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

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 16th December 2019	**On 28th February 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

FN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms H Salmon, Central England Law Centre
For the Respondent: Mr D Mills, Home Office Presenting Officer

DECISION AND REASONS

1. An anonymity direction has previously been made by the Upper Tribunal. For the avoidance of any doubt that direction continues. Unless and until a Tribunal or Court directs otherwise, FN is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

2. The appellant is a national of Burundi. She is the subject of a deportation order that was signed on 21st April 2010. On 17th November 2017 the respondent considered representations made on behalf of the appellant between April 2013 and September 2017 and rejected the appellant's account that she would be at risk upon return to Burundi and rejected her claim that her deportation to Burundi would be in breach of Articles 3 and 8 of the European Convention on Human Rights, and would be in breach of her daughter's Article 8 rights. The respondent refused to revoke the deportation order. The appellant's appeal against that decision was allowed on Article 8 ECHR grounds only, for the reasons set out in a decision of First-tier Tribunal Judge Chapman promulgated on 16th March 2018. First-tier Tribunal Judge Chapman dismissed the appeal on refugee, humanitarian protection and Article 2 and 3 grounds. The respondent was granted permission to appeal by First-tier Tribunal Judge Dineen on 12th April 2018.

3. A Rule 24 response was filed on behalf of the appellant and as Upper Tribunal Judge Coker noted in her 'error of law' decision, the appellant did not seek to challenge the findings made by First-tier Tribunal Judge Chapman that she is not entitled to international protection. Upper Tribunal Judge Coker was however satisfied that the First-tier Tribunal Judge erred in failing to make adequate findings on the Article 8 issues, in particular as to the impact of the appellant's deportation, upon her daughter. The decision of First-tier Tribunal Judge Chapman was set aside by Upper Tribunal Judge Coker for reasons set out in a decision promulgated on 16th July 2019. It was directed that the decision would be remade in the Upper Tribunal.

4. The matter was listed before me on 16th December 2019, and after hearing evidence I reserved my decision. I informed the parties that my decision would follow in writing. I now give my decision with my reasons.

The Background

5. The appellant arrived in the UK on 10th October 2003 and claimed asylum. That claim was refused by the respondent for reasons set out in a decision dated 31st

October 2003. The appellant's appeal against that decision was dismissed for the reasons set out in a decision promulgated on 16th February 2004.

6. The appellant entered into a relationship with a Sudanese national ("RA") and there is a child of that relationship ("JA") who was born on 4th December 2007.

7. On 5th January 2009 the appellant was convicted of a number of offences at Stoke-on-Trent Crown Court. For the offence of using a false instrument, she was sentenced to 6 months imprisonment. For the offence of obtaining pecuniary advantage for self by deception, she was given a 15-month sentence of imprisonment. She was also convicted of three counts of dishonestly making false representations to make gain for self/another or cause loss to other/expose other to risk, for which she received two 10-month sentences of imprisonment and one 15-month sentence of imprisonment. Each of the sentences of imprisonment were to run concurrently. It is helpful at this point to record the sentencing remarks made by His Honour Judge Glenn:

> "... Your dishonesty spanned a significant period, about two years and four months, and involves a good deal of money. You earned in excess of £45,000. You came to this country illegally and sought asylum. You had failed in your initial asylum application and apparently exhausted your appeal rights by 2003.
>
> You got your job by tendering false documents. This sort of offending is, your solicitor has already said, indeed very prevalent. But not content with the income from that paid employment, you also claimed support on the basis that you were destitute, and you received a significant amount of benefits in response to that claim. And still in September 2008, you were denying being in any paid employment at all. That wasn't desperation; that was greed. Your dishonesty was sustained. You gave no explanation in interview for where the money went nor really have you done so today as to where the bulk of this money went to.
>
> I give you full credit for your guilty pleas and I will reduce the otherwise appropriate sentences by one third. I take account of the fact that you have no convictions. I have taken account of what is said in the pre-sentence report. I've no doubt that you worked very hard and very well. I've also taken account of the fact that you have a young child and plainly have medical problems and I direct that the document prepared by Dr Bodah Singh should be sent to the prison governor.
>
> You knew what you were doing was wrong. This wasn't just a case of surviving. You had a significant income. The offences are plainly so serious that only custody is appropriate. I have considered the Court of Appeal authorities….
>
> I have also had regard to totality because technically the claim for the Home Office support would have merited a consecutive sentence but to keep the sentences short as I

> can, I'm going to make all the sentences concurrent. On count one the sentence is six months imprisonment. On counts two and three, the sentence is 15 months imprisonment. On counts four and five, the sentence is 10 months imprisonment. As I've said they are all concurrent…."

