Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/19780/2018**

THE IMMIGRATION ACTS

Birmingham CJC	**Decision & Reasons Promulgated**
On the 3rd May 2022	**On the 25 October 2022**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

JIBRIL SHABAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Vokes, Counsel instructed by Turpin & Miller LLP
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of the Democratic Republic of Congo ("the DRC"). On 17th September 2018, a deportation order was made after the respondent had, on 16th September 2018, made a decision to refuse a human rights claim made by the appellant. The appellant's appeal against the respondent's decision to refuse his human rights claim was dismissed by First-tier Tribunal Judge Hobson for reasons set out in a decision promulgated on 2nd December 2020.

2. The appellant applied for and, was granted permission to appeal by Upper Tribunal Judge Lindsley on 12th February 2021. Following a hearing, the decision of First-tier Tribunal Judge Hobson was set aside for reasons set out in the decision of Upper Tribunal Judge Rintoul promulgated on 17th June 2021. Upper Tribunal Judge Rintoul summarised the background in paragraphs [2] and [3] of his decision:

> "2. The appellant was born in DRC on 12 May 1996 and on the basis of the unchallenged findings of the judge, left that country at the latest at the age of 7. He then lived in Uganda where he was assisted at a distance by his mother, who had sent support via friends and relatives, and he eventually joined her in the United Kingdom some point later. He was granted indefinite leave to remain but on 15 June 2018 he was convicted at the Crown Court in Warwick of one count of possessing a firearm and three counts of possessing ammunition without a valid certificate for which he was sentenced to five years' imprisonment and it is that conviction which gave rise to the Secretary of State's decision that he is a foreign criminal who should be deported.
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> 3. Briefly and in summary, the appellant's case is that there are in this case very compelling circumstances such that he should not be deported. A number of factors are relied upon, including that he does not speak Lingala or French, the languages spoken in DRC, but speaks only Swahili; that he has a hearing impediment to the extent he has to wear hearing aids as a result of tuberculosis and as such has difficulty in communicating; that he has had no contact with DRC since he left at a young age, his mother has no contact with the DRC and she has no family there and that in effect he would be required to go and live in a country about which he knows little."

3. Upper Tribunal Judge Rintoul was concerned that in his decision First-tier Tribunal Judge Hobson referred to a series of negative factors without adopting a 'balance sheet approach' including the positive factors, such as the links the appellant has with the United Kingdom or the fact that he has lived here for several years and has not lived in the DRC since he was a young child. Furthermore, there did not appear to be any consideration of the effect on the appellant of deportation, or on his relationship with his mother. At paragraph [19], Upper Tribunal Judge Rintoul said:

> "… I bear in mind that the reality of this appeal is that the appellant who would be returning to a country about which he effectively knows nothing, where he does not speak either main language of communication, where he speaks a language which is spoken by a relatively small minority, where he would have to rely on charitable support or the support of foreign NGOs and where he had in effect no support from family or contacts of family and I do

not consider that there has in this case been a sufficient analysis of the cumulative effects of these to the extent that there has not been a proper holistic assessment of these factors as required by Hesham Ali and in the circumstances I find that the decision of the First-tier Tribunal did involve the making of an error of law and I set it aside."

4. Upper Tribunal Judge Rintoul directed that the decision will be made in the Upper Tribunal. He went on to say:

"3. The facts as found by the First-tier Tribunal at [37] are preserved, save for the findings that his mother would be able to support him. It will, however, be necessary to remake in more detail the findings about how the appellant will or will not be able to reintegrate into life in the DRC, for example, the level of support he might receive from NGOs, etc. and employment/accommodation he might be able to access, in effect, the obstacles to integration.

4. The Upper Tribunal would be greatly assisted by evidence on the number of Swahili Speakers in Kinshasa, or whether he would be able to got to a part of the DRC where they are more prevalent; and, the extent to which his hearing loss impairs his ability to communicate, including how long his hearing aids would function without technical support."

5. As findings made by First-tier Tribunal Judge Hobson have been preserved, it is useful for me to record those findings in this decision. Although Upper Tribunal Judge Rintoul states the facts as found by the First-tier Tribunal at [37] are preserved, it was common ground between the parties in their submissions before me that the preserved findings begin at paragraph [35] of the decision. First-tier Tribunal Judge Hobson said:

"35. I accepted the following facts from the evidence before me:

a. I accepted that the Appellant has little recollection of Congo and has no family or other contacts there. He speaks Swahili, but does not speak either Lingala or French. I accepted what I found to be clear and credible evidence from Mrs Amir that the Appellant was 7 years' old when she resumed contact with him, and he was living in Uganda by that time.

b. I accepted that the Appellant has a genuine and close relationship with his mother, despite their lengthy separation when the Appellant was a child.

c. I accepted that the Appellant was seriously unwell with tuberculosis in 2017 and that he now wears hearing aids as a result of the subsequent hearing loss he experienced. He is now recovered from tuberculosis. His hearing is sufficiently impaired that he has been prescribed hearing aids, but he is not completely

> deaf: the Appellant's medical records suggest that he was able to provide a doctor with a detailed history and engage in a consultation at a time when he was not wearing any hearing aids (page 11 Appellant's bundle).

