



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

Binaku (s.11 TCEA; s.117C NIAA; para. 399D) [2021] UKUT 00034 (IAC)

**THE IMMIGRATION ACTS**

**Heard remotely by *Skype for Business*  
On 5 November and 2 December 2020**

**Decision & Reasons Promulgated**

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**Before**

**THE HON. MR JUSTICE LANE, PRESIDENT  
UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**SHABAN BINAKU  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the appellant: Mr Z Malik, Counsel, instructed by SMA Solicitors  
For the respondent: Mr I Jarvis, Senior Home Office Presenting Officer

*The procedural issue: appeals under section 11 of the TCEA 2007*

*(1) The appellate regime established by the Nationality, Immigration and Asylum Act 2002, as amended, is concerned with outcomes comprising the determination of available grounds of appeal;*

- (2) *A party who has achieved the exact outcome(s) sought by way of an appeal to the First-tier Tribunal being allowed on all available grounds relied on (in respect of an individual) or because it has been dismissed on all grounds (in respect of the Secretary of State) cannot appeal to the Upper Tribunal under section 11(2) of the Tribunals, Courts and Enforcement Act 2007 against particular findings and/or reasons stated by the judge;*
- (3) *Devani [2020] EWCA Civ 612; [2020] 1 WLR 2613 represents binding authority from the Court of Appeal to this effect.*

*The substantive issue: the relationship between Part 5A of the NIAA 2002 and the Immigration Rules*

- (4) *By virtue of section 117A(1) of the 2002 Act, a tribunal is bound to apply the provisions of primary legislation, as set out in sections 117B and 117C, when determining an appeal concerning Article 8.*
- (5) *In cases concerning the deportation of foreign criminals (as defined), it is clear from section 117A(2)(b) of the 2002 Act that the core legislative provisions are those set out in section 117C. It is now well-established that these provisions provide a structured approach to the application of Article 8 which will produce in all cases a final result compatible with protected rights.*
- (6) *It is the structured approach set out in section 117C of the 2002 Act which governs the task to be undertaken by the tribunal, not the provisions of the Rules.*
- (7) *A foreign criminal who has re-entered the United Kingdom in breach of an extant deportation order is subject to the same deportation regime as those who have yet to be removed or who have been removed and are seeking a revocation of a deportation order from abroad. The phrases “cases concerning the deportation of foreign criminals” in section 117A(2) and “a decision to deport a foreign criminal” in section 117C(7) are to be interpreted accordingly.*
- (8) *Paragraph 399D of the Rules has no relevance to the application of the statutory criteria set out in section 117C(4), (5) and (6);*
- (9) *It follows that the structured approach to be undertaken by a tribunal considering an Article 8 appeal in the context of deportation begins and ends with Part 5A of the 2002 Act.*

## **DECISION AND REASONS**

### **INTRODUCTION**

1. This is an appeal against the decision of First-tier Tribunal Judge Bunting (“the judge”), promulgated on 25 February 2020, by which she dismissed the appellant’s

appeal against the respondent's decision to refuse his human rights claim, which in turn had been made in the context of the appellant having re-entered the United Kingdom in breach of a deportation order.

2. This case raises two issues; one procedural in nature, the other substantive. In respect of the former, we can state the question as follows: can a party who has succeeded on all available grounds in an appeal before the First-tier Tribunal and who may therefore be described as "the winner", then appeal to the Upper Tribunal on a point of law?
3. On this the parties are divided. The appellant argues that the winning party can appeal and therefore must comply with the applicable procedural steps. The respondent submits that the only appropriate vehicle for that party to raise such a ground is by way of a response under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) (a "rule 24 response") when the losing party has applied for, and been granted, permission to appeal.
4. We have concluded that the respondent's position is broadly correct, but, for reasons set out in due course, the answer to the procedural question is entirely academic in this case and the observations we make on the issue do not form part of the *ratio* of our decision.
5. The substantive issue concerns the relationship between the Immigration Rules ("the Rules") relating to deportation and the statutory framework set out in Part 5A of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"), with a particular focus on section 117C. At its heart, the question is whether the satisfaction by an individual of the relevant criteria under section 117C(4), (5), and (6) of the 2002 Act is determinative of an appeal, notwithstanding the provisions of the Rules.
6. In contrast to the position regarding the procedural question, the parties are in agreement as to the correct answer: the ability to meet either of the two exceptions or to show very compelling circumstances over and above those described in the exceptions will be determinative of an appeal. That view accords with our own and provides the basis upon which we have concluded that the First-tier Tribunal erred in law and that the decision in this appeal should be re-made in the appellant's favour.
7. Before moving on, we wish to express our gratitude to both representatives for the skill with which they presented their respective cases, both in writing and orally.

## **BACKGROUND**

8. The appellant is a citizen of Kosovo, born in 1979. He first arrived in the United Kingdom in June 1998, whereupon he made an asylum claim. This was refused in July 2005 and an appeal dismissed in April 2009. In the interim, the appellant had been convicted in November 2008 of theft and possession of a weapon and was sentenced to 12 months' imprisonment. This resulted in a deportation order being made on 21 September 2009. The appellant married his wife, a naturalised British

citizen, in June 2010. In October 2011 the appellant accrued further convictions, this time for supplying Class A drugs, and was sentenced to 3 years' imprisonment. An appeal against a decision to deport him was dismissed in April 2012. Having signed a disclaimer, the appellant was deported to Kosovo on 3 July 2012.

9. The appellant then re-entered the United Kingdom on an unspecified date in 2014, in breach of the deportation order. His presence in this country was only detected when he was arrested in June 2018. Representations were submitted in January 2018 requesting that the deportation order be revoked. These were predicated on the appellant's family life in the United Kingdom with his wife and the couple's two children, born in November 2014 and July 2017, both of whom are British citizens. It was said that the appellant and his wife suffered from significant mental health problems and that the family unit could neither relocate to Kosovo, nor be split up.
10. Following an initial rejection of the representations and the instigation of judicial review proceedings, the respondent agreed to reconsider the appellant's case and consequently refused his human rights claim by a decision dated 7 June 2019.

#### **THE DECISION OF THE FIRST-TIER TRIBUNAL**

11. The judge recorded that the appellant was not pursuing a claim that his appeal should succeed on the basis of his mental health problems alone. She subsequently concluded that the appellant could not meet the private life exception under section 117C(4) of the 2002 Act.
12. The primary focus of the judge's attention was on the position of the two children. Having accepted in full all of the evidence presented by the appellant, including a significant body of medical evidence and the report of an independent social worker, the judge concluded that it would be unduly harsh on the children to have to go to live in Kosovo or to be separated from their father. The effect of that conclusion was that the appellant had satisfied the family life exception under section 117C(5) of the 2002 Act.
13. Importantly, the judge's consideration of the appellant's case did not end there. As the appellant had re-entered the United Kingdom in breach of a deportation order, the judge directed herself to paragraph 399D of the Rules. She noted that the threshold in that provision was a "extremely demanding one", as made clear by the Court of Appeal in SSHD v SU [2017] EWCA Civ 1069; [2017] 4 WLR 175. The judge regarded her conclusion that relocation or separation was unduly harsh as "one factor in the 399D balancing exercise." Having considered other surrounding circumstances resting on both sides of the balance sheet, the judge ultimately concluded that the very high threshold established by paragraph 399D had not been met and thus the appellant's appeal fell to be dismissed.

