



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No.: UI-2023-004590

First-tier Tribunal No: HU/56308/2023

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On 19<sup>th</sup> of December 2023**

**Before**

**UPPER TRIBUNAL JUDGE PERKINS**  
**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**ADMIR PALUSHI**  
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms K McCarthy, Counsel instructed by SMA Solicitors

For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

**Heard at Field House on 21 November 2023**

**DECISION AND REASONS**

1. The appellant appeals against the decision of First-tier Tribunal Judge Cox promulgated on 7 September 2023 (“the Decision”). By the Decision, the Judge dismissed the appellant’s appeal against the decision of the respondent made on 4 May 2023 to refuse his human rights claim as a foreign criminal in respect of whom there was an extant deportation order, and who had entered the United Kingdom in breach of this deportation order.

**Relevant Background**

2. The appellant is a national of Albania, whose date of birth is 14 July 1993. The appellant was first encountered on 17 December 2016 when he was arrested on suspicion of having committed a series of offences. On the day of his arrest the appellant was served with an RED.001 Notice for being an illegal entrant and overstayer.
3. On 16 January 2017 at Inner London Crown Court the appellant was convicted of possession with intent to supply a controlled Class A drug (cocaine), possessing/controlling a false identity document or another person's identity document that had been improperly obtained; using a vehicle without insurance and driving otherwise than in accordance with a licence. For these offences that were committed on 17 December 2016, the appellant was sentenced to 2 years and 8 months' imprisonment.
4. On 1 February 2017 the appellant was served with a decision to deport him from the UK. In response, the appellant signed a disclaimer on 12 February 2017 waiving his right to oppose deportation. On 9 May 2017, a deportation order was signed against the appellant, and this was served to him on 12 May 2017 together with a decision to maintain the decision to deport. On 21 May 2017 the appellant was deported to Albania under the Early Release Scheme.
5. On 1 July 2019 the appellant was arrested on suspicion on dangerous driving. He claimed to have returned to the UK in the back of a lorry 3 or 4 months earlier. The appellant was served with a Notice of Liability for Removal. As the appellant had returned to the UK before his sentence expired on 18 August 2019, he was returned to prison to finish his sentence. Removal directions were set for 1 September 2019, but on 28 August 2019 the appellant made a claim of modern slavery, and on 16 September 2019 the appellant made a claim for asylum. On 5 November 2020 the appellant applied for a grant of status under the EU Settlement Scheme, relying on his marriage to Kamelia Yotova, a Bulgarian national, which had taken place on 4 November 2020. On 7 March 2023 the appellant withdrew his asylum claim
6. On 4 May 2023 the respondent issued separate decisions in respect of, firstly, the appellant's application for a grant of status under the EUSS and, secondly, the appellant's further submissions that his deportation would breach the UK's obligations under the European Convention on Human Rights.
7. The application under the EUSS was refused on the grounds of suitability as he was subject to a deportation order which was made on 9 May 2017.
8. As to his human rights claim, the respondent accepted that his wife was settled in the UK. But it was not accepted that his relationship with Kamelia Yotova was formed when he was in the UK lawfully and his immigration status was not precarious. This was because he had entered the UK illegally and therefore his relationship was not forged at a time

when he had an expectation that he would be permitted to remain in the UK indefinitely. The family and private life exceptions to deportation did not apply to him, and so consideration had been given as to whether there were very compelling circumstances such that he should not be deported. To outweigh the very significant public interest in deporting him, he would need to provide evidence of a very strong Article 8 claim over and above the circumstances described in the exceptions to deportation. In respect of family life, nothing compelling had been raised. Conversely, there was a significant public interest in deporting him. The respondent went on to cite the Judge's sentencing remarks, and the fact that he had returned to the UK in breach of the deportation order which was made with the intention of preventing him from returning to the UK. The respondent regarded breaches of the UK's laws by a person subject to immigration control as extremely serious, as it showed that the person had no regard for the laws of the UK. Therefore, having considered the facts of his case, it was not accepted that there were very compelling circumstances which outweighed the public interest in seeing him deported by reinforcing the deportation order previously made against him.