6. There are other findings that are to be found at paragraphs [39] to [48] of the decision of First-tier Tribunal Judge Hobson. They are also preserved, save for the findings that the appellant's mother would be able to support him, which is to be found at paragraph [45] and the finding at [46] that the appellant had lived independently at 'The Foyer':

> "39. … I am not satisfied on the evidence before me that the Appellant is likely to be detained or mistreated if he is returned to Congo.
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> 40. … I agree that his disability will make life more difficult for him than it would be for a person without that disability. However, the Appellant is able to hear to some extent without aids…I was satisfied that the Appellant's disability does not prevent him from communicating with others and is unlikely to prevent him from meeting and speaking to Swahili speakers in Congo.
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> 41. The Appellant was convicted of a very serious offence. The judge who sentenced him accepted that he had been a custodian of the firearm in question, and did not intend to use it himself. However, the statutory minimum sentence for firearms offences illustrates the seriousness with which such offences are viewed in the United Kingdom.
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> 42. The Appellant had no previous convictions at the time of his conviction. I accepted his evidence that he has undertaken courses while in custody and that he recognises the factors which led to his arrest. However, he continues to deny the offence.
>
> 43. In my judgment there are no features of the offence itself which could be described as 'very compelling circumstances' which counter the public interest in deporting the Appellant.
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> 44. … I accept that integration will be difficult for him in Congo….: whilst the Appellant may not be all able to communicate with everyone in Congo on his return, it is likely, in my judgment, that he will be able to communicate with those residents of Kinshasa who do speak Swahili. And while there is no state support, there are charities and international agencies, as Mr Ntung, writes, who may be able to provide support.
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> …
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> 47. … if he is returned to Congo, in my judgment it is unlikely the strangers he meets there will know about his conviction unless he tells them. Even if his conviction is known, the Appellant would face a similar difficulty finding employment in the United Kingdom as a result of his conviction.
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> 48. … There is no indication in any of the evidence relating to the Appellant that his nationality is likely to be disputed. He has a travel document identifying his birthplace as Kinshasa (page 15 Appellant's

bundle). I found it unlikely that the Appellant would not be recognised as of Congo if he were returned there."

The appeal before me

7. The appeal was listed for hearing before me to remake the decision. Briefly stated, before me, the appellant maintains that his deportation would amount to a disproportionate interference with his rights to a private and family life under Article 8 ECHR because there are very compelling circumstances such that deportation would breach Article 8 ECHR pursuant to section 117C(6) of the Nationality, Immigration and Asylum Act 2002.

The evidence

8. In preparation for the hearing of the appeal before me the appellant's representatives have prepared a consolidated bundle of documents comprising of 262 pages. The bundle helpfully includes the relevant decisions of the First-tier Tribunal, Upper Tribunal, the respondent's bundle and the evidence now relied upon by the appellant. At the outset, Mr Vokes confirmed that the consolidated bundle contains all the updated evidence that I will need to have regard to, when considering this appeal.

9. I heard oral evidence from the appellant only. He gave his evidence in English. He signed and adopted his witness statement dated 19th April 2022, a copy of which is to be found at pages 19 to 25 of the consolidated bundle.

10. The appellant confirms that he does not remember anything about the DRC and has no connections to the country and does not have any family there. He does not speak Congolese. He has no memory of his father, who he believes was killed in the DRC during the war because he was from Rwanda. He refers to a difficult life in Uganda where he was left with his grandmother. The appellant's mother financially supported him and his grandmother. In Uganda, he spoke Swahili and learnt some English.

He came to the UK in 2011 aged 15. He speaks of a difficult relationship with his stepfather that caused him to leave the family home in 2014 and move to 'The Foyer', a service that supports young people with accommodation. Although he had moved out of the family home he maintained a very close relationship with his mother and stepsiblings. The appellant does not believe that he completed any GCSE examinations. He attended college where he studied Business and Admin, and also completed an ESOL course at Entry 2 and 3. He attended City College to study 'Business' but only managed to study for two months because of ill health. The appellant refers to his subsequent admission to hospital for tuberculosis and the treatment he received. Following a spell in hospital the appellant returned home but in 2017 moved back to 'The Foyer' because there was insufficient space at home. He became involved with people who were committing crime and describes himself as 'very lost in life' at that time. Looking back, he now accepts he should have gone to his mother for help and guidance, having never been in trouble previously. Despite his impaired hearing since 2017, he did not receive a hearing aid until December 2018, nine months into his prison sentence.