#### **THE GROUNDS OF APPEAL AND GRANT OF PERMISSION**

14. The grounds of appeal took aim at the judge's consideration of a number of factors weighed up in the proportionality exercise. Nothing was specifically raised in respect

of the interaction between the conclusion that the exception under section 117C(5) had been met and the failure to have satisfied the test under paragraph 399D.

15. In granting permission, Upper Tribunal Judge Norton-Taylor deemed it appropriate to state an additional issue in relation to which the judge may have erred in law. This was put in the following terms:

“[W]as the judge entitled to conclude that the appellant had to meet the test under paragraph 399D of the Immigration Rules in order to succeed, notwithstanding the fact that exception 2 under section 117C [of the 2002 Act] applied, or was satisfaction of that exception determinative of the appeal?”

16. In the event, it is the answer to this question which has provided the basis on which we have ultimately decided this appeal.

### **THE PROCEDURAL ISSUE: RELEVANT LEGAL FRAMEWORK**

17. The two core legislative provisions relevant to the procedural issue are sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 (“the 2007 Act”). Subsections (1) and (2) of section 11 provide:

“(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (8).”

18. Subsections (1) and (2) of section 13 provide:

“(1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.

(2) Any party to a case has a right of appeal, subject to subsection (14).”

19. Subsections (8) of section 11 and (14) of section 13 have no bearing on our consideration of this case.

### **THE PROCEDURAL ISSUE: DISCUSSION**

20. The procedural issue in this case arose because, following the grant of permission, the respondent provided a rule 24 response. This purported to challenge the judge’s findings on the undue harshness issue under section 117C(5) of the 2002 Act.

21. This attempted challenge was refuted in the appellant’s first skeleton argument, wherein it was asserted that the respondent had not sought to appeal to the Upper Tribunal on the issue in question and therefore was precluded from mounting an attack at this stage. The rule 24 response could not cure this jurisdictional defect.

22. It is this initial dispute which put in train the considerable amount of thought applied by the parties to what we are describing as the procedural issue in this case, as set out in paragraph 2, above.
23. Before turning to address the respective arguments, we record the respondent's decision (contained in Mr Jarvis' skeleton argument dated 4 November 2020) to withdraw reliance on the rule 24 response. That had the effect of leaving the judge's findings on the undue harshness issue unchallenged, whatever our conclusions on the procedural issue. The decision to resile from the response was of course entirely a matter for the respondent. For what it is worth, we regard it as wholly justified. The judge clearly took relevant evidence into account and made eminently sustainable findings thereon in accordance with sound legal self-directions.
24. Rather than setting out the parties' submissions on the proceeded issue in detail here, we will endeavour to address their substance as we progress through the discussion. Suffice it to say at this stage that the disputed territory is said to be occupied by two judgments of the Court of Appeal: Devani [2020] EWCA Civ 612; [2020] 1 WLR 2613 and Anwar [2017] EWCA Civ 2134. Mr Malik relies on Anwar as authority for the proposition that the winning party before the First-tier Tribunal can appeal to the Upper Tribunal on a point of law. He submits that Devani should be read consistently with that judgment and, if it cannot, it is wrong and was decided *per incuriam*. Mr Jarvis argues that Devani expressly decides the procedural issue against the appellant's position and can be readily distinguished from Anwar.
25. The Devani case concerned a Kenyan businessman facing extradition to his own country in order to face prosecution for alleged fraud. Mr Devani sought to resist this on the ground that he would be detained in prison conditions which violated Article 3 ECHR. The Divisional Court rejected this claim on the basis of assurances provided by the Kenyan government. Mr Devani then made a protection claim to the Secretary of State, still relying on the prison conditions issue. The claim was refused. On appeal, the First-tier Tribunal purported to reject all grounds put forward, namely that the refusal was contrary to the United Kingdom's obligations under the Refugee Convention and that it breached Mr Devani's rights under the ECHR, specifically Articles 3 and 8. However, the substance of the judge's reasoning was to the effect that she in fact intended to allow the appeal on Article 3 grounds only. Believing that he could not rely on the so-called "slip rule" in order to correct this error, Mr Devani appealed to the Upper Tribunal on the basis that it should substitute that aspect of the judge's decision (or "order") relating to Article 3. The Secretary of State was unhappy with the judge's reasoning on Article 3, but neither lodged an appeal nor provided a response under rule 24. Her position was that she could not pursue an appeal as the ostensible "winner" before the First-tier Tribunal. Instead, there was an attempt to challenge the judge's reasoning at the hearing before the Upper Tribunal. The Deputy Upper Tribunal Judge declined to consider this challenge. Having first concluded at paragraphs 23-24 that the case of Katsonga ("Slip Rule"; FtT's general powers) [2016] UKUT 228 (IAC) was wrongly decided (see also MH (review; slip rule; church witnesses) Iran [2020] UKUT 125 (IAC)), Underhill LJ (with whom Nicola Davies and Males LJ agreed) turned to the matter with which we are

presently concerned. The scene is set in paragraph 26, with paragraph 27 containing the relevant conclusions:

“26. I turn to the substantive issue under this head, namely whether the Judge erred in law in declining to consider the Secretary of State's challenge to paras. 48-49 of the FTT's Reasons. His reason for taking that course was that she had failed to raise that challenge in accordance with "the relevant procedure rules": specifically, he referred to her failure (a) to appeal or (b) to provide a rule 24 response or (c) to serve a skeleton argument. Mr Chapman submitted that that was a misdirection: there was no obligation on the Secretary of State to take any of those steps.

