph 399, namely whether it would be unduly harsh for A to move to the DRC with her father, since before us Mr Clarke indicated that the Respondent considers that test (at paragraph 399(a)(i)(a)) to be met. He further accepted that the same must be said of N.

56. In order to assess whether the Appellant can show a "very compelling circumstances" over and above that history, and further whether those circumstances can be said to meet the yet higher threshold of exceptionality, we must look to the future.

57. The medical evidence in respect of N is as follows. In October 2015 she was diagnosed with 'IgG kappa multiple myeloma with significant kappa light chain ISS Stage III', or more colloquially, bone cancer. The condition was identified after N was admitted to hospital with fatigue, nausea and high temperatures. She was treated for a kidney injury and once the cancer was identified, was immediately started on a course of chemotherapy. Although some of her clinicians have referred to her 'responding well' to that treatment, that was not the assessment of N herself. She told us that she found the side effects of the chemotherapy very difficult to deal with. She felt weak and sick all of the time. We know from Dr Ashutosh Wechelekar, Honorary Consultant and Reader in Medicine and Haematology at UCLH, that one point at the beginning of the treatment N suffered from acute heart failure and had to

be resuscitated. It seems that by spring 2016, six months into her treatment, N started to express doubts to her clinicians about whether she wished to continue it. Although the doctors had successfully harvested stem cells and wished to use these to combat the cancer, N was reluctant. She was afraid of the immediate consequences and of the side effects. Correspondence between Consultant Haematologist Dr Rabin and his colleagues confirm N's increasing insistence that she receive neither stem cell transplant nor any further chemotherapy. By November 2016 her doubts had hardened into resolve that she would not agree to any more of what Dr Maria Cuadrado, Specialist Registrar in Haematology at UCLH described as this "standard treatment".

58. Before us N was adamant that this remained the case. She has read online that chemotherapy is poison. She believes that she would be better to accept her fate and to treat the symptoms of her cancer with natural remedies that she orders from the internet. She believes that only a very small percentage of patients who receive stem cell treatments survive. We are quite satisfied that N has here misunderstood the advice she is being given by doctors. We think it extremely unlikely that the NHS would be providing a treatment that killed 98% of its recipients. We are however equally satisfied that this is a belief that N genuinely holds. It is clear from the various letters from her doctors that she has consistently expressed these views; we would observe that some of those letters, in particular those of Dr Rabin, betray some degree of frustration with N's "personal choice" to refuse further treatment.

59. It is against that background that we must read Dr Rabin's latest letter. On the 10th October 2018 he wrote to the Tribunal to say that he expects N's myeloma to return within 12-18 months. Whilst he stresses that there is no cure for this type of cancer, he states that there is good treatment available, so she could expect to live for between 5 to 10 years. What he does not explain is what her life expectancy might be if she continues to refuse treatment. We proceed on the assumption, we think uncontroversially, that it will be less than if the treatments were administered.

60. In our forward looking assessment of whether there are "very compelling" and yet further "very exceptional" circumstances in this case we find there to be two possible outcomes. The first is that N will, in the immediately foreseeable future, succumb to her illness, leaving the Appellant with sole parental responsibility for A. The second is that N manages to survive until A reaches majority. We consider each in turn.

61. Dr Rabin leaves us in no doubt that N is dying. Although this is not apparently an aggressive form of cancer, it is an incurable one. In his expert opinion, offered in October 2018, Dr Rabin believes that it will return within 12 to 18 months. We see no reason to believe that N will change her mind about accepting treatment. It is clear from the medical evidence that she gave careful consideration to her decision over a period of some months in 2015-2016 and it is a decision she has maintained ever since, despite the best endeavours of her clinicians. There is therefore a very strong possibility that N will die from her illness in the immediately foreseeable future, whilst A is still a young teenager.

62. Should N be, at that point, the only parent A has in this country, we are quite satisfied that this would be a catastrophe for A that would meet the very high test set out in the Rules. This is a child who is already experiencing the psychological consequences of the *threat* of losing her parents: she has described the anxiety she feels, and how it has left her at worse feeling "suicidal". We are satisfied that *actually* losing both parents in a short time frame would unquestionably amount to "very compelling circumstances over and above" it simply being "unduly harsh". Whilst parliament and the courts have emphasised the very great public interest in deporting those who receive sentences of over four years, we are unable to accept that this would extend to leaving children effectively orphaned.

63. We are further satisfied that having regard to the overall circumstances of the family, it would amount to a very exceptional situation, and unusually, a reason to justify revocation of a deportation order, even where the deportee had flouted the terms of that order and re-entered the country. In addition to the psychological trauma experienced by A, we must further weigh in the balance the very real personal anguish likely to be experienced by the Appellant, and by N herself.