8. In March 2009 the appellant was informed that in light of her convictions she is liable to deportation under the Immigration Act 1971 and may be subject to automatic deportation in accordance with s32(5) of the UK Borders Act 2007, unless one of the exceptions apply. The appellant was invited to set out any reasons she has for believing that the exceptions do apply. The appellant responded in April 2009 and on 21st April 2010 a deportation order was signed against her. The appellant was served with the reasons for deportation on 23rd April 2010. The appellant's appeal against that decision was heard by Immigration Judge Frankish on 25th June 2010 and dismissed for reasons set out in a decision promulgated on 7th July 2010.

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

> "16. …So far as asylum is concerned, the appellant relies upon the rather speculative suggestion that election violence in connection with the election as of today, the date of drafting, is such as to place her at risk. Her asylum claim was considered in detail on appeal on 16 February 2004 (AS/59039/2003). It was accepted that she was a citizen of Burundi but, for the detailed reasons given (paragraph 31), she was not credible. The appeal was rejected. The 2003 country case of N (Burundi) UKIAT 00065, has since dropped off the country guidance list. It dealt with the post-war civil situation and found that conditions, although bad, did not cross the threshold as to necessitate international protection…
>
> …
>
> 18. We were not taken to any new facts, any new political developments, any new case law country guidance to suggest that it would be wrong to diverge from the previous findings in accordance with Devaseelan…… so far as asylum is concerned, we find no reason to diverge from the findings in the previous determination in accordance with Devaseelan…"

10. Immigration Judge Frankish also considered the appellant' Article 8 claim, noting that the human rights of third parties, i.e., the appellants partner and daughter,

must also be considered. Immigration Judge Frankish concluded, at [27], as follows:

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

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

The respondent's decision of 21st November 2017

12. The respondent has set out in the decision, the appellant's immigration and offending history. The respondent refers to the sentencing remarks made by His Honour Judge Glenn on 5th February 2009. The respondent refers to the claim made by the appellant that she will not return to Burundi with her daughter because she has a genuine fear of returning to Burundi and it would be unsafe for her daughter. The respondent refers to the adverse credibility findings previously by Adjudicator, Mr Coates in the decision promulgated on 25th February 2004, and rejected the appellant's claim that she would be at risk in Burundi due to her father's political profile. The respondent concluded that neither the appellant nor her daughter, would be at risk upon return due to the appellant's imputed political opinion, returning as a single woman or due to a fear of being trafficked.

13. The respondent addressed the Article 8 claim made by the appellant, relying upon her relationship with RA, and their daughter who was born in the UK. The respondent accepted the appellant has a genuine and subsisting relationship with her daughter. Having considered the evidence relied upon by the appellant the

respondent concluded that it would not be unduly harsh for the appellant's daughter to live in Burundi with the appellant should the appellant and her partner decide it would be in the child's best interest to do so. The respondent noted the appellant's daughter is likely to experience significant emotional upheaval and a sense of loss following the appellant's deportation if she were to remain in the UK without the appellant. The respondent concluded the appellant's daughter would continue to be cared for by her father and would continue to receive assistance and support regarding her education and healthcare. The respondent concluded that although deportation of the appellant would initially have a significant impact on her daughter given the appellant's close relationship with her, the appellant's daughter could maintain contact with the appellant should she remain in the UK with her father. The respondent concluded the child's day-to-day needs could be provided for by her father, and the impact upon the child does not outweigh the strong public interest in deportation of the appellant.

14. The respondent also considered the impact of deportation upon the appellant's relationship with RA. The respondent accepted the appellant has a genuine and subsisting relationship with RA. The respondent accepted the appellant does not live with RA purely due to the appellant being provided with NASS support. The respondent concluded the appellant's relationship with RA was formed at a time when the appellant was in the UK unlawfully and her immigration status was precarious. The respondent concluded that in any event, it would be open for RA to live in Burundi with the appellant.

15. The respondent did not accept the appellant is socially and culturally integrated in the UK and on the evidence available, the respondent concluded there are no other very compelling circumstances to sufficiently outweigh the significant public interest in the appellant's deportation.

16. The respondent also considered the medical evidence relied upon by the appellant and concluded that suitable medical treatment would be available to the appellant in Burundi. The respondent concluded that the appellant's removal would not be in

breach of Article 3 ECHR. Having considered the claim made by the appellant, the respondent concluded there are no grounds on which to revoke the deportation order.