### **The Decision of the First-tier Tribunal**

9. The appellant's appeal came before Judge Cox sitting at Hatton Cross in the First-tier Tribunal on 24 August 2023. Both parties were legally represented.
10. In the Decision at paras [8]-[10], the Judge gave a summary of the proceedings. As well as having regard to the composite bundle and the oral testimony of the appellant and his wife, the Judge said that he had also had regard to the Supreme Court decisions in *KO (Nigeria) -v- SSHD* [2018] UKSC 53, and *HA (Iraq) -v- SSHD* [2022] UKSC 22.
11. At para [11], the Judge set out the agreed facts. These included the fact that Ms Kotova had entered the UK with her mother in August 2015 and had been residing in the UK ever since, and that the appellant had met Ms Kotova in September 2018 and they had started living together in January 2019.
12. The Judge set out the issues in the appeal at paras [14] and [15]. The respondent accepted that the appellant was in a genuine and subsisting relationship with his wife. However, the appellant conceded that the relationship was not formed at a time when he was lawfully in the UK, and when his immigration status was not precarious. As such, the appellant could not rely on the exceptions, and he must demonstrate that there were very compelling circumstances over those described in the exceptions.
13. At para [17], the Judge set out the factors relied upon by Counsel for the appellant as demonstrating that there were very compelling circumstances over and above those described in the family and private life exceptions. The factors relied upon included the fact that the appellant had offended in December 2016 and had not offended since. He had plainly been

rehabilitated. He was remorseful for his actions. His life had changed significantly since the time of his offence. He was now married. He was a one-time offender and he had not been convicted of any violent or sexual crimes. Their relationship could not continue abroad as Ms Kotova had no knowledge of life in Albania.

14. At para [18], the Judge accepted that it would be very difficult for the appellant's wife if the appellant was deported. At para [20], he acknowledged that the appellant had not committed a violent offence. However, those involved with supplying drugs were involved in a process that had harmful consequences for society, destroying lives and creating havoc and insecurity in communities throughout the UK. At para [21], the Judge accepted that the appellant was remorseful and this went to his credit. However, the public interest in deportation was not based only on the need to protect the public from further offending, but on wider policy concerns of deterrence and public confidence.

15. The Judge continued as follows:

22. In any event, under the exceptions an applicant must show that it would be unduly harsh and Lord Hamblen noted that:

*"... 'unduly' harsh does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context denotes something severe, or bleak. It is then the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher. (see HA Iraq -v- SSHD [2022] UKSC 22)."*

23. Overall, I find the appellant's wife will find the appellant's deportation very difficult. She has established a life in the UK and he is an integral part of her future. However, I am not satisfied that her circumstances will [not] be bleak or severe. She is a healthy young woman who has been able to adapt to life in the UK. If she goes to Albania, the appellant, who is very familiar with the culture and life in Albania, will be able to help her adapt to life there. She will be able to communicate with her mother through modern forms of communication and she will be able to visit her.

24. Alternatively, the appellant's wife can remain in the UK. I have no doubt that such a separation will be painful, but she can remain in contact with the appellant through modern forms of communication. She will also be able to visit him.

25. If the appellant's conviction was the only matter to weigh against him, then I may have reached a different conclusion. However, following the appellant's initial deportation, he subsequently re-entered the UK in breach of that deportation order. In my view, this is a further matter that weighs heavily against the appellant. The appellant's wife acted upon the appellant's assurance that he was going to try and legitimise his status in the UK, and this was always going to be very difficult as he was the subject of a deportation order.

26. On the totality of the evidence, I am not satisfied that there are very compelling circumstances so as to justify the appellant being granted leave to remain in the UK.
27. At para [27], the Judge concluded that on balance he was satisfied that the respondent's decision amounted to a necessary and proportionate interference with the appellant and his wife's rights to enjoy respect for their family life in the UK. Their rights did not outweigh the respondent's legitimate aims of protecting the economic well-being of the country and for the prevention of disorder or crime.