27. I start with the alleged failure by the Secretary of State herself to appeal. I agree with Mr Chapman that there was no such failure. In my view Mr Tufan was quite right in his submission to DUTJ Latter (see para. 16 above) that that course was not open to her because she was (ostensibly) the winning party. As appears from para. 17 of his decision, the Judge acknowledged that that had once been the law, but he said that the position was changed by section 11 (2) of the Tribunals, Courts and Enforcement Act 2007, which reads “Any party has a right of appeal, subject to subsection (8)3 .” Subsection (1) defines a right of appeal, so far as relevant, as a right of appeal to the UT on a point of law. I accept that on a literal reading subsection (2) could be construed as giving a right of appeal not only to a party against whom an order has been made but also to a party who has obtained, as regards that order, the exact outcome that they sought: although usually the winning party would have no wish to appeal, occasionally they may be dissatisfied with particular findings made by the Court or with aspects of its reasoning (the present case, if the slip rule were unavailable, would be an example albeit of a very specific kind). But for the winning party to have a right of appeal in such a case would be contrary to well-established case-law governing the position in the common law courts, which reflects important policy considerations; the authorities are well-known, and I need only refer to the commentary in para. 9A-59.3 of the White Book. It was not suggested to us that there was any reason why Parliament should have intended a different approach in the case of appeals to the Upper Tribunal. Ms Broadfoot sought to support DUTJ Latter’s conclusion by reference to the decision of the UT in *EG and NG (Ethiopia)* [2013] UKUT 000143 (IAC), but that was not concerned with the present point at all. I am sure that section 11 (2) of the 2007 Act is intended to confer a right of appeal only against some aspect of the actual order of the FTT, and that the phrase “any party” must be read as referring only to a party who has in that sense lost.”

26. We are satisfied that the Court’s attention was not drawn to Anwar.
27. The essential facts of Anwar were as follows. Mr Anwar, a citizen of Pakistan, had been in the United Kingdom with leave to remain as a student. In 2013 he made an application for further leave in the same category. The refusal of that application was in part based on the conclusion that Mr Anwar had breached a condition of his leave, namely a prohibition on switching between different educational institutions without first making a new application to the respondent. It was said that paragraph 322(3) of the Rules applied. The appeal against the decision was dismissed by the First-tier Tribunal. The Upper Tribunal allowed Mr Anwar’s onward appeal on the limited

basis that the respondent had failed to exercise a discretion and that the resulting decision was not otherwise in accordance with the law (in order for the Upper Tribunal to have reached that stage it must also have been the case that the First-tier Tribunal had failed to address this issue or had done so erroneously). However, the finding by the First-tier Tribunal that Mr Anwar had breached a condition of his leave was expressly upheld. Mr Anwar appealed to the Court of Appeal against this aspect of the Upper Tribunal's decision.

28. The relevant part of the judgment of Singh LJ (with whom Peter Jackson LJ agreed) is relatively brief and it is best to set it out in full:

“Is the Present Appeal Academic?”

14. When permission to appeal in the present case was first refused on the papers by Simon LJ, it was on the ground that the case had become academic because the Appellant's appeal had succeeded in front of the UT. As I have already mentioned, the outcome of the appeal was that the UT remitted the case to the Secretary of State for reconsideration.

15. In granting permission at the oral hearing on 5 May 2016 Lewison LJ noted that the normal rule in ordinary litigation is that appeals are made against orders rather than against the reasons for making those orders. That was decided in *Lake v Lake* [1955] P 336, although, as Lewison LJ observed, where the appellant does not get all the relief from the lower court that he is entitled to, the court nevertheless has the power to entertain an appeal: see *Curtis v London Rent Assessment Committee* [1999] QB 92.

16. Lewison LJ also noted that the right of appeal to this Court in cases of the present kind is conferred by section 13 of the Tribunals, Courts and Enforcement Act 2007. Subsection (1) of that section provides:

“For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant appellate court on any point of law arising from a decision by the Upper Tribunal other than an excluded decision.”

17. Lewison LJ said that “any point of law arising from a decision” is wider than the normal rule for appeals. He said:

“I am satisfied that this Court does have jurisdiction to entertain the appeal, and that if the appeal were to succeed it would significantly affect any future decision which the Secretary of State were to make in relation to the appellant's application for an extension of leave to remain.”

18. I respectfully agree with those observations.

19. There is one further point which should be mentioned at this stage, because it too goes to the question of whether this appeal has become academic.

20. Since the UT decision, on 13 August 2015, the Secretary of State made a fresh decision, again refusing the application for leave to remain as a Tier 4 (General) Student. However, the Secretary of State did not cite the breach by the Appellant of



an immigration condition as a reason for this decision. Nevertheless, the Appellant submits that this appeal has not become academic. The Secretary of State has not suggested that it has become academic; indeed she maintains that the Appellant was in breach of a condition which was attached to his leave to remain in 2011.

21. In my view, it is appropriate for this Court to consider the points of law which are raised, because the Appellant continues to have an interest in the matter. As things stand, it has been held by a judicial body that he was in breach of an immigration condition. As will become apparent later, that could, at least in principle, render him liable for a criminal offence. In any event, that is something which is on his record and may affect future applications he may make, perhaps if he wishes to go to another country elsewhere in the world.”

29. The Court ultimately concluded that the condition of leave in question had not been lawfully imposed and thus Mr Anwar was not in breach. His appeal fell to be allowed on that ground.
30. In the first instance, and for the reasons set out below, we conclude that Anwar can be distinguished from Devani.
31. It is self-evidently the case that Anwar was concerned with section 13 of the 2007 Act, not, as in Devani, section 11. Section 13 specifically addresses the Court of Appeal’s jurisdiction to hear appeals brought against decisions of the Upper Tribunal. Whilst set out within the statutory framework of the 2007 Act, it is apparent from the observations of Lewison LJ when granting permission in Anwar that the Court’s long-established common law tradition formed an element of the backdrop against which the issue in hand was being considered.
32. More importantly, there is an important distinction between the specific issues being considered by the Court in the two cases: Anwar was, as is apparent from paragraphs 16 and 17 of the judgment, concerned with subsection (1) of section 13; whereas paragraphs 26 and 27 of Devani make it clear that it was the jurisdictional scope of subsection (2) of section 11 which arose as a material issue and as such the conclusions reached constituted an aspect of the *ratio* of the Court’s decision on the appeal.
33. In our view, the purpose underlying subsection (1) of sections 13 and 11 is to clarify that the right of appeal exercisable under subsection (2) of either section must be founded upon “any point of law arising from a decision” of the Upper Tribunal or First-tier Tribunal (as the case may be) other than an excluded decision. Anwar is a decision on the scope of that statutory phrase, at least in so far as procedure and jurisdiction is concerned. What it does not purport to do is address the questions of who has the right of appeal in the first place: that is the domain of subsection (2) of sections 13 and 11. The phrase in subsection (2) “any party to a case” does not carry with it the implicit meaning that a successful party has, *in all circumstances*, a right of appeal. All it does is to confirm that an appellant and respondent in the proceedings below, together with any other party which may have been joined, has the right of appeal, subject to any provisions made by the Lord Chancellor.