The issue in the appeal

17. As I have already set out, First-tier Tribunal Judge Chapman dismissed the appellant's appeal on refugee, humanitarian protection and Article 2 and 3 grounds, and as Upper Tribunal Judge Coker noted in her 'error of law' decision, the appellant did not seek to challenge those findings made by First-tier Tribunal Judge Chapman. The issue in the appeal before me is limited to whether the removal of the appellant in pursuance of the deportation order would be in breach of her Article 8 rights.

18. At the outset of the hearing before me, Ms Salmon confirmed the appellant's case is essentially that the public interest in her deportation is outweighed by the appellant's right to a family life, taking into account the best interests of the appellant's daughter. For his part, Mr Mills confirmed that the respondent accepts the appellant's daughter has lived in the UK continuously for at least seven years and it would be unduly harsh for her to live in Burundi. The respondent's case is that it would not however, be unduly harsh for the appellant's daughter to remain in the UK without the appellant.

The Law

19. Section 3(5) of the Immigration Act 1971 provides that a person who is not a British citizen is liable to deportation from the United Kingdom if *inter alia,* the Secretary of State deems his deportation to be conducive to the public good. Section 32 of the UK Borders Act 2007 ("the 2007 Act") defines a foreign criminal, a person not a British citizen who is convicted in the UK of an offence and, *inter alia*, sentenced to a period of imprisonment of at least 12 months. Section 32(4) of the 2007 Act sets outs out the clear proposition that deportation of a foreign criminal is conducive to the public good. That is a statement of public policy

enacted by the legislature, which the courts and tribunals are obliged to respect. Section 32(5) of the 2007 Act requires the Secretary of State to make a deportation order in respect of every foreign criminal, subject to the exceptions set out in section 33. Insofar as is relevant that is:

> "(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach–
>
> (a) a person's Convention rights, or
>
> (b) the United Kingdom's obligations under the Refugee Convention.
>
> …
>
> (7) The application of an exception—
>
> (a) does not prevent the making of a deportation order;
>
> (b) results in it being assumed neither that deportation of the person concerned is conducive to the public good nor that it is not conducive to the public good;
>
> but section 32(4) applies despite the application of Exception 1 or 4.".

20. Part 5A of the Nationality, Immigration and Asylum Act 2002 NIAA 2002 informs the decision making in relation to the application of the section 33 exceptions. Section 117A in Part 5A provides that, when a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8, and, as a result, would be unlawful under section 6 of the HRA 1998, the court, in considering the public interest question, must (in particular) have regard to the considerations listed in section 117B and, additionally, in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C. So far as is material to this appeal, the following provisions set out in s117C are relevant:

> "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."

21. The Immigration Rules set out the approach to be followed by the Secretary of State where a foreign criminal liable to deportation claims that the deportation would be contrary to the United Kingdom's obligations under Article 8 ECHR. So far as relevant to this appeal, the immigration rules state:

Revocation of deportation order

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.

…

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.

…

396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

Deportation and Article 8

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; 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.

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.

22. As is apparent, Exception 1 as set out in s117C(4) of the 2002 Act replicates the same conditions as those set out in paragraph 399A of the Immigration Rules.

The evidence

23. I have been provided with a bundle comprising of some 184 pages, that is relied upon by the appellant. The appellant's evidence is set out in section A of that bundle. Section B has within it, background material concerning Burundi, and at section C, there are copies of authorities relied upon by the appellant.

24. I heard oral evidence from the appellant, and RA, Reverend Gaston and Mrs Annette Haywood. I heard submissions made by the party's representatives. A full record of the evidence and submissions is set out in my record of proceedings and has been carefully considered by me in reaching my decision. I have also had regard to the respondent's bundle. For the avoidance of any doubt, I have had regard to all the evidence whether it is referred to in this decision not.

The evidence of the appellant

25. The appellant adopted her witness statement that is to be found at pages 1 to 4 of the appellant's bundle and was signed by the appellant on 8th November 2019. She confirmed that she and her daughter have lived apart from RA for about two

years and that her daughter has now been granted indefinite leave to remain. She confirmed that the only reason they live apart is that she remains in NASS accommodation and RA is not permitted to stay at the address. She confirmed that RA spends a lot of time with their daughter and that he takes her to school on his days off, and when she is on holiday, he will spend time with her whenever he can, although their daughter never stays with him overnight. The appellant confirmed that RA helps out financially by buying any uniform that their daughter needs, paying for school meals and for their daughter's transport to and from school. He also assists financially when their daughter needs clothes, shoes and trainers.