64. The Appellant has lived with N for 15 years. They have, we accept, a close and loving relationship as exemplified by his care for her since her diagnosis and the view of their daughter that theirs is a happy and close-knit family. Any husband losing a wife will experience the pain of intense grief. When N dies, however, those feelings will be exacerbated for the Appellant by the fact that he cannot be with her when she goes. Those emotions of guilt and helplessness will in turn be eclipsed by his concerns and fears for his daughter, left without a parent in the United Kingdom. We recognise that N has made a personal choice about her treatment, and how to deal with her terminal diagnosis. As early as 2016 when she went to the DRC to, in effect, say goodbye to her elder children she had recognised the inevitable. We note that she is a woman of faith and that this has given her comfort. We find however that this stoicism will likely be dramatically undermined if she is facing death knowing that her daughter will be left without either of her parents, who have until now been her world.

65. We conclude that both parents, and A herself, are likely to face extreme levels of mental suffering if N is to die without the Appellant being in this country to comfort her at the end, and to look after his daughter and give her the psychological support that he has hitherto provided. We cannot think that the statutory framework, and the Rules that reflect it, mandate an outcome that betrays such a lack of humanity.

66. The second potential outcome is that N manages to survive A's minority. On the evidence of Dr Rabin this is possible, since with treatment she could have a life expectancy of between 5 and 10 years. Whilst we accept that N has consistently refused treatment since the Spring of 2016 we consider, in the alternative, the possibility that she will change her mind and agree to stem cell transplant and further chemotherapy, and so manage to live longer.

67. Even in that scenario, N will still have stage III cancer. Her condition will not improve. The evidence before us indicates that currently her symptoms are intermittent. Some days are better than others. Her main complaints are overwhelming fatigue, joint pain and at worse, the debilitating intense cramps in her legs which result in her losing mobility and having to take to her bed. The consistent evidence of N, A, the Appellant and the family GP is that it is the Appellant who is providing assistance to N when she needs it. This assistance includes lifting her into more comfortable positions to ease the pain, lifting her in and out of bed or the shower, helping her dress, as well as undertaking household duties such as cooking, cleaning and shopping. One concern, as we indicated at hearing, is that if the Appellant is removed from the home it will be A who takes up this role. There is a danger that she would in effect become her mother's carer. Mr Clarke agreed that this would be manifestly contrary to A's best interests but asked that we consider two matters before reaching such a conclusion. First, that N does not at present need a 'carer' as such. She continues to work, albeit in a modified way, and on her own evidence still has days where she is able to lead a relatively normal life. Second, there is now a fourth member of the household: N's adult daughter E who has recently settled in this country.

68. Mr Clarke is quite right to point to the fact that N is still working: it was this employment which led the First-tier Tribunal to doubt whether she needed any assistance at all. She has told us that she travels, four times a week, to Chase Farm hospital where she manages to do a four-hour shift before travelling home on her own. She is clearly not therefore at the stage of her illness where she is housebound and entirely dependent on the care of others. We accept Mr Clarke's point that at the moment N plainly does not need full time care. Having heard the totality of the evidence, however, we accept that she does require assistance throughout the average week. She told us that she only continues to work because she has to: the Appellant cannot, of course, undertake any lawful employment. She has changed jobs so that she is able to sit for much of the day and is not now required to undertake physical tasks such as cleaning. She takes the bus to work because she is no longer able to drive. When she is too weak to work she calls in sick. When she gets home from work she is often exhausted and it is then that the Appellant 'picks up the slack', making dinner, cleaning the house etc. We conclude that whilst N is not yet in need of a full-time carer, she does require the level of support and physical assistance currently provided by the Appellant, and that someone will have to fill his shoes once he is deported.

69. That someone could potentially be N's daughter E. We are given little information about E. She was born in the DRC in 1999. In 2003 her mother left the infant E and her elder brothers in the care of relatives and came to the United Kingdom. As far as we are aware they did not see each other again until 2016 when N returned to Congo on a month-long visit. We know from A's evidence that E was present in the house that they stayed in during that trip, and that she helped look after N. We have no information about what she might currently be doing in that regard. None of the witnesses before us made any mention of E taking any significant role in assisting N. The family GP stated in his letter of 28th August 2018 that it is the Appellant who

undertakes tasks such as helping N with washing, dressing and looking after the house, but we accept that this may be simply because he has not been made aware of, or asked to comment upon, any input from E, who had been living in the family home less than a year at that point. We think that it would be extraordinary if E, now a 19 year-old young woman who has come to join her mother in this country, would have no involvement at all in her care. We would further find it to be extraordinary if she did not increase her involvement upon the Appellant's deportation.

70. We are therefore satisfied that if the Appellant were to be deported the responsibility of caring for N would not fall to A alone. E has been living in the house since sometime in mid-2017. She attends language college full time but this would not preclude her from helping out in the mornings, evenings and weekends.