34. Thus, the Court in Anwar was concerned with a statutory provision (subsection (1) of section 13 of the 2007 Act) which was not only different from that arising for specific consideration in Devani, but one which cannot have a decisive bearing on the question of whether “the winner” below has a right of appeal under subsection (2) of sections 11 and 13.
35. Further and in any event, cognisant of the marked similarity in the wording of subsections (1) and (2) of sections 11 and 13 of the 2007 Act, it is appropriate to offer additional analysis of Anwar and Devani were it to be said that we are wrong in seeking to distinguish these cases on the basis set out above.
36. A proper understanding of the two judgments, and indeed the entire appellant regime under the 2007 Act, comes down to the question of outcomes. By “outcomes” we mean the decision of the First-tier Tribunal or Upper Tribunal (in respect of a re-making decision undertaken) on the ground(s) relied on by an appellant under section 84 of the 2002 Act in an appeal. This may be described as constituting the “order” of the First-tier Tribunal or the Upper Tribunal.
37. Following the wholesale changes to Part 5 of the 2002 Act by virtue of the Immigration Act 2014, the number of appealable decisions under section 82(1) was very significantly reduced, as were the corresponding grounds of appeal available to an appellant. Where, as occurred in Devani, an individual makes a protection and a human rights claim, and both are refused by the respondent, a challenge against the decisions will result in two appeals running in parallel.
38. The limited grounds of appeal available in respect of a protection appeal are set out in section 84(1):
- “(1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds –
- (a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;
- (b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;
- (c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).
39. It is to be noted that the ground under section 84(1)(c) covers Article 3 in the context of a protection appeal.
40. In an appeal against the refusal of a human rights claim, the only available ground is that under section 84(2):

“(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998.”

41. The outcomes (as we have defined that term) in any appeal are in effect constituted by the success or otherwise of the specific ground(s) of appeal relied on. If, for example, an individual pursuing an appeal against a refusal of a protection claim asserts that they are a refugee and the ground of appeal under section 84(1)(a) is made out, they will have obtained the “exact outcome” sought, namely a recognition of their status and a binding decision that their removal would breach this country’s international obligations. The same is true for an individual who successfully relies on a claimed entitlement to humanitarian protection in reliance on the ground of appeal under section 84(1)(b). Notwithstanding the legislative oddity that a protection claim cannot be based on the assertion that removal would violate Article 3, in an appeal against a refusal of such a claim an individual can, pursuant to the ground of appeal under section 84(1)(c), assert that removal would expose them to, for example, the real risk of being detained in prison conditions contrary to that absolute right. In respect of an appeal against a refusal of a human rights claim, the position is somewhat more nuanced. It is possible for an individual to rely on Articles 3 and 8 where, for example, it is asserted that their removal in consequence of the decision would give rise to a sufficiently high risk of suicide and that they additionally enjoy family life in the United Kingdom. Whilst the only ground of appeal available is that contained within section 84(2), with a favourable decision being that the respondent’s refusal of the human rights claim is unlawful under section 6 of the Human Rights Act 1998, a tribunal should in our view state its decision in respect of the different protected rights expressly relied on; in the example given, Articles 3 and 8. The issues in respect of each provision will often be sufficiently distinct to justify a differentiation in terms of the decision(s) made. In any event, and more importantly, an appellant who expressly relies on different articles of the ECHR is entitled to an outcome decision in respect of each. There is, however, no scope for a legally effective delineation between success on the basis of private life or in respect of family life within Article 8: success on this basis amounts to a composite outcome.
42. We re-emphasise here the fact that the respondent can also be the “winner” as the result of a decision by the First-tier Tribunal dismissing an appellant’s appeal on all grounds. Indeed, that is the scenario considered by the Court in Devani itself, albeit that the judge had intended to allow the appeal on a single ground.
43. As a matter of common practice, the outcome of an appeal is usually stated under a subheading entitled “Decision” or “Notice of Decision” within the decision and reasons document produced by judges in the Immigration and Asylum Chamber of both Tribunals. By way of example, one may see the following form of words employed:

“I dismiss the appeal against the respondent’s refusal of the protection claim in respect of the Refugee Convention and humanitarian protection.

I allow the appeal against the respondent's refusal of the protection claim on Article 3 ECHR grounds.

I dismiss the appeal against the respondent refusal of the human rights claim in respect of on Article 8 ECHR."

44. In order to ensure that the outcome(s) can be clearly identified, and in turn the extent to which one party or the other is "the winner", judges should set out fully the precise basis (or bases) of their decision, whether favourable to the appellant or otherwise.
45. The outcomes-based approach is reflected in the conclusion of Underhill LJ in paragraph 27 of Devani that the right of appeal under section 11(2) of the 2007 Act lies only against an aspect of the "order" (or, as we have previously explained, the determination of the specific ground(s) relied on, including, where applicable, different articles of the ECHR) and that a party who has obtained "the exact outcome" sought cannot, as the "winning party", mount an appeal. It follows that an appellant who is able to, and does, rely on a number of grounds *will* have a right of appeal in respect of those upon which they are unsuccessful. This is simply because they have not, in effect, obtained the "exact outcome" sought, a point implicitly recognised by Underhill LJ in footnote 4 of his judgment: the "winner" can appeal under section 11 of the 2007 Act because their success has been partial and one or more additional outcomes may ultimately be achieved.
46. What is set out in the preceding paragraph represents, in our respectful view, a correct analysis of the current appellate regime and we regard Devani as binding authority on the point.
47. We return to Anwar. This too is a case concerned with outcomes. Mr Anwar succeeded on a narrow basis (the decision of the respondent under appeal was found to be not otherwise in accordance with the law and was sent back for it to be retaken on a lawful basis). This was not the outcome hoped for, or, to put it in the terms of the common law cases, he did not get all the "relief" he believed he was entitled to.
48. What is important to note is that Mr Anwar's appeal to the First-tier Tribunal and then to the Upper Tribunal was pursued under the statutory regime in place prior to the changes brought about by the Immigration Act 2014. As a consequence, he had at his disposal a variety of grounds of appeal under the unamended section 84 of the 2002 Act on which to rely, including the contentions that the respondent's decision was not in accordance with the Rules (section 84(1)(a)) and that it was not otherwise in accordance with the law (section 84(1)(e)). Thus, it had been open to him on appeal to the First-tier Tribunal and (in respect of the re-making of the decision) the Upper Tribunal to argue that paragraph 322(3) of the Rules did not apply to him and that he had satisfied all other requirements of the Rules relating to students. If this ground of appeal had succeeded, it appears to us clear that his appeal would have been allowed outright by the Upper Tribunal and he would have been granted leave in line with it, as opposed to the more circumscribed basis of success afforded by the conclusion that the respondent's decision was not otherwise in accordance with the law. In other

words, Mr Anwar succeeded in respect of one ground of appeal, but failed on another which would have provided a more beneficial result for him.