26. The appellant's evidence is that her daughter has told her she does not know how she is going to cope if the appellant is deported, and she has been unable to speak to other adults such as her teachers about her fears, because feels shameful and is worried that others will make fun of her.

27. The appellant said that the only time she has been apart from her daughter was when she was in prison, but at that time, her daughter was very young. The appellant believes that her deportation will affect her daughter psychologically, emotionally and mentally. The appellant said that the ongoing uncertainty is affecting her daughter who worries a lot. She said that she could not leave her daughter in the UK and if she is deported she will take her daughter with her, because "*... she is my everything ...*". When Ms Salmon asked the appellant whether her daughter had said what she wants to do if the appellant is deported, the appellant replied that her daughter hadn't said anything "*... other than she will come with me. She said that she cannot stay here without me …*". The appellant stated that her daughter's aspirations for the future are that she would like to be a midwife.

28. In cross-examination, the appellant confirmed that she considers herself to remain in a relationship with RA, and since he moved out about two years ago, she has been unable to live with him because he only has a one bedroom flat. She said that RA had applied for council housing, but they could not be accommodated

together because the appellant has no lawful status in the UK. She did not know whether RA had made any application for two-bedroom accommodation, so that their daughter could live with him. She said that she had not spoken to her daughter about the possibility of remaining in the UK with her father, because she has said before that she does not want to stay with her father and has said that she would go to Burundi with the appellant.

29. The appellant was referred to her witness statement in which she confirms that her daughter is a good sensible girl who often acts like an older person and tries to protect others. Mr Mills suggested to the appellant that as a capable resilient child, she would be able to manage if she had to stay in the United Kingdom with her father. The appellant replied that that would not be possible because her daughter is so used to her, and as a teenage girl, she needs to have her mother around. The appellant acknowledged that her daughter has a godmother but said that her godmother would be unable to help because she already has grandchildren and a lot of other responsibilities. Her evidence was that her daughter can be a private person who does not like to share things with other people. For example she has not spoken to her teachers about the possibility of the appellant's deportation and has not even discussed her puberty with them. The appellant acknowledged that she herself has spoken to the school, but she had not told her daughter about that because she does not want her daughter to feel bad about it.

30. The appellant confirmed that in Burundi she had attended school up to secondary education and then worked as a care assistant. She was an only child with no siblings and both of her parents passed away. She said that she does not have any communication with any uncles or aunts. She confirmed that she has a maternal uncle and a paternal uncle, and one maternal aunt and two paternal aunts, all of whom lived in Bujumbura previously.

<u>The evidence of the appellant's partner, RA</u>

31. The appellant's partner, RA, adopted his witness statement that is to be found at pages 9 to 10 of the appellant's bundle and was signed by him on 14th November 2019. He confirmed that he sees his daughter approximately two to three days each week and he helps her with her homework. When he is at home at weekends he also takes her to church. He confirmed that he works 12 hour shifts and earns £8.25/hour. He lives in a one-bedroom flat that is rented from Wolverhampton City Council.. He confirms that his daughter has never stayed at the flat overnight because it only has one bedroom.

32. His evidence was that life would be very difficult for him if the appellant is deported. He said that his daughter is now a teenager and needs her mum. Because of the long hours that he works, he could not be around for her all of the time. He described that he leaves home to go to work at about 07:15 to 07:30 each morning and returns at 20:30 to 20:45 each night. His evidence was that if his daughter were to live with him he would have to bid for accommodation and his daughter could not live with him in the one-bedroom flat that he currently occupies. He said that he would have to work more hours to meet the additional costs that would be associated with his daughter living with all the time.

33. RA said that he has spoken to his daughter about things like bullying and about the appellant being deported to Burundi. It makes her very anxious. He said that even when the appellant goes shopping, if his daughter is with him, she gets anxious if the appellant has been away for too long and will ask him to telephone her mother to see where she is.