11. The appellant claims that during his time in prison, he passed all drug tests and made the effort to complete courses in painting, construction, money management, cleaning, BICS, Maths and English and a STOIC course that taught him to manage those things that he can and cannot control. He now wants to help his siblings to ensure they do not make the same mistakes as him by keeping bad company. During his time in prison the appellant claims he became much closer to his mother, and he does not now wish to put her in a similar situation because of his actions. He claims that being in prison changed his understanding and approach to life. The time was a learning curve that allowed him to accept his situation and to mature. He accepts he had surrounded himself with the wrong people but has now learned from his mistakes, albeit that he will face challenges in the future as he has a criminal record. Since his

release from prison he has stayed out of trouble and continued to build a better relationship with his family. He would like to pursue a career as an engineer and to do that, accepts he must complete higher education.

12. The appellant claims he would not know what to do if he were deported to the DRC. He does not have any recollection of life there, cannot speak Congolese and would feel extremely lost as he would have no family or support system available to him. He knows nothing about the DRC. It is the country where he was born but he has no knowledge or understanding of the country or its culture. He is terrified of the idea of being sent there.

13. In cross-examination, the appellant confirmed that he is currently living in shared accommodation with 4 to 5 other people. The appellant clarified that he was released on 2nd December 2020. He has not worked since his release from prison, and neither has he undertaken any educational courses. He had wanted to complete an apprenticeship but it is difficult because he is in a room with lots of people. Mr Tan referred the appellant to the claim made by the appellant's mother in her witness statement that she had five brothers, two of whom have passed away. She claims she has not had any contact with her brothers since 2011. The appellant said that he does not really know his mum's brothers and is not sure whether she has brothers in the DRC. He does not know why she has not had contact with them since 2011. He said that neither he nor his family have friends from the DRC that live in the UK. He did not know if his mother was trying to contact anyone in the DRC. He said that if he had to go back, he has not really got any family in the DRC. The only family he has, is his mother. Mr Tan referred the appellant to the claim made by his mother in paragraph 7 of her witness statement that she was able to track the appellant down through a friend on 'Facebook'. The appellant said he did not know if this friend was someone who lived in the DRC.

14. By way of clarification I asked the appellant whether he knew of his maternal uncles when he was in the DRC. The appellant said he did not really remember anything about the DRC because he was a child when he had lived there. I asked whether this mother had any contact with her brothers after the appellant's arrival in the UK. He said he did not know if she did. There was no re-examination.

15. The appellant's mother, Furaha Amir has made a witness statement that is to be found at pages [26] to [29] of the consolidated bundle. The statement is unsigned but is said to have been agreed by her, over a telephone call on 19th April 2022. She confirmed she was born in the DRC and had five brothers and one sister. Her sister and two of her brothers have passed away. She met the appellant's father, who was originally from Rwanda, in Kinshasa, where she had moved to study, in 1994. They subsequently married. The appellant's father was sadly killed when the appellant was just two or three years old. They were living in Kinshasa at the time. About a week prior to his father's death, the appellant had been taken by his maternal aunt to Beni. Following the death of her husband, she realised that she had to go and get her son but she was unable to do so because the relevant road was blocked and internal fighting had increased. She therefore had no option but to leave the DRC without the appellant. She left in 2000 and following her arrival in the United Kingdom in 2001, she claimed asylum. The appellant's mother refers to the steps she took to find her son and establish contact with him. She eventually made contact with him in or about 2003 after tracking him down through a friend on Facebook. Her sister had passed away and the appellant had been living with his maternal grandmother, initially in Beni, but then in Uganda because of the war in the DRC.

16. The appellant's mother refers to the difficult relationship between the appellant and her husband, when the appellant came to the UK. She had spent a considerable amount of time and money in getting the appellant to the UK and that placed a strain on her marriage. The marriage broke

down in 2014, leaving her as the sole carer for her three children. The appellant's mother refers to the appellant's illness and the period that he spent in hospital. That had an impact upon his studies and the loss of his hearing is something that he continues to struggle with. She states that after the appellant returned to 'The Foyer', he would often come home for meals and to see his stepsiblings. She works as a full-time support worker, and she did not know how the appellant became involved in drugs and crime. She was very disappointed in him. She states the appellant went through the prosecution without any hearing aid and support.

17. I also have in the evidence before me a letter from Dr Kolluri of the Willenhall Oak Medical Centre. Dr Kolluri confirms the appellant was diagnosed with hearing loss in 2017. According to their records, he was fitted with hearing aids in 2018. He was last assessed for his hearing by the Audiology Department at the University Hospital of Coventry in May 2021 and was described as having moderate to severe hearing loss in both ears, with it being worse in the left ear. Dr Kolluri states the appellant is due to be fitted up-to-date hearing aids, but there is no record of that having been done. Dr Kolluri is unable to comment on how long the appellant's hearing aids would function without technical support as it is outside Dr Kolluri's expertise.