49. The Court's reference to the potential success of Mr Anwar's appeal having a significant effect on future decisions taken by the respondent sits happily with our analysis. If the ground upon which Mr Anwar had been unsuccessful before the Upper Tribunal was ultimately upheld, it would have been as a consequence of a finding that he had not in fact breached a condition of his leave, and in turn his immigration record would have remained impeccable. This consideration can also be seen as the question of materiality going to the Court's willingness to consider the appeal notwithstanding Mr Anwar's success before the Upper Tribunal on another ground.
50. Seen in this way, the Court's conclusion that it had jurisdiction to entertain Mr Anwar's appeal, despite him being, in respect of one ground of appeal only, "the winner", is consistent with what is said in Devani.
51. It follows from the *ratio* of Devani and our reading of Anwar that a winning party does not have a right of appeal against particular findings or reasons made by a tribunal in circumstances where these have not resulted in a negative determination of the relevant ground of appeal. This category is what in our view Underhill LJ was referring to in paragraph 27 when concluding that to provide a right of appeal in "such a case" would be contrary to well-established case-law (as discussed in paragraph 9A-59.3 of the White Book).
52. If this were not the case, the Upper Tribunal and Court of Appeal would be faced with the distinct possibility of successful parties seeking to appeal against a plethora of findings and/or reasons regarded as undesirable or problematic. Quite apart from the likelihood of a very substantial increase in the number of appeals brought, in our judgment it would result in an unprincipled state of affairs which would run contrary to the statutory scheme in which outcomes play the pivotal part.
53. Mr Malik has put forward the submission that to preclude a winner before the First-tier Tribunal from appealing to the Upper Tribunal would result in "extraordinary consequences." In support, he gives two examples. An individual who has been found to have acted dishonestly in the context of the obtaining of a TOEIC certificate or discrepancies in tax returns, but nonetheless succeeds in an appeal on the only available ground relating to Article 8, will be unable to challenge that finding in an onward appeal. The finding would be likely to cause the individual significant difficulties in respect of any future applications for indefinite leave to remain or naturalisation as a British citizen. Conversely, the respondent will be unable to challenge a potentially legally flawed finding that an individual is innocent of any dishonesty if an appeal is dismissed. The respondent would therefore be "stuck" with that finding and may be required to grant a future application to an undeserving individual.

54. Mr Malik's solution to these scenarios is to suggest the adoption of a "material benefit" test attaching to the availability of a right of appeal for a winning party: such a party will be able to appeal to the Upper Tribunal (and presumably to the Court of Appeal in light of the similarity in wording of subsections (1) and (2) of sections 11 and 13 of the 2007 Act) if success of the appeal would provide a "material benefit" to the appealing party, with an example being that it would "significantly affect any future decision." This approach is said to be consistent with Anwar and the decision in Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 216 (IAC).
55. Whilst attractively put, the submission is unsustainable for a number of interconnected reasons.
56. First, if we are correct in distinguishing Anwar from Devani, reliance on the former takes Mr Malik's argument no further.
57. Second, in any event it is contrary to what we regard as the binding authority of Devani on the meaning of section 11(2) of the 2007 Act and the central importance of outcomes in the appellate regime established by Parliament.
58. Third, we see nothing extraordinary, absurd, or perverse, arising from the conclusions drawn in Devani. The individual found to be dishonest but successful in their appeal on the only available ground will not be able to challenge that finding to the Upper Tribunal through the appellate route, but would be able to seek a remedy through judicial review proceedings if a future application was refused by the respondent in reliance on that finding. That was the situation in Mansoor (Balajigari - effect of judge's decision) [2020] UKUT 126 (IAC), a decision which we regard as consistent with Devani and unsupportive of Mr Malik's current position. The applicant in that case had been found to have practised deception, but his appeal to the First-tier Tribunal was allowed on the basis of additional matters relevant to Article 8. There had been no attempted appeal to the Upper Tribunal in respect of the adverse finding. The judicial review proceedings arose following the respondent's refusal of a subsequent application for indefinite leave to remain based on the finding of deception. It is incorrect to assert that Mansoor implicitly adopted Mr Malik's interpretation of the approach in Anwar, and in any event, the Upper Tribunal was clearly not concerned with section 11 of the 2007 Act.
59. Alternatively, if the respondent appealed against the allowing of the appeal and was granted permission, the individual would then be able to argue that the finding on deception was wrong, pursuant to rule 24 response.
60. As regards the respondent's position where an allegation of deception may have been erroneously rejected by the First-tier Tribunal, but the appeal dismissed in any event, the respondent would be able to challenge the particular finding by way of a rule 24 response if the individual were to appeal to the Upper Tribunal and be granted permission.

61. Even if the potential avenues for challenge set out above were not available in any given case, it would in our view simply be a consequence of the statutory regime, which may, on occasion, give rise to hard-edged results for one party or another.
62. Fourth, reliance on the decision in Smith takes Mr Malik's argument no further. Smith concerned the situation in which an appellant had succeeded before the First-tier Tribunal on one ground of appeal, but the judge had declined to determine the ground relating to Article 8. The conclusion of the Upper Tribunal that this failure constituted a "decision" which could be appealed under section 11 of the 2007 Act is clearly consistent with Devani: the individual in Smith had "won" in respect of one ground, but effectively "lost" on the other and thus had not achieved all the outcomes sought. In addition, the central issue in Smith was whether a partially successful party must bring an appeal against a decision of the First-tier Tribunal; or whether they are entitled to await a challenge by the other party and then seek to argue those grounds on which they were initially unsuccessful by way of a rule 24 response. It is plain that this does not address the prior question of whether a party can bring an appeal in the first place.
63. Nothing in what we have set out in our analysis on the procedural issue should be taken as an encouragement to parties to instigate appeals against decisions of the First-tier Tribunal in circumstances where they have succeeded in respect of certain grounds and as a result achieved in substance what they may have sought all along, namely a grant of leave flowing from the favourable outcome.

#### **THE PROCEDURAL ISSUE: SUMMARY OF CONCLUSIONS**

64. In answer to the question posed in paragraph 2 of this decision, our *obiter* conclusions are as follows:
  - (a) The appellate regime established by the Nationality, Immigration and Asylum Act 2002, as amended, is concerned with outcomes comprising the determination of available grounds of appeal;
  - (b) A party who has achieved the exact outcome(s) sought by way of an appeal to the First-tier Tribunal being allowed on all available grounds relied on (in respect of an individual) or because it has been dismissed on all grounds (in respect of the Secretary of State) cannot appeal to the Upper Tribunal under section 11(2) of the Tribunals, Courts and Enforcement Act 2007 against particular findings and/or reasons stated by the judge;
  - (c) Devani represents binding authority from the Court of Appeal to this effect.

#### **THE SUBSTANTIVE ISSUE: RELEVANT LEGAL FRAMEWORK**

65. Section 117A of the 2002 Act provides as follows:

“117A Application of this Part

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

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

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

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

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

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

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

66. Section 117C is very familiar to all and provides:

“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.”