34. In cross-examination, RA confirmed that he was granted indefinite leave to remain in September 2017, and that was on the basis that their daughter had been registered as a British citizen. He said that he had been unable to obtain two-bedroom accommodation because his daughter lives with her mother and he was told at the time that he should get a one-bedroom flat and then register for a two-bedroom flat. He confirmed that despite that advice, he had not looked into securing a two-bedroom flat. He said that at the moment he lives about 15 to 20

minutes' walk away from the appellant and his daughter. RA confirmed that he had looked after his daughter when the appellant was in prison. However she was 8 to 9 months old at the time, and he was able to look after her for about eight months. He said that he was able to cope at the time because his daughter was very young and that now she is a teenager and needs her mum. Before he had been looking after a toddler, and his daughter is now at a very different stage in her life. He explained that, culturally, he would not be able to discuss personal issues, such as puberty and 'dating boyfriends', with his daughter. He said there is no one else he can turn to that could help him discuss those kinds of matters with his daughter. Although there are individuals at the church that they attend, those individuals could only provide limited support, but he does not know whether there would be anyone willing to sit down and discuss personal matters with his daughter. He accepted that he could change and modify the hours that he works, but that would not address the problem, because he could not cope with his daughter on his own.

The evidence of Reverend Gaston

35. Reverend Gaston, a vicar in the Parish of Central Wolverhampton also gave evidence and adopted his witness statement dated 7th November 2019. In cross-examination he said that in his view, RA would have difficulty coping with his daughter given her age. He said that RA would be left looking after his daughter at a time when he would also have to cope with the appellant being deported and is likely to be overwhelmed. His view is that the impact of the appellant's deportation upon her daughter would be, in his words, "*astronomic*". He said that the appellant and her daughter have a very close relationship and go everywhere together. The appellant's daughter was described by him as an "*exceptional child*", and he attributes that to the role the appellant has played in her daughter's life. He said that the church would always be supportive but would be unable to replace the support that is provided by the appellant to her daughter. He was unable to say whether other members of the congregation could assist when the

appellant's daughter requires personal support regarding matters that she may feel unable to speak to her father about.

The evidence of Annette Haywood

36. Finally I heard evidence from Mrs Annette Haywood, who is JA's godmother and a member of the congregation of the church attended by the appellant's daughter. In cross-examination she was asked about the support that she could provide if the appellant's daughter was living with her father. She said that the support would be limited and no more than the support that is provided at the moment. That is because she does not live in the area and is 40 to 50 minutes away by car. She could support the appellant's daughter, with matters such as puberty, but that would only be by talking to her on the phone, and that would obviously not be the same as being available and there, when support is needed. Her evidence was that she tries to catch up with the appellant every month or two by telephone and she will speak to the appellant's daughter if she is around. They see each other face-to-face, perhaps once or twice a year for 2 to 3 hours.

The evidence of JA

37. In the appellant's bundle I also have a statement made by the appellant's daughter dated 31st October 2019. I have carefully read the content of that statement in which JA describes her mother as the person that she is closest to in her life. She explains that she loves her father and sees him each week but cannot stay with him because he lives in a one-bedroom flat and there is often no food in his home when she visits. She refers to the long hours worked by her father, that often prevents her seeing him. In her statement she confirms that she now attends a secondary school that is supportive, and she is aware that her mother has spoken to the headteacher about what is happening, but she has still not told any of her friends. She refers to the difficulties that she would have in speaking to her father about changes to her body as she gets older. She describes a typical day in her life and says that if she is separated from her mother " *I think I will stop seeing colour, everything will be black and white and dull. When I am with my mum I wake up feeling*

happy. If she was not here I feel heartbroken every single morning. I will never be able to understand why my mum has been taken away from me and sent to Burundi.".

Other evidence

38. I have in the appellant's bundle, a letter from the headteacher at St Lukes Church of England School dated 18th July 2019. That letter was written at a time when the appellant's daughter was transitioning to secondary school. The letter confirms that the appellant and her daughter have a very close relationship and that as JA enters puberty, with all the physical, emotional and hormonal changes that this brings, she will be looking to her mother. The headteacher states that the appellant's daughter is usually a positive child but the uncertainty surrounding her mother is having a negative impact which in turn is affecting her education and will undoubtedly have a negative impact on her progress and future attainment.

The evidence of the independent social worker

39. I have also been provided with an Independent Social Work report prepared by Sarah Edwards, dated 15th October 2019. Her conclusions are summarised in section 2 of her report. She considers that it is in the best interests of JA for her mother to remain in the UK and in her opinion, the deportation of the appellant will have a significant detrimental impact upon the appellant's daughter. She concludes that it is in JA's best interests to remain in the UK with both of her parents, rather than face the option of having to choose between one of them and either leave the UK with her mum or remain in the UK with her dad. She expresses concern that the burden emotionally for JA, if she were to remain in the care of her father following deportation of her mother, is likely to be excessive and have a significant impact on her. There will plainly be an impact upon her emotionally because of the limited contact that she would be able to have with her mother, and Ms Edwards expresses the opinion that that is likely to have a significant detrimental impact towards her emotional well-being and stability. There is also likely to be a financial impact if RA has sole responsibility for his

daughter. Ms Edwards refers to the care provided by RA in the past but notes that the current developmental stage for JA is likely to be more challenging for RA, as he himself appears to recognise. Ms Edwards refers to the relationship that JA has with her mother, the support that is provided, and states that it is clear that the loss of the appellant at this crucial stage within JA's life will have an impact upon her.