18. Finally, I have a further report from Alex Ntung dated 30th October 2021. Mr Ntung claims to be a Country Expert specialising in the Great Lakes Region of Africa (DRC, Uganda, Rwanda, Burundi) in political and security risks. He states he grew up in the South Kivu province of the eastern DRC. He has lived and worked in Uganda, Burundi and Rwanda. He now lives in the UK but maintains strong links with the African continent through his consultancy and research work. He states he is currently undertaking doctorate research in International Conflict Analysis with specific emphasis on political conflict in the DRC.

19. Mr Ntung states, at paragraph [7] of his report, that the DRC has no welfare system; the representatives of local NGOs and civil society organisations rely on international funding to assist in some situations such as help to Internally Displaced People (IDP). At paragraphs [8] and [9] he states:

> "8. Most of IDPs and returnees' refugees do not have access to essential basic services, housing or employment opportunities, keeping them in a permanent state of displacement and extreme vulnerability. The DRC has one of the highest unemployment rates in the world, and one of the most youthful populations.
>
> 9. The DRC has had no housing schemes to enable access to adequate, affordable housing and basic services, nor housing subsidies or loans for civil servants. There is no housing finance facility or other institution capable of implementing such a scheme."

20. Mr Ntung states many communities live in socially and economically deprived areas. In cities, a majority of people live in slums where affording something to eat can be extremely hard. Poverty is endemic. He states, at [12], that nearly three in four people live on less than $1.90 per day, representing one of the largest populations in the world living in extreme poverty. At paragraph [13], he states:

> "[The appellant] is likely to face issue of food insecurity. The ongoing conflict in the DRC has had a devastating impact on food security and livestock, exacerbating existing issues regarding access to water and sanitation. In Kinshasa, food and water prices are highest. In eastern Congo, humanitarian conditions have deteriorated: there is a lack of medical care and infrastructure, a significant number of internally displaced people, and poor sanitation systems, which all impact on existing health issues such as malaria, yellow fever and TB. These conditions put people in danger and are often exploited by looters of cattle, which leads to violence."

21. Mr Ntung notes the DRC is diverse in languages, traditions and cultures with as many as two hundred different ethnic groups speaking hundreds of different languages and dialects. Lingala is the main language spoken in Kinshasa. It is considered as one of the five national languages (French, Lingala, Tshiluba, Kiswahili and Kikongo). Formal Lingala is mostly used in official communication and is often spoken by the general public and in popular music. Mr Ntung states, at [16], that people from

eastern Congo speak mainly Swahili and local dialects. Their traditions and cultures are very different from people in the western part of the country (e.g. Kinshasa). At paragraph [17], Mr Ntung states Swahili speakers are a very small minority in Kinshasa, and most are political and private sector officials or some university students. At paragraph [19] Mr Ntung states that if the appellant is to be relocated to eastern Congo, it is important to note that the region is very unsafe.

The parties submissions

22. On behalf of the respondent Mr Tan relies upon the respondent's decision and the preserved findings of the First-tier Tribunal. He submits the appellant does not challenge the decision to refuse his asylum claim. Mr Tan submits the appellant had denied the offence and was convicted following a trial before a jury. Mr Tan submits appellant has not been lawfully resident in the UK for most of his life and there is scant evidence before the Tribunal of the appellant being socially and culturally integrated in the United Kingdom, either before his conviction or since his release. The appellant lives apart from his mother and even now, is not in education or employment. Mr Tan submits the appellant is educated and has demonstrated that he can live independently, without support from others. The appellant had previously adapted to life in Uganda and then adapted to life in the UK. He has demonstrated an ability to learn other languages. He learnt English when he was in Uganda.

23. Mr Tan accepts the appellant has a hearing impairment but submits there is no evidence that he cannot continue to use the hearing aids he has, or that he would be unable to access assistance for the maintenance of the hearing aids, such as with a change of batteries.

24. Mr Tan submits that in her statement, the appellant's mother states she has three brothers who appear to be in Congo, but there is no evidence of any attempt having been made to re-establish contact with them, and no explanation why no such attempts have been made. Mr Tan submits

her evidence also points to a sister who previously lived in Congo, and a friend who was previously in contact with the appellant's mother. He submits there is no reason those contacts cannot be re-established.

25. Mr Tan submits the appellant speaks Swahili, a language that is widely spoken. He refers to the material relied upon by the respondent from 'Translators without borders' that is found at page 55 of the consolidated bundle. Swahili is very widely spoken in many areas. As far as the evidence of Mr Ntung is concerned, Mr Tan submits that in paragraph [17] of his latest report, Mr Ntung speaks broadly about the languages spoken in the DRC and the demographic. Mr Ntung does not engage with the statistic that Swahili is one of the most widely spoken languages. He appears to suggest that Swahili speakers are a very small minority in Kinshasa but accepts that some people from the eastern part of the country, where Swahili is widely spoken, come to Kinshasa to search for work. Mr Tan submits that is evidence of economic migration and a broader category of people speaking Swahili in areas like Kinshasa. Mr Tan submits the evidence provided by the respondent demonstrates that the use of Swahili is not limited to the Kivu region and establishes that there are a number of people in Kinshasa who speak Swahili, including students and economic migrants. Mr Tan submits that as far as the appellant relies upon any discrimination in opportunities because of his conviction, it is unlikely that anyone in the Congo would know of the conviction. It is an opinion that is not based on any source material. Mr Tan submits there are charities and NGO's that would support the appellant and the appellant would continue to have support from the UK from his mother and others that have supported him previously. The appellant's mother has had communication with the appellant using social media and telephone in the past, and that could continue in the future if the appellant is returned. In the end, here, the public interest in the deportation of the appellant is a strong one and outweighs the interests of the appellant.