67. Section 117D defines the term “foreign criminal”:

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

- (a) who is not a British citizen,
- (b) who has been convicted in the United Kingdom of an offence, and
- (c) who –
  - (i) has been sentenced to a period of imprisonment of at least 12 months,
  - (ii) has been convicted of an offence that has caused serious harm, or
  - (iii) is a persistent offender.”

68. Paragraphs 398-399A of the Rules will also be familiar to the reader and do not, for the purposes of this appeal, require setting out. Paragraph 399D is of greater relevance and it provides as follows:

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

### **THE SUBSTANTIVE ISSUE: DISCUSSION**

69. In his skeleton argument prepared for the hearing on 5 November 2020, Mr Jarvis made the following essential submissions:

- (a) When a Tribunal is considering an appeal based on Article 8 ECHR in a deportation context, it should first apply section 117C of the 2002 Act, this being consistent with the “normal approach” that primary legislation is the starting point and in line with what is said in CI (Nigeria) [2019] EWCA Civ 2027;
- (b) There is no difference in approach whether a tribunal is considering a pre-deportation scenario (i.e. where the individual has not yet been removed from the United Kingdom) or a refusal on the respondent’s part to revoke a deportation order, whether the individual is abroad or they have re-entered this country in breach of an order;
- (c) In SU [2017] EWCA Civ 1069, the Court of Appeal did not address the question of the interaction between the 2002 Act and the Rules;

- (d) That the test of undue harshness under section 117C(5) of the 2002 Act bore the meaning attributed to it by the Supreme Court in KO (Nigeria) [2018] UKSC 53; [2018] 1 WLR 5273;
- (e) That once the judge in the present case had reached her conclusions under section 117C(5), she should not then have gone on to consider paragraph 399D of the Rules;
- (f) As the findings on the unduly harsh issue had been open to the judge, her decision should be set aside and the decision be re-made in the appellant's favour.

70. Unsurprisingly, in his first skeleton argument Mr Malik endorsed the respondent's analysis.
71. At the remote hearing on 5 November 2020, we raised a concern as to the respondent's concessions, as set out in (b) and (e), above. It was not immediately apparent to us why paragraph 399D of the Rules added nothing to the equation. On one possible reading of section 117C(7), it might be said that the mandatory considerations set out in subsections (1) to (6) did not cover all of the ground in a case concerning an individual who re-entered the United Kingdom in breach of a deportation order and that they might legitimately face an even stronger public interest counterweight to their Article 8 claim than would be the case in a pre-deportation or post-deportation scenario. In turn, where it was not simply the fact of previous convictions which underpinned the decision under appeal, the elevated threshold under paragraph 399D of the Rules may play a part, with the effect that the satisfaction of either of the exceptions under section 117C(4) and (5), or indeed the wider exercise under (6), might not in fact be determinative of an appeal.
72. As this particular angle on the substantive issue had not been considered by the parties, an adjournment was granted in order for further submissions to be provided. This was done through additional skeleton arguments from Mr Jarvis and Mr Malik, together with their concise oral submissions at the resumed hearing.
73. On behalf of the respondent, Mr Jarvis maintained the concession previously made and provided the following refined submissions:
- (a) One of the purposes of section 117C(7) of the 2002 Act is to ensure that the mandatory considerations set out in subsections (1) to (6) are applied by tribunals only in so far as the decision under appeal is predicated upon a conviction or convictions and not other factors such as offending which did not lead to a conviction;
  - (b) The provision also has the effect of ensuring that all convictions may in principle be relevant to an assessment under section 117C;

- (c) That “a decision to deport a foreign criminal” in section 117C(7) should be read together with the phrase “cases concerning the deportation of foreign criminals” in section 117A(2)(b): both should be construed as covering all aspects of the respondent’s efforts to carry out and maintain deportation action, whether that involves deporting an individual in the first instance, preventing them from re-entering in breach of deportation order, or seeking to deport those who have managed to re-enter;
  - (d) In the case of an individual who is able to rely on either of the two exceptions under section 117C(4) and (5) and in fact satisfies one or both thereof, the effect of section 117C(3) is that the public interest does not require deportation and the appeal would fall to be allowed;
  - (e) The Rules play no part in the assessment of undue harshness under section 117C(5) and are only of relevance where a tribunal is considering section 117C(6) in so far as they provide “further insight into the character of the public interest”. Even then, it is the very compelling circumstances test which must be applied rather than the very exceptional circumstances threshold under paragraph 399D of the Rules.
74. Mr Malik again agreed with Mr Jarvis’ position. Relying on CI (Nigeria), he submitted that the provisions of Part 5A of the 2002 Act established a structured approach which would produce in all cases a final result compatible with Article 8. This approach, it is said, applies to all foreign criminals, including those who re-enter the United Kingdom in breach of a deportation order. He then posited two solutions to the question posed by the substantive issue:
- (a) For the purpose of paragraph 399D of the Rules, “very exceptional circumstances” will exist in a case where either of the two exceptions in section 117C(5) and (6) of the 2002 Act applies; or
  - (b) Where either of the two exceptions in section 117C(5) and (6) of the 2002 Act apply, the appeal will succeed even if there are no “very exceptional circumstances” for the purposes of paragraph 399D of the Rules
75. Strictly speaking, the two exceptions arise under subsections (4) and (5), not (6), although the point being made by Mr Malik is clear enough: an ability to satisfy any of the criteria in these subsections will be determinative of an appeal without needing to have recourse to the provisions of the Rules.
76. In our judgment, the collective position of the parties on the substantive issue in this appeal is essentially correct and our initial concern (set out in paragraph 71, above) falls away. Our reasons for reaching this conclusion are as follows.
77. By virtue of section 117A(1) of the 2002 Act a tribunal is bound to apply the provisions of primary legislation, as set out in sections 117B and 117C, when determining an appeal concerning Article 8. In cases concerning the deportation of a

foreign criminal (as defined), it is clear from section 117A(2)(b) of the 2002 Act that the core legislative provisions are those set out in section 117C. It is now well-established that these provisions provide a structured approach to the application of Article 8 which will produce in all cases a final result compatible with protected rights (see for example NE-A (Nigeria) [2017] EWCA Civ 239, at paragraph 14, and CI (Nigeria), at paragraph 20).

78. By contrast, the relevant Rules are not legislation, but a statement of the practice to be followed by the respondent's officials when assessing a claim by an individual seeking to resist deportation and a reflection of her view as to where the public interest lies. On this basis, Leggatt LJ (as he then was) concluded at paragraph 21 of CI (Nigeria) that:

“In these circumstances it seems to me that it is generally unnecessary for a tribunal or court in a case in which a decision to deport a “foreign criminal” is challenged on article 8 grounds to refer to paragraphs 398-399A of the Immigration Rules, as they have no additional part to play in the analysis.”

79. We respectfully agree. It is the structured approach set out in section 117C of the 2002 Act which governs the task to be undertaken by a tribunal, not the provisions of the Rules.