The parties' submissions

40. Mr Mills accepts the appellant has a genuine and subsisting parental relationship with her daughter and the issue in this appeal is whether it would be unduly harsh for the appellant's daughter to remain in the UK without the appellant. He submits that the test requires a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. He refers to the decision of Lord Carnwath in KO (Nigeria), that the terms of Exception 2 in s117C(5) do not require a balancing of the relative levels of severity of the offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Mr Mills submits there is a close relationship between the appellant and her daughter. The appellant remains in a relationship with her partner and he is only absent because of the particular circumstances that prevent them living together. Mr Mills submits the appellant and RA enjoy a good relationship and he continues to play a full and active role in his daughter's life limited only by his work commitments. There is no evidence that RA is unable to look after his daughter and there should be no assumption that the appellant is best placed to care for the child. The reality is that there are single fathers who bring up a daughter, and they are perfectly able to cope with the demands placed upon them. There are sources of support like teachers, the church family and others such as the godmother, that can provide some support and step in and fill a gap when needed. Mr Mills accepts that support will not equate to the care and support that the appellant gives, but that is not to say that the effect of the appellant's deportation on her daughter would be unduly harsh. There will plainly be an impact upon the appellant's daughter but that in itself is not enough. Here, the

evidence points to the appellant's daughter being a bright and resilient child. Mr Mills submits that the more competent and capable a child, the harder it is to say that it will be unduly harsh. Mr Mills submits the appellant's daughter is better able to cope than other children in the same situation might, and the Tribunal is entitled to work on the basis that, if needed, social services would perform their duties under the law.

41. On behalf of the appellant, Ms Salmon submits that the evidence establishes that it would be unduly harsh for the appellant's daughter to remain in the UK without the appellant. She submits RA was clearly embarrassed about discussing personal matters regarding his daughter and her puberty, and the appellant's absence would mean that JA would be unable to discuss matters of a personal nature with her father. Even if she felt able to approach her father, Ms Salmon submits RA would be unable to assist her for cultural reasons, and he would find it very difficult to seek support from others.

42. Ms Salmon acknowledges that the deportation of foreign criminals is in the public interest and the more serious the offence committed, the greater is the public interest in the deportation. Mrs Salmon submits the offences for which the appellant has been convicted are not offences involving violence, and that in the end, the appellant was in prison for a period of 7½ months and that was now over 10 years ago. Mrs Salmon submits the appellant has conducted herself impeccably since her conviction and release, and the public interest in her deportation has reduced with the passage of time. Ms Salmon submits there is no doubt the appellant has a genuine and subsisting relationship with her partner and daughter, and with the exception of the 7½ months that the appellant was apart from her daughter when she was in prison, the appellant has been the primary carer of her daughter. She submits the separation of the family and their inability to live together is something that has been forced upon them, but the appellant is the person that her daughter has the closest relationship with. Her daughter is now aged 12, has started secondary school and is at a critical stage of her physical and educational development. There is no-one else

that the appellant's daughter can meaningfully turn to, particularly when matters such as puberty and relationships arise. Mrs Salmon submits the loss of the support from her mother will have a profound effect upon the appellant's daughter and as the independent social worker has said, the appellant's daughter would be left having to choose between leaving the UK with her mother or remaining in the UK with her father. The independent social worker refers to the added pressure that the appellant's daughter would have, worrying about her mum which will have a detrimental impact upon her.

43. The appellant's daughter has set out in her own words how she would feel, and Mrs Salmon submits, this is an excessively oblique position for a 12-year-old girl to find herself in. There will inevitably be an impact upon RA too. He has previously looked after his daughter when the appellant was in prison but, as he acknowledges, that was when his daughter was a toddler, and she is now at a very different stage in her life and development. Although it might be possible for him to adjust his working hours, there are likely to be financial implications as noted by the social worker. Mrs Salmon submits the evidence establishes that the effect of the appellant's deportation on her daughter in particular, would be unduly harsh.