26. On behalf of the appellant Mr Vokes referred me to what was said by Upper Tribunal Judge Rintoul in paragraph [19] of the 'error of law' decision; "*..: the reality of this appeal is that the appellant who would be returning to a country about which he effectively knows nothing, where he does not speak either main language of communication, where he speaks a language which is spoken by a relatively small minority, where he would have to rely on charitable support or the support of foreign NGOs and where he had in effect no support from family or contacts of family…".* Mr Vokes adopts the observations that were made by Upper Tribunal Judge and he goes as far as to say that they are essentially findings that were made by the Upper Tribunal and I am bound by those findings and they should form the starting point for my consideration of this appeal. Alternatively, if they are observations made by the Upper Tribunal, they are observations that should be given significant weight.

27. Mr Vokes submits that in any event, there is a preserved finding that the appellant has a genuine and close relationship with his mother. He submits there is no real purpose to break that relationship now. It would be traumatic for both the appellant and his mother. The appellant has finally been reunited with his mother and deportation would break the close bond they have now established. Mr Vokes submits the deportation of the appellant would have a significant impact upon his mother.

28. Mr Vokes submits the appellant was seriously unwell with tuberculosis in 2017 and he now wears hearing aids. The letter from the appellant's GP, Dr Kolluri, confirms that he needs up-to-date hearing aids. Mr Vokes candidly accepts there is no further evidence regarding the appellant's hearing aids and how long they would function without technical support. There remains a question about how the appellant will have the support he would require in the DRC, to pay for replacements or to get the replacements that he requires. There is no direct evidence regarding the availability hearing aids in the DRC, although there can be little doubt that Kinshasa is a very expensive city to live in. In paragraph [17] of his

report, Mr Ntung states the cost of living is high in Kinshasa and it is very expensive to relocate/travel from the east to Kinshasa.

29. Mr Vokes submits that it must be obvious that a person who has a hearing disability and is partially deaf, will find it more of a struggle to learn a new language. The evidence relied upon by the appellant demonstrates the geographical distribution of Swahili speakers in the DRC. They are heavily situated in the eastern part of the country. Kinshasa is nearer the west, and there are hardly any Swahili speakers there. The evidence of Mr Ntung is that Swahili is not generally spoken in Kinshasa. Mr Vokes referred to paragraph [24] of the report of Mr Ntung in which it is said that health infrastructure is absent or non-functional in eastern Congo. Other than insecurity, there is a challenge to provide health services to a widely dispersed population. In urban areas, health services may be physically within the reach of the poor and other vulnerable populations but are provided by unregulated private providers who do not deliver Essential Health Package services.

30. Mr Vokes submits the appellant has little recollection of the DRC and has no family or other contacts there. He would either have to live in his home area in the east of the country, where he has no family support and would have no-where to live, but where Swahili is spoken, or, he would have to live in Kinshasa where there are very few Swahili speakers. Mr Vokes submits the appellant does not have the means to find employment and housing and faces poverty in the DRC. Mr Vokes referred to the previous report of Mr Ntung dated 18th September 2020 and the reference at paragraph [49] to the DRC not having capacity to protect vulnerable people and a country that is considered to be one of the poorest in the world. Mr Ntung had expressed the opinion at paragraph [50] of that report, that finding work/employment would be extremely difficult for the appellant, and that in such circumstances people in the DRC turn to the community, family and friends as their primary support mechanisms. The appellant would not have such

support mechanisms to turn to. Mr Vokes submits the appellant is very vulnerable and would be particularly vulnerable in the DRC. This goes far beyond very significant obstacles to reintegration. There are here, he submits, very compelling circumstances over and above those described in Exceptions 1 and 2 such that the public interest that requires deportation, is outweighed. Mr Vokes accepts there is a very high threshold, but he submits, it is not an impossible test to meet. The appellant simply has no connections to a country that he left when he was very young and taking the cumulative effects of all of the obstacles together, the appellant meets the high threshold.

Findings and conclusions

31. I have considered whether the appellant's deportation would be unlawful under section 6 of the Human Rights Act 1998 as being in breach of Article 8 ECHR. I am required by cases such as NA (Pakistan) v SSHD [2016] EWCA Civ 662 to adopt a structured approach to that question.

32. Section 117A in Part 5A of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act") 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.