80. We recognise that the Court in CI (Nigeria) was not concerned with an individual who had re-entered the United Kingdom in breach of a deportation order and thus paragraph 399D of the Rules did not arise. This factual difference with the present case does not, however, undermine our view as to the general correctness of the respondent's considered position, as put forward by Mr Jarvis.

81. In the context of construing and applying Part 5A of the 2002 Act we see no reason in principle as to why the re-entry scenario should not be considered as much a part of what was described in Williams (scope of “liable to deportation”) [2018] UKUT 00116 (IAC) as the “deportation regime” as removal action and exclusion from this country during the currency of a deportation order, and that the phrases “cases concerning the deportation of foreign criminals” in section 117A(2) and “a decision to deport a foreign criminal” in section 117C(7) should be interpreted accordingly. The fact that an individual has endeavoured to circumvent the banishment consequent to being deported does not thereby take them outside of the schematic framework in place to give effect to the public interest.

82. We find support for our view in the case-law. In Williams, the Upper Tribunal was dealing with an individual who had been deported and was seeking to have a deportation order revoked whilst still outside of the United Kingdom. It concluded that section 117C applied to those against whom there was an extant deportation order, whether or not they had yet to be deported (see paragraph 27 and 28). The Tribunal considered itself to be bound by the Court of Appeal's judgment in IT (Jamaica) [2016] EWCA Civ 932 (although it stated that the same conclusion would have been reached in the absence of such authority).

83. Paragraph 52 of IT (Jamaica) is instructive for present purposes:

“The function of section 117C is to set out the weight to be given to the public interest to be taken into account in the proportionality exercise to be carried out under Article 8 of the Convention in the case of a foreign criminal. Section 117C(1) states that the deportation of foreign criminals is in the public interest. In this context, and indeed in the other uses of the word “deportation” in this section, the word “deportation” is being used to convey not just the act of removing someone from the jurisdiction but also the maintaining of the banishment for a given period of time: if this were not so, section 117C(1) would achieve little.”

84. We of course acknowledge that the specific conclusions stated at paragraphs 55 and 64 of IT (Jamaica) (which effectively equated the undue harshness test with that of very compelling reasons) were subsequently disapproved by the Supreme Court in KO (Nigeria). However, the point made in the passage quoted above was not the subject of criticism and it holds good.

85. In SU, the Court of Appeal was faced with a factual scenario similar to that with which we are concerned. The novelty of this was stated at the outset of the judgment of David Richards LJ (with whom the Chancellor of the High Court and Asplin J (as she then was) agreed):

“2. We were told that this is the first occasion on which this court has been concerned with the correct approach to the revocation of a deportation order where it has been implemented but the deportee has, in breach of the deportation order, returned to the UK and has established a private and family life during the following period of unlawful presence here.”

86. The Court acknowledged that the provisions of Part 5A of the 2002 Act had applied to the appellant’s appeal before the First-tier Tribunal. However, the focus of attention rested squarely with the Rules relating to deportation and in particular whether there was a material difference between the very compelling circumstances test under paragraph 398 and that of very exceptional circumstances under paragraph 399D. In rejecting the appellant’s argument and concluding that there was, Stephen Richards LJ concluded at paragraph 45 that:

“45. I am unable to accept this submission. The difference in the language of paragraphs 398 and 399D, suggesting a more stringent requirement under paragraph 399D, reflects a real difference in the circumstances covered by each paragraph. Paragraph 398 addresses the question whether a deportation order should be made, or an existing order maintained, against a person who has yet to be deported, whereas paragraph 399D addresses the very different case of a person who has been deported and then re-enters illegally and in breach of the order. In the latter case, any Article 8 claim that was raised by the deportee before his original deportation will, *ex hypothesi*, have been decided against him. It is readily understandable that in the cases covered by paragraph 399D the Secretary of State should have formed the view that there is a particularly strong public interest in maintaining the integrity of the deportation system as it applies to foreign criminals.”

87. For whatever reason, no consideration was given to the application of the structured approach under Part 5A of the 2002 Act and, in particular, the import of section 117C and its relationship with the Rules. As such, we do not regard SU as constituting binding authority to the effect that paragraph 399D of the Rules imports an additional threshold to be met over and above what is contained in section 117C.
88. Nor are we persuaded that the reasoning in SU should otherwise lead us to depart from the view set out at paragraph 81, above, namely that section 117C applies equally to all three aspects of the deportation regime: pre-removal; exclusion from the United Kingdom once an individual has been removed; and efforts to remove an individual who has re-entered this country in breach of a deportation order.
89. That the respondent herself as expressly accepted that we should not do so is clearly significant. So too is the fact of what has not been provided for in section 117C. If Parliament had intended to impose a higher threshold in respect of those individuals re-entering United Kingdom in breach of a deportation order, it could have said so in express terms. For example, that class of persons could have been treated as though they had received a sentence of four years or more, and were thus precluded from relying on either of the two exceptions under section 117C(4) and (5) and that in addition they would have to show very exceptional circumstances in order to succeed on appeal rather than the very compelling circumstances stated in section 117C(6). Finally, there is the plain wording of section 117C itself. We look to subsections (3) and (6), which provide:

“(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.

...

(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.”

(underlining added)

90. The effect of the use of the term “unless” is inescapable: if the medium offender can satisfy either of the two exceptions, or if they cannot or are precluded from doing so due to the length of a custodial sentence, but yet can show that very compelling circumstances exist, the public interest will *not* require their deportation and the appeal will be allowed. Nothing in the Rules can be treated as modifying the statutory criteria and outcomes provided for.
91. It follows from the foregoing that the structured approach to be undertaken by a tribunal considering an Article 8 appeal in the context of deportation begins and ends with Part 5A of the 2002 Act. Paragraph 399D of the Rules has no part to play in the application of section 117C(5), or for that matter section 117C(4) (although we find it hard, if not impossible, to conceive of a situation in which an individual who had re-

entered the United Kingdom in breach of a deportation order would be able to rely on the private life exception). Nor can paragraph 399D constitute a relevant factor when a tribunal is considering section 117C(6) and we reject this particular aspect of Mr Jarvis' submissions to the contrary. If, as we have concluded it does, the "deportation regime" established under Part 5A applies equally to those individuals within the three categories identified in paragraph 89, above, it must follow that the criterion under subsection (6) should be applied consistently as between each. The significance attached by the respondent to a re-entry in breach of a deportation order, as represented by paragraph 399D, is in the first instance a matter for her officials to assess when making decisions on human rights claims.