Decision and Reasons

44. The respondent accepts the appellant is in a genuine and subsisting relationship with RA, but he is not a "qualifying partner". He is neither a British citizen nor settled in the United Kingdom. In determining for the purposes of section 117C(5) whether the effect of the appellant's deportation on the child would be unduly harsh, I look at the position on the basis that the appellant's daughter would remain in the UK with her father. The respondent accepts the appellant's daughter has lived in the UK continuously for at least seven years and it would be unduly harsh for her to live in Burundi. There is however nothing preventing the appellant's daughter living with the appellant in Burundi, if that is the choice that is made by the family.

45. I have carefully considered the matters set out in the report of Sarah Edwards, the independent social worker. She expresses the opinion that even with a planned transition for the appellant and her daughter, there is likely to be an impact upon the appellant's daughter and the process of forced deportation and removal, will continue to have an impact upon her. She confirms that if the appellant's daughter remains in the UK, she would have the added pressure of worrying about her mother which will have a detrimental impact upon her. She expresses the opinion that if the appellant were to be deported, and her daughter were to remain within the UK, RA will have to fulfil the supportive role the appellant plays in her daughter's education, whilst also completing his full-time job within a challenging environment. Her overall conclusion is that it is in the best interests of the appellant's daughter for her to remain living in the UK with both of her parents, rather than face the option of having to choose between one of them, and either leave the UK with her mum or remain in the UK with her dad. She notes the appellant's daughter is likely to lose day-to-day contact with one of her care givers given the constraints of either of her parents to be able to contact the other regularly, and this is likely to have an impact upon how she is able to experience and consider one aspect of her culture. She recognises that remaining in the UK is likely to be of greater benefit to JA than moving to live in Burundi. By remaining in the UK she will benefit from stability, possible security and educational prospects, but the impact upon the family emotionally and the limited contact that JA would be able to have with her mother, is likely to have a significant detrimental impact towards her emotional well-being and stability.

46. Having carefully considered the evidence before me, I am satisfied that there is an extremely close bond between the appellant and her daughter. That is plainly apparent from the report of the independent social worker and has been confirmed by each of the witnesses that gave evidence before me. I am also quite satisfied that apart from the period during which the appellant was incarcerated for a period of about 7½ months, the appellant's daughter has lived with the appellant. I find that the appellant lived with her daughter and RA until

September 2017, when RA moved into his own accommodation after he was granted leave to remain in the UK. I accept that the separate living arrangements have been caused by the circumstances that the appellant and RA find themselves in, and that the appellant and RA have always played an important part in the life of JA. Despite the current living arrangements, RA continues to play a positive role in his daughter's life, maintaining regular contact with his daughter, helping with school-work and other activities, and making a positive emotional and financial contribution whenever he is able to do so. The evidence of the appellant, RA and indeed their daughter confirms the relationship that RA has with his daughter is a good one and having heard RA give evidence, I am satisfied that he will do whatever he can to assist his daughter and would be quite prepared to care for his daughter notwithstanding the challenges that that would bring. He would be able to make arrangements for her accommodation with him and he would be able to make adjustments to his working pattern so that he is available to care for his daughter. He already assists his daughter with her homework, ensures that she is able to attend church regularly and buys her what she needs.

47. It would in my judgement undoubtedly be in the best interests of the appellant's daughter to continue to live with both of her parents together in the UK. I acknowledge that the best interests of the child are a primary factor in my ultimate decision, however it is not the determinative factor.

48. I have no reason to doubt the evidence given by Reverend Gaston that the appellant and her daughter have a very close relationship and the deportation of the appellant will have a significant impact upon her daughter. I also accept his evidence that RA would have difficulty coping with his daughter given her age. His evidence is consistent with the opinions expressed by the independent social worker. However, the difficulties that RA will undoubtedly encounter, are much the same as the difficulties that any single parent would encounter when dealing with adolescence and the transitional phase of growth and development between childhood and adulthood. The appellant's daughter will undoubtedly require

some support regarding her emotional and physical development and although I accept that relying upon the support of others is not the same as the support that the appellant's daughter could provide to her daughter, there is nevertheless some wider support available to the appellant's daughter from her teachers, the church community and her godmother.