33. The first question which arises is whether the appellant is a foreign criminal, as defined in s117D(2) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). On 15th June 2018 the appellant was convicted at Warwick Crown Court of possessing a handgun and 3 counts of possession of ammunition without a valid certificate. He was sentenced on 11th July 2018 at the same court to a total of five years

imprisonment. In order to put the appellant's conviction and sentence in context, I pause to note the sentencing remarks made by His Honour Judge Cooke when he sentenced the appellant on 11th July 2018:

> "…The only logical interpretation of what the jury found that you did on, I have to say clear and compelling evidence, is that you had agreed to be the custodian of a loaded handgun. That is a lethal and very importantly concealable weapon but additional ammunition that would fit it and, in the instance of one bullet, another weapon of a different calibre and you had done so for and on behalf of, one can only infer, a serious criminal who was too wary to risk being caught with such a thing himself. You have been used but I am afraid if you agree to allow yourself to be used in this way, it doesn't spare you a significant sentence. You are in a position analogous to a drugs mule carrying drugs through the Customs checkpoint for somebody else. Stiff sentences follow. Parliament has laid down how stiff they must be. But you are still a very young man and in my judgment there is no necessity here to go beyond the five-year minimum which has been laid down, so on count 1 that will be the sentence.
>
> On the three other counts, which relate to the different types of ammunition found in and with the gun, on each of those, concurrently and concurrent to the five-year term, I impose two-year sentences. So the total sentence is one of five years…"

34. The appellant not a British citizen and has been convicted in the United Kingdom of an offence and been sentenced to a period of imprisonment of at least 12 months. He is therefore a 'foreign criminal'. It is useful to set out s117C of the 2002 Act:

> "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."

35. Quite apart from the fact that the appellant has been sentenced to a period of imprisonment of four years or more, as Judge Rintoul noted in paragraph [13] of the 'error of law' decision, the appellant cannot rely upon 'Exception 1' for the simple reason that he has not lived in the United Kingdom long enough. He arrived in the United Kingdom in July 2011 and on a purely arithmetical calculation, he has not been lawfully resident in the United Kingdom for most of his life. As was recorded in paragraph [15] of the error of law decision of Upper Tribunal Judge Rintoul, here, simply meeting one of the exceptions was not enough.

36. Although the question whether there would be very significant obstacles to the appellant's integration into the DRC is relevant, in accordance with s117C(6), the public interest requires the appellant's deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

S117C (6) of the 2002 Act

37. The appellant must show, if he is to avoid deportation on Article 8 ECHR grounds, that there are very compelling circumstances, over and above those in the exceptions to deportation, which suffice to outweigh the public interest in deportation: s117C(6) of the 2002 Act.

38. In HA (Iraq) & Others v SSHD [2022] UKSC 22, [2022] 1 W.L.R 3784, Lord Hamblen said:

> “46. Under section 117C(6) of the 2002 Act deportation may be avoided if it can be proved that there are "very compelling circumstances, over and above those described in Exceptions 1 and 2"
>
> 47. The difference in approach called for under section 117C(6) as opposed to 117C(5) was conveniently summarised by Underhill LJ at para 29 of his judgment as follows:
>
> > "(A) In the cases covered by the two Exceptions in subsections (4)-(5), which apply only to medium offenders, the public interest question is answered in favour of the foreign criminal, without the need for a full proportionality assessment. Parliament has pre-determined that in the circumstances there specified the public interest in the deportation of medium offenders does *not* outweigh the article 8 interests of the foreign criminal or his family: they are, given, so to speak, a short cut. The consideration of whether those Exceptions apply is a self-contained exercise governed by their particular terms.
> >
> > (B) In cases where the two Exceptions do not apply - that is, in the case of a serious offender or in the case of a medium offender who cannot satisfy their requirements - a full proportionality assessment is required, weighing the interference with the article 8 rights of the potential deportee and his family against the public interest in his deportation. In conducting that assessment the decision- maker is required by section 117C(6) (and paragraph 398 of the Rules) to proceed on the basis that 'the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2'."
>
> 48. In *Rhuppiah v Secretary of State for the Home Department [2016] 1 WLR 4203 at para 50* Sales LJ emphasised that the public interest "requires" deportation unless very compelling circumstances are established and stated that the test "provides a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of article 8 to remove them."
>
> 49. As explained by Lord Reed in his judgment in *Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60; [2016] 1 WLR 4799 at para 38* :
>
> > "… great weight should generally be given to the public interest in the deportation of [qualifying] offenders, but … it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in the *SS (Nigeria) case [2014] 1 WLR 998* . The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State."