92. It will be recalled that Mr Malik proposed two possible means by which paragraph 399D could be incorporated into our conclusions: the very exceptional circumstances threshold will be met where an individual can satisfy the criteria in section 117C(5) or section 117C(6); alternatively, that where the statutory criteria have been met, the appeal must succeed even if no very exceptional circumstances exist. In light of what we have said, it is unnecessary to come down in favour of one or the other. The provisions of section 117C speak for themselves and do not need to be reconciled with paragraph 399D of the Rules. For the sake of completeness, either proposition offered by Mr Malik will suffice and a judge will not have materially erred in law by stating a preference if she/he is minded to do so.
93. We turn to the other two submissions made by Mr Jarvis as to the interpretation of section 117C(7) of the 2002 Act, both of which we agree with. In support of his position that the provision in principle permits a tribunal to take account of all convictions acquired by a foreign criminal, Rexha (S.117C - earlier offences) [2016] UKUT 335 (IAC) is cited. At paragraph 15, the Upper Tribunal concluded as follows:

"15. We see no reason for construing Section 117C(7) as limiting the considerations relevant to sub-Sections (1) to (6) to solely the most recent offence or offences for which the person has been convicted. Firstly, that is not what the Section expressly says. It does not say in Section 117C(7) that only the offence or offences immediately prior to the deportation decision are to be taken into account. Secondly, the use of the phrase "only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted" expressly requires an examination of the decision to identify which parts of the criminal's antecedent history provide the basis for the decision. It will be a matter for the respondent to decide in each case which parts of a candidate for deportation's criminal past is to be relied upon in support of the making of a deportation order. It may well be that in the vast majority of cases the of the criminal offending will provide the reason for the decision. Equally, there may be cases where some of the person's criminal past could not properly be relied upon. This could occur, for instance, because of their youth at the time of the offending or because of the passage of a significant period of time, or because the offending was rooted in beliefs or circumstances now quite irrelevant to the justification for a deportation order being made. Thus, in our view what is required is careful scrutiny pursuant to Section 117C(7) of those offences which are on the person's criminal record which have provided a reason for the decision to deport. All of those convictions are then relevant to undertaking the exercise required by Section 117C(1) to (6)."

94. Whilst this passage does indeed confirm that the totality of an individual's criminal history can be relevant, it also highlights the important caveat imposed by section 117C(7) to the effect that the mandatory considerations under subsections (1) to (6) are only to be applied to the conviction(s) actually relied on in the decision.
95. The reasoning in Rexha was approved by the Court of Appeal in OH (Algeria) [2019] EWCA Civ 1763, implicitly at paragraph 46 and expressly at paragraph 48.
96. Mr Jarvis' final point is that the wording of section 117C(7) requires a nexus between the taking into account of the mandatory considerations in subsections (1) to (6) and the existence of a conviction or convictions relied on in the decision under appeal. In other words, the mandatory considerations are not to be taken into account in respect of any aspect of a decision which is not based on a conviction or convictions. By way of example, the considerations will not apply to that part of a decision based on information from the police relating to associations and suspected criminality, but in respect of which there have been no convictions. This is consistent with what is said in Rexha and OH (Algeria) and we agree with Mr Jarvis' position.

## **SUMMARY OF CONCLUSIONS**

97. Our central conclusions on the substantive issue in this appeal can be summarised as follows:
  - (a) By virtue of section 117A(1) of the 2002 Act, a tribunal is bound to apply the provisions of primary legislation, as set out in sections 117B and 117C, when determining an appeal concerning Article 8.
  - (b) In cases concerning the deportation of foreign criminals (as defined), it is clear from section 117A(2)(b) of the 2002 Act that the core legislative provisions are those set out in section 117C. It is now well-established that these provisions provide a structured approach to the application of Article 8 which will produce in all cases a final result compatible with protected rights.
  - (c) It is the structured approach set out in section 117C of the 2002 Act which governs the task to be undertaken by the tribunal, not the provisions of the Rules.
  - (d) A foreign criminal who has re-entered the United Kingdom in breach of an extant deportation order is subject to the same deportation regime as those who have yet to be removed or who have been removed and are seeking a revocation of a deportation order from abroad. The phrases "cases concerning the deportation of foreign criminals" in section 117A(2) and "a decision to deport a foreign criminal" in section 117C(7) are to be interpreted accordingly.



- (e) Paragraph 399D of the Rules has no relevance to the application of the statutory criteria set out in section 117C(4), (5) and (6);
- (f) It follows that the structured approach to be undertaken by a tribunal considering an Article 8 appeal in the context of deportation begins and ends with Part 5A of the 2002 Act.

### **DECISION ON ERROR OF LAW**

- 98. In light of the respondent's concession on the substantive issue, with which, for the reasons set out above, we agree, the judge erred in law by treating the satisfaction of Exception 2 under section 117C(5) of the 2002 Act as constituting simply one factor to be considered in light of paragraph 399D of the Rules, and, as a consequence, failing to treat the satisfaction of the exception as being determinative of the appellant's appeal.
- 99. On this basis, we set the judge's decision aside. It is unnecessary to address the remaining grounds of appeal.

### **RE-MAKING THE DECISION**

- 100. The re-making of the decision in this appeal can be stated briefly. It is now accepted by the respondent that the judge was entitled to find that it would be unduly harsh for the family unit to relocate to Kosovo and for the children to be separated from the appellant. The appellant satisfies Exception 2 under section 117C(5) of the 2002 Act and, given our conclusions on the substantive issue, this is determinative of the appeal and entitles the appellant to succeed on Article 8 grounds.

### **ANONYMITY**

- 101. The First-tier Tribunal made an anonymity direction in this case, although no reasons for doing so were provided.
- 102. We had reservations as to whether the anonymity direction should be maintained and gave the parties an opportunity to provide written submissions on this issue. In light of their responses and for the reasons set out below, we have concluded that it is not appropriate to maintain the anonymity direction.
- 103. First, a concern raised by the appellant was that details of the mental health difficulties suffered by both he and his wife, together with information relating to the latter's past experiences, might be set out in our decision. As is apparent, no such disclosure has occurred.
- 104. Second, this case does not fall within any of the categories requiring anonymity (see Upper Tribunal Immigration and Asylum Chamber Guidance Note 2013 No.1).
- 105. Third, no protection-based issues arise.

106. Fourth, the general principle that open justice is a fundamental tenet of our legal system is not displaced by any other features in this case. Indeed, as rightly pointed out by the respondent, there is a significant public interest in disclosing the appellant's identity in light of his offending history and re-entry to this country in breach of a deportation order.

### **NOTICE OF DECISION**

**107. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.**

**108. We set aside the decision of the First-tier Tribunal.**

**109. We re-make the decision by allowing the appeal on Article 8 ECHR grounds.**

Signed: *H Norton-Taylor*  
Upper Tribunal Judge Norton-Taylor

Date: 22 January 2021

### **TO THE RESPONDENT** **FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed: *H Norton-Taylor*  
Upper Tribunal Judge Norton-Taylor

Date: 22 January 2021