### **The Grounds of Appeal to the Upper Tribunal**

28. The grounds of appeal to the Upper Tribunal were settled by the appellant's solicitors. In their introduction, they said that the Judge had erred in his application of s117C(5) by going on to apply a test of very compelling circumstances over and above the statutory exceptions.
29. Ground 1 was that the Judge had mis-applied s117C(5) and/or had failed to give adequate reasons. The Judge had cited the unduly harsh test at para [22], but had then concluded that there were not very compelling circumstances at para [26]. This was a different test which fell under s117C(6).
30. Ground 2 was that the Judge had erred in considering an immaterial factor. At para [25], the Judge found that if it was only the appellant's conviction that was in issue, he might have reached a different conclusion. He then proceeded to look at the appellant's return to the UK in breach of the deportation order. This was an irrelevant consideration in assessing s117C(5), and/or in assessing the impact upon the appellant's wife of his deportation.

### **The Reasons for the Grant of Permission to Appeal**

31. On 14 October 2023 First-tier Tribunal Judge Thapar granted the appellant permission to appeal, as in her view it was arguable, having regard to para [26] of the Decision, that the threshold applied by the Judge pursuant to s117C was "*unclear*".

### **The Rule 24 Response**

32. On 30 October 2023 Mr Wain, of the Specialist Appeals Team, settled a Rule 24 Response opposing the appeal. In summary, he submitted that Judge Cox had directed himself appropriately. It was clear that the Judge had made the Article 8 assessment using the relevant test applicable in the case - namely whether there were very compelling circumstances to outweigh deportation. The grounds of appeal appeared to have conflated which test was applicable. The parties were reminded that the s117C(5) test was conceded at para [15] of the Decision, and that the skeleton

argument for the appellant focused on the very compelling circumstances test.

### **The Hearing in the Upper Tribunal**

33. At the outset of the hearing before us to determine whether an error of law was made out, Mr Wain drew to our attention, and to the attention of Ms McCarthy, the Rule 24 Response. It had been uploaded to the CE file on 31 October 2023, but it had not been incorporated in the core bundle for the hearing.
34. Ms McCarthy acknowledged that it had been conceded below that the family life exception could not be met. However, it remained the case that it was not clear which test the Judge was applying. The reason why the appellant did not come within the scope of s117C(5) was because his relationship with his partner was formed when he had re-entered the UK in breach of the extant deportation order. Accordingly, by introducing the appellant's re-entry in breach of the deportation order at para [25], the Judge was raising a matter which was already factored into the concession, and he was thereby guilty of double-counting.
35. In response, Mr Wain adhered to his Rule 24 response. As to the specific point made by Ms McCarthy, he submitted that there was no double-counting. In resolving the question of whether there were very compelling circumstances that justified the appellant being granted leave to remain in the UK, it was open to the Judge to attach weight to the fact that, following his initial deportation, the appellant had subsequently re-entered the UK in breach of that deportation order.
36. We reserved our decision.

### **Discussion and Conclusions**

37. If it had been an issue in the appeal before the First-tier Tribunal whether the family life exception in s117C(5) was met, it would have been legally erroneous for the Judge to resolve that question by reference to the strength of the public interest in the appellant's deportation.
38. As the Supreme Court held in *KO (Nigeria)* [2018] UKSC 53 at [20]-[23], the private and family life statutory exceptions are self-contained; and, in the case of the application of the unduly harsh test in Exception 2 (which applies *inter alia* where C has a genuine and subsisting relationship with a qualifying partner) what is not required or appropriate is a balancing of the relative levels of severity in the deportee's offending.
39. However, the starting point in the appeal before the First-tier Tribunal was that s117C(5), in other words Exception 2, did not apply, as the appellant's relationship with a qualifying partner was formed at a time when he did not meet the second of the three conditions set out in the corresponding paragraph 399(b) of the Rules, which is that the relationship was formed at

a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious.