49. I must take into account the Article 8 rights of the appellant, RA and their daughter and the public interest in deportation as expressed in the immigration rules and s117C of the 2002 Act. I have carefully considered whether there is anything within the evidence and in particular, the report of the independent social worker, that establishes a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent reminding myself that it is an elevated threshold denoting something severe or bleak to be evaluated exclusively from the effect on the child. Having carefully considered the evidence, in my judgment there simply is not the evidence on which I can properly conclude that the deportation of the appellant would lead to her daughter suffering a degree of harshness beyond what would necessarily be involved for any child of a foreign criminal facing deportation. I have no doubt that the appellant's daughter will initially feel a sense of loss because of her close relationship with her mother. That is apparent from the moving terms in which the appellant's daughter describes how she would feel if the appellant was required to leave the UK. I have no doubt that the consequences of the appellant's deportation will be harsh. The evidence establishes that the appellant's daughter is bright and resilient and has had a successful transition into secondary school. The 'commonplace' distress caused by separation from a parent is insufficient to meet the test. The appellant's daughter will continue to receive the love, care and support that she needs from her father in the United Kingdom.

50. I accept the opinion of the independent social worker that reliance upon modern means of communication is no substitute for physical presence and face-to-face contact. However, I do not believe that in the event of the appellant's

deportation, such face-to-face contact would not be possible. The appellant's daughter has expressed a willingness to travel to Burundi to be with her mother and there is nothing in the evidence before me to establish that some, albeit limited, face to face contact would not be possible from time to time. It would in my judgement be entirely possible for the appellant to see both her partner and daughter in Burundi during visits and to maintain regular communication in between.

51. The appellant's deportation will undoubtedly mean that RA will have to arrange suitable accommodation and make changes to his work pattern. It will undoubtedly be difficult for RA and the appellant's daughter in the short term, but in my judgment the evidence simply does not provide a basis upon which the appellant can establish Exception 2 under s.117C(5) of the 2002 Act and paragraph 399 of the Immigration Rules.

52. In NA (Pakistan) -v- SSHD [2016] EWCA Civ 662, Lord Justice Jackson held that the fall back protection set out in s117C(6) also avails those who fall outside Exceptions 1 and 2 and that on a proper construction of section 117C(3), the public interest requires the person's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2. As to the meaning of "very compelling circumstances" over and above those described in Exceptions 1 and 2, Lord Justice Jackson said:

> "28. … The new para. 398 uses the same language as section 117C(6) . It refers to "very compelling circumstances, over and above those described in paragraphs 399 and 399A." Paragraphs 399 and 399A of the 2014 rules refer to the same subject matter as Exceptions 1 and 2 in section 117C , but they do so in greater detail.
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> 29. In our view, the reasoning of the Court of Appeal in JZ (Zambia) applies to those provisions. The phrase used in section 117C(6) , in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or

> 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.

53. Whether there are "very compelling circumstances" is a demanding test, but nonetheless requires a wide-ranging assessment, so as to ensure that Part 5A produces a result compatible with Article 8.

54. I have noted the appellant's offending history and have set out the sentencing remarks of His Honour Judge Glenn following the appellant's convictions in January 2009. I accept the appellant was not convicted of a crime of violence, and I note that the appellant's sentence of imprisonment is at the bottom of the range covered by section 117C(3). That however does not undermine the seriousness of her offending reflected in the sentencing remarks and the sentence of imprisonment imposed. I also accept the appellant has not offended again, but she has been the subject of a deportation order since April 2010 and has failed to leave the UK despite an appeal having been dismissed in July 2010, in which her human rights claim was considered by the Tribunal. She arrived in the UK and made a claim for asylum in October 2003 that was swiftly refused by the respondent and an appeal against that decision was dismissed in February 2004.

55. The best interests of the appellant's daughter certainly carry great weight because of the passage of time, nevertheless, it is a consequence of criminal conduct that an offender may be separated from their child for many years, contrary to the best interests of the child. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in SSHD -v- CT (Vietnam) [2016] EWCA Civ 488 at [38]:

> "Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation."

56. I acknowledge that the public interest in the deportation of a foreign criminal is not set in stone and must be approached flexibly, recognising that there will be cases where the person's circumstances outweigh the strong public interest in

removal. I have had regard inter alia to the appellant's length of residence in the UK, the close ties that she retains with her partner and daughter, her immigration and offending history, and the family circumstances described in the report of the independent social worker. However, there are in my judgment no very compelling circumstances which make her claim based on Article 8 especially strong. It follows that in my judgement, the deportation of the appellant is in the public interest and not disproportionate to the legitimate aim.

Decision

57. I dismiss the appeal.

Signed Date 17th February 2020

Upper Tribunal Judge Mandalia