71. That is not to say that we find A will be entirely excluded from the process of looking after her mum. Having had the opportunity of hearing directly from A ourselves we would be very surprised if she allowed that to be the case. She is, perhaps as a result of the difficult circumstances in which she has found herself, a relatively mature 13 year-old, with a clear sense of responsibility. The impression we gained from her evidence, and that of Diana Harris, is that although A has a small group of school friends her life centres around her parents. Given her mother's illness, and her father's immigration status, it is understandable that she would be drawn inward just at the time that many young women of her age would be starting to look outward, and to move away from their families: A very much wishes to preserve what she has at home. It is with that in mind that we are unable to find that A will play no part in her mother's care. Whilst it is not necessarily contrary to the best interests of a teenager to be involved in helping relatives, or in chores around the house, there are three matters which concern us.

72. First, that A is approaching a key stage in her education. This term she will choose her GCSE options and study for those important exams begins this September. We are therefore satisfied that the care and support required of A, and which in the absence of her father her own sense of love and responsibility would compel her to give, is going to place her in some difficulty in the next few years, when she should be concentrating on nothing but her education.

73. Second, we note that at present the Appellant is the only adult in the house who is able to communicate effectively in English. N told us that she can speak some English but she is not confident in it and that is why the Appellant is required to go to medical appointments with her. It is the Appellant who attends at A's school to raise issues with her teachers (for instance when she was being bullied in primary school) or simply attend parents evenings. E is at college but remains unable to speak anything other than very basic English. As such she would be unable to interact with A's school, or with N's doctors should, for instance, N be readmitted to hospital. Although A has an aunt and cousins who also live in London, and who could presumably with notice help with such matters, we are concerned that day to day this is a factor which will lead to increased demands on A.

74. Third, in the alternative scenario that we are considering N has agreed to resume treatment for her cancer. The evidence before us is that last time she underwent chemotherapy she became extremely unwell. She felt nauseous and fatigued all of the time: she was in fact so weak that she suffered acute heart failure. She became entirely dependent upon the Appellant to manage the household. We are therefore satisfied that N's care needs, and the demands of the household, would increase in parallel to the ever greater need for A to be concentrating on her school work. At this crucial stage in her education we find that this would be strongly contrary to her best interest.

75. This brings us to a further concern about the impact upon A should her father be deported. A has made clear in her evidence that her love and devotion for her father is not simply the affection that the average child might feel for the average father. It is a relationship that has been cemented by the collective challenge of living with N's terminal illness. A tells us that when she felt suicidal in her first year at secondary school, it was to her father that she turned for emotional support and reassurance. The consistent evidence before us, from all three family members, is that when N is seized by the cramping pain it is very severe, and distressing for A to observe. N told us that when A becomes upset by these incidents it is to her father that she turns for comfort. We have no reason to doubt that evidence, having heard from A herself about how horrible it is for her to see her mother suffer. She says that after these attacks her mother will very often fall asleep and remain in bed: when she wakes up she calls to A and the Appellant and they attend her together. Again, it was clear from her evidence that she valued being able to participate in supporting her mother, alongside her father.

76. We are extremely concerned about A's ability to cope with her mother's illness, and the practical challenges that brings, without her father's emotional support. He has been there for A throughout these difficult years, and we do not think we need any formal psychiatric evidence to conclude that she will find it more stressful to face these issues without him. We note that Ms Harris expressed similar concerns. In applying the standardised questionnaire[2] she found that A is already suffering from depression; A told us as much herself and that she had arranged to see a counsellor at school. Whilst such a referral is hopefully a positive one for A, we are satisfied that in the circumstances described the absence of her father is likely to have a profound impact on A's emotional wellbeing. We are not at all satisfied that A would derive the same level of support from other family members. We note in particular that E and A do not appear to have a close relationship. The two half-sisters did not meet until 2016 when E was 17 and A was 11. Until that time contact was limited to telephone calls on special occasions, i.e. A being asked to wish her sister happy birthday over the phone. They spent a few weeks together in the DRC in 2016 and the next time they met was when E arrived here. We were told that E speaks only very limited English. When she spoke with Ms Harris A told her that she was not close to her siblings from the Congo. Whilst it is to be hoped that this is a relationship which will grow with time, we do not accept that E – until recently a complete

[2] Department of Health 'Adolescent Wellbeing Scale'

stranger - can offer A the solace and support that she currently receives from her father.

77. Having considered all of the available evidence we are satisfied that even on the second scenario the facts in this case do meet the very high threshold required by paragraph 399D, and therefore the lower threshold of the still arduous test in 399. A is child who has an unusually close relationship with her father, borne out of the tragic circumstances in which this family find themselves. Whatever the immediately foreseeable future brings for N, we find the interference with that bond to be disproportionate: we do so having had full regard to the very, very substantial weight to be attached to the public interest in deporting the Appellant.

Decisions

78. The decision of the First-tier Tribunal contains errors of law such that it is set aside.

79. The decision in the appeal is re-made as follows: "we allow the appeal on human rights grounds".

80. There is an order for anonymity.

Upper Tribunal Judge Bruce
Dated 13th January 2019