> 50. How Exceptions 1 and 2 relate to the very compelling circumstances test was addressed by Jackson LJ in *NA (Pakistan)* . In relation to serious offenders he stated as follows:
>
> > "30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of article 8."
> >
> > ...
>
> He also emphasised the high threshold which must be satisfied:
>
> > "33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient."
>
> 51. When considering whether there are very compelling circumstances over and above Exceptions 1 and 2, all the relevant circumstances of the case will be considered and weighed against the very strong public interest in deportation. As explained by Lord Reed in *Hesham Ali* at paras 24 to 35, relevant factors will include those identified by the European Court of Human Rights ("ECtHR") as being relevant to the article 8 proportionality assessment. In *Unuane v United Kingdom (2021) 72 EHRR 24* the ECtHR, having referred to its earlier decisions in *Boultif v Switzerland (2001) 33 EHRR 50* and *Üner v The Netherlands (2006) 45 EHRR 14* , summarised the relevant factors at paras 72-73 as comprising the following: ...”

39. I reject the submission made by Mr Vokes that I am bound by what was said by Upper Tribunal Judge Rintoul in paragraph [19] of the ‘error of law’ decision. The decision of Upper Tribunal Judge Rintoul was confined to whether there is an ‘error of law’ in the decision of the First-tier Tribunal. When one reads what was said at paragraphs [16] to [19] of his decision as a whole, it is clear that at paragraph [19], Upper Tribunal Judge Rintoul was doing no more than to summarise relevant positive factors that were capable of weighing in favour of the appellant, that the First-tier Tribunal Judge failed to have proper regard to in a holistic

assessment. The fact that Upper Tribunal Judge Rintoul may have considered *"the reality of the appeal"* being the factors he identified, is not to say that he was making findings regarding those matters. They are, nevertheless, factors that are relevant to the question whether there are very compelling circumstances, over and above those described in Exceptions 1 and 2 set out in s117C of the 2002 Act.

40. I pause to note that although Exception 1 does not apply here, one of the relevant considerations is whether there would be very significant obstacles to the applicant's integration to the DRC. The test that applies under the 'private life grounds' in the immigration rules as to "very significant obstacles to integration" was set out in Kamara v SSHD [2016] EWCA Civ 813 ; *"the idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life".*

41. The test in s117C(6) is a proportionality test, balancing the rights of the appellant against the public interest in his deportation. The scales are weighted heavily in favour of deportation. I consider that there is a cogent and strong public interest in the appellant's deportation.

42. Against the cogent public interest in deportation, the importance of which is underlined in primary legislation, there are preserved findings that the appellant has little recollection of Congo and has no family or other contacts there. The appellant has a genuine and close relationship with his mother. He now wears a hearing aid as a result of hearing loss he experienced following a period in 2017 when he was unwell with tuberculosis. There is a preserved finding that his disability will make life

more difficult for him in the DRC than it would be for a person without his disability. The disability does not prevent him from communicating with others, and there is a preserved finding that it is unlikely to prevent him from meeting and speaking to Swahili speakers in the DRC. First-tier Tribunal Judge Hobson accepted, at [44], that integration will be difficult for the appellant in the DRC, but it is likely that he will be able to communicate with those residents of Kinshasa who do speak Swahili.

43. I accept the appellant and his mother were separated when the appellant was very young, and I accept what is said by the appellant's mother in her witness statement that she and the appellant's siblings were affected by the absence of the appellant when he was in prison, and they would be devastated if he were to be deported. The appellant does not however live with his mother and stepsiblings, and historically, they were able to maintain a relationship despite geographical separation when the appellant was living in Uganda.

44. In considering the obstacles to the appellant's integration into the DRC, I have had regard to the two reports that have been prepared by Mr Alex Ntung. In his first report, Mr Ntung refers at some length to what he describes as the 'political turmoil' and 'troubled history' in the DRC. He states, at [49], that the DRC does not have the capacity to protect vulnerable people. The country is considered to be one of the poorest countries in the world and poverty is widespread. At paragraph [50] he expresses the opinion that finding work or employment would be extremely difficult and that in such circumstances, people turn to the community, family and friends as their primary support mechanism. That opinion is repeated at paragraph [12] of Mr Ntung's second report. I accept, as Mr Vokes submits, that on the preserved findings, the appellant would not have such support mechanisms to turn to.

45. In his initial report, Mr Ntung refers to the Roman Catholic Church, international agencies and related charities providing alternative public

services in the absence of functioning state institutions. There is no welfare system. In paragraph [8] of his most recent report, he states most internally displaced people and returning refugees do not have access to essential basic services, housing or employment opportunities keeping them in a permanent state of displacement and extreme vulnerability. The difficulty with the report of Mr Ntung is that much of what is said by him is unsourced, and perhaps more fundamentally, he does not address the level of support that the appellant may be able to receive from NGO's or the Roman Catholic Church, international agencies and other related charities that he had previously referred to. Although I am prepared to accept that support might be limited, that is not to say that no support would be available to the appellant, particularly in the short term, whilst the appellant re-establishes himself in the DRC.