40. Under s117C (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 the Exceptions 1 and 2. The corresponding provision in the Rules at para 398 for medium offenders (those who have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months) is that if the family and private life exceptions described in paras 399 and 399A do not apply, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paras 399 and 399A.

41. At para [47] of *HA (Iraq)*, Lord Hamblen said that the difference in approach called for under s117C(6) as opposed to s117C(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 sub-sections (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 they are 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 shortcut. 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 of 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.”

42. At para [50], Lord Hamblen cited with approval the analysis of Jackson LJ in *NA (Pakistan)* as to how Exceptions 1 and 2 interrelate with the very compelling circumstances test when applied to medium offenders. At para [32] of *NA (Pakistan)* Jackson LJ said:

“Similarly, in the case of a medium offender, if all he could advance in support of his Article 8 claim was a ‘near miss’ case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were ‘very compelling circumstances, over and above those described in Exceptions 1 and 2’. He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall-back protection. But again, in principle, there may be cases in which such an offender can say that features of his case of

the kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision-maker, but it the Secretary of State or the Tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.”

43. At para [51], Lord Hamblen said that, 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]-[35], the relevant factors would include those identified by the European Court of Human Rights as being relevant to the Article 8 proportionality assessment.
44. As is apparent from the ASA, and the factors relied upon by the appellant’s Counsel that are set out in the Decision at [17], the appellant did not expressly rely on the proposition that he was a ‘near miss’ under Exception 2, but his Counsel impliedly submitted that for Ms Kotova to follow the appellant to Albania would be unduly harsh.
45. Accordingly, as part of his rounded assessment of the appellant’s case, the Judge rightly applied the unduly harsh test to both the ‘stay’ and ‘go’ scenarios.
46. At para [41] of *HA (Iraq)*, Lord Hamblen said that he considered the best approach to applying the unduly harsh test was to follow the guidance which was said to be authoritative in *KO (Nigeria)*, which was the *MK* self-direction. At [45], he said that such an approach does not involve a lowering of the threshold approved in *KO (Nigeria)* or a reinstatement of any link with the seriousness of the deportee’s offending,
47. As the Judge expressly directed himself by reference to *HA (Iraq)*, and expressly applied the *MK* self-direction approved by the Supreme Court, we infer that he was fully aware that the unduly harsh test which he was applying did not involve a reinstatement of any link with the seriousness of the appellant’s offending.
48. Although the transition could have been more clearly signposted, it is tolerably clear that, having applied the *MK* self-direction to both the ‘stay’ and ‘go’ scenarios at paras [22]-[24]), at para [25] the Judge returned to the broader question of whether there were very compelling circumstances such as to outweigh the public interest in the appellant’s deportation.
49. Hence, having found that the appellant’s re-entry to the UK in breach of the deportation order was a matter that weighed heavily against the appellant, the Judge went on to conclude at para [26] that, on the totality of the evidence. the test of very compelling circumstances was not made out.



50. The Judge's introduction into the balancing exercise of the appellant's re-entry to the UK in breach of the deportation order was not double-counting, as submitted by Ms McCarthy, and nor was it irrelevant. On the contrary, it was highly relevant to the question of the strength of the public interest in the appellant's deportation, as is underscored by para 399D of the Rules which provides:

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.

51. In conclusion, the Judge did not misdirect himself. The Judge engaged fully and comprehensively with the case that was put forward on the appellant's behalf, which was that there were very compelling circumstances over and above those described in paragraph 399(b) and the corresponding family life exception contained in s117C(5) of the 2002 Act, and he gave cogent and legally sustainable reasons for finding that this case was not made out. His line of reasoning does not indicate that he misunderstood the relationship between s117C(5) and s117C(6), or that he wrongly believed that a relevant component of the unduly harsh test is the level of seriousness of the deportee's offending.

### **Notice of Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

### **Anonymity**

The First-tier Tribunal did not make an anonymity order in favour of the appellant, and we do not consider that it is necessary or appropriate for the appellant to be accorded anonymity for the purposes of these proceedings in the Upper Tribunal.

Andrew Monson  
Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber  
12 December 2023