46. A factor upon which the appellant places significant reliance is the preserved finding the appellant speaks Swahili but does not speak either Lingala or French. In the second of his reports, Mr Ntung states Swahili speakers are a very small minority in Kinshasa. He acknowledges that most are political and private sector officials or some university students. He also acknowledges that some people from the eastern part of the country come to Kinshasa to search for work, and families may relocate to Kinshasa due to government related employment. Mr Ntung states there is no data available to confirm the percentage of Swahili speakers in Kinshasa, but from his own experience, Swahili is generally not spoken in Kinshasa. He states a small percentage of Swahili speakers tend to be government business officials. The observations made by Mr Ntung regarding the use of Swahili largely in the east of the DRC is consistent with the material relied upon by the respondent. What is clear however is that although the use of Swahili is not widespread in Kinshasa, it is a language that continues to be used particularly by political and private sector officials, and people from the eastern part of the country that go to Kinshasa to search for work. That is the position the appellant would find

himself in, and I find that he would not therefore be living in an area where he would not have the means of communicating with others.

47. I have also had regard to the health of the appellant and the extent to which his hearing impairment and use of aids would impact upon his ability to participate in daily life in Kinshasa so as to have a reasonable opportunity to be accepted there. In paragraph [24] of his report, Mr Ntung refers to health infrastructure being absent or non-functional in eastern DRC. He states that in urban areas, health services may be physically within the reach of the poor and other vulnerable populations but are provided by unregulated private providers who do not deliver essential health package services.

48. The letter from the appellant's GP, Dr Kolluri, confirms that he needs up-to-date hearing aids. Mr Vokes candidly accepts there is no further evidence regarding the appellant's hearing aids and how long they would function without technical support. Although I am prepared to accept, as Mr Vokes submits, the cost of living is high in Kinshasa, there is, as Mr Vokes accepts, no direct evidence regarding the availability hearing aids in the DRC, of the facilities available for their maintenance.

49. Although finely balanced, I am satisfied that standing back, looking at the evidence holistically, and taking the appellant's lack of connections to the DRC, his ability to only speak Swahili, and his hearing impairment cumulatively, is sufficient to establish very significant obstacle to the appellant's integration into the DRC. That however is insufficient for me to allow the appeal.

50. In reaching my decision and in conducting an Article 8 proportionality assessment, I have had regard to all the relevant evidence and considered and weighed that evidence against the very strong public interest in deportation. I have already referred to the sentencing remarks of His Honour Judge Cook. The nature and seriousness of the appellant's conviction is reflected in the sentence imposed. I note the observation

made in the sentencing remarks that the appellant had been used and that he was in a position analogous to a drugs mule carrying drugs through the Customs checkpoint for somebody else. The appellant was convicted in July 2018 of offences committed in January 2018. He was convicted following trial, having entered a 'not guilty' plea, and I accept there is no evidence before me of any further offending behaviour. I note however that the OASys assessment records the risk to the public is 'high' and likely to be greatest when the appellant is associating with negative peers. The nature of the risk is of serious physical, psychological or emotional harm as a consequence of being a party or witness to physical harm, or as a result of threats or intimidation with a gun. The risk in the community to the public is described as 'high'. The appellant's evidence before me was that he had surrounded himself with the wrong people but has now learned from his mistakes, albeit that he will face challenges in the future as he has a criminal record. Since his release from prison he has stayed out of trouble and continued to build a better relationship with his family. He would like to pursue a career as an engineer and to do that, accepts he must complete higher education. I accept the appellant has expressed remorse. He accepted in cross examination, and I find, that since his release, the appellant has not engaged in any meaningful employment or education.

51. I have given due weight to the preserved finding that the appellant has a genuine and close relationship with his mother. I am prepared to accept that extends to the relationship that he has with his siblings. He does not however live with them and he has managed to maintain a relationship with them in the past despite the geographical separation. I have had regard to the fact that the appellant left the DRC when he was very young and there is a preserved finding that the appellant has little recollection of the DRC and has no other contacts there. I find the appellant will have maintained cultural links initially through his aunt and grandmother, and more recently through his mother. I accept the appellant has lived in the UK since 2011 when he was granted a

settlement visa to join his mother. The evidence before me regarding the appellant's education, qualifications and employment is vague and unclear. The appellant has historically relied upon the support of his mother and others in the UK and there is no evidence before to suggest that that support would not continue in the event the appellant is deported to the DRC.

52. Overall, in my judgment the evidence demonstrates a rather tenuous degree of private life in this country. Even giving due weight to the appellant's relationship with his mother and siblings, having considered the factors that weigh in favour of and against the appellant, I am not satisfied that on the evidence before me, the appellant has established that there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

53. In my final analysis, I find the appellant's protected rights, whether considered collectively with rights of others that he has formed associations with, or individually, are not in my judgement such as to outweigh the public interest in the appellant's removal having regard to the policy of the respondent as expressed in the immigration rules and the 2002 Act. I am satisfied that on the facts here, the decision to refuse the appellant's human rights claim is not disproportionate to the legitimate aim and I am obliged therefore, to dismiss his appeal on Article 8 grounds.

Notice of Decision

1. The appeal is dismissed on human rights grounds.

Signed **V. Mandalia** Date 17th October 2022

Upper Tribunal Judge Mandalia