



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

**Case No: UI-**  
**2023-004889**  
**First-tier No:**  
**HU/53883/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 29 May 2024**

**Before**

**UPPER TRIBUNAL JUDGE BLUNDELL**  
**and**  
**DEPUTY UPPER TRIBUNAL JUDGE CHANA**

**Between**

**MUHAMMAD ARSHAD**  
**(NO ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Lawrence Youssefian, instructed by Adam Bernard Solicitors

For the Respondent: Arifa Ahmed, Senior Presenting Officer

**Heard at Field House on 17 May 2024**

**DECISION AND REASONS**

1. The appellant appeals with the permission of First-tier Tribunal Judge Seelhoff against the decision of First-tier Tribunal Judge Cary (“the judge”). In his decision, which was issued on 31 August 2023, the judge dismissed the appellant’s appeal against the respondent’s refusal of his human rights claim.

**Background**

2. The judge summarised the relevant background at [1]-[7] of his decision. We cannot improve on that summary and reproduce it in full:

[1] Mr Muhammad Arshad, the Appellant is a citizen of Pakistan. He was born on September 1 1983 and is now aged 39. He appeals against the decision of the Respondent who on June 14 2022 refused to revoke a deportation order which had served on the Appellant on October 18 2014 and enforced by his removal to Pakistan on November 11 2014. The Appellant subsequently returned to the United Kingdom on October 21 2016 and after he was encountered by immigration officers during a home visit on September 14 2017 his solicitors wrote to the Respondent on September 27 2017 making various submissions on his behalf as to why he should not be removed from the United Kingdom under the original deportation order. They subsequently lodged an application for permission to remain on human rights grounds at the end of October 2017.

[2] The Appellant was originally granted leave to enter the United Kingdom on February 20 2004 on the basis of his marriage to Ms Zanib Bibi ("Ms Bibi"), his wife. He entered the United Kingdom on April 1 2004 and was granted indefinite leave to remain on the basis of his marriage on March 28 2006. The Appellant then began offending. His first appearance was at Stratford Magistrates Court on March 11 2008 when he was prosecuted for driving whilst disqualified and without insurance on February 25 2008. He was disqualified from driving for 2 years and also sentenced to a community order with an unpaid work requirement of 180 hours.

[3] The Appellant continued to drive and was subsequently prosecuted again at the City of London Magistrates Court on June 10 2008 for driving whilst disqualified and uninsured on May 11 2008. He received a further period of disqualification of 2 years and in addition was given a 4 month prison sentence suspended for 2 years. 40 hours were added to his outstanding unpaid work requirement.

[4] The Appellant next appeared at Birmingham Magistrates Court on September 14 2009 when he was again prosecuted whilst disqualified and for using a vehicle whilst uninsured on September 12 2009. He was sentenced to 4 months in prison and disqualified from driving for a further 12 months. He was also dealt with for obstructing a police officer on the same date for which he received a 1 month custodial sentence.

[5] The Appellant continued to offend. On February 25 2011 he was dealt with at Thames Magistrates Court for driving otherwise than in accordance with a licence, using a vehicle whilst uninsured and working as a "taxi tout". He was disqualified from driving for 9 months. Within a few weeks he was caught driving whilst disqualified and uninsured on March 8 2011. He was also found to be in possession of a false or improperly obtained identity document. He received a total of 6 months imprisonment and was again disqualified from driving for 2 months.

[6] He next appeared at East London Magistrates Court on March 7 2013 for again acting as a taxi tout, driving whilst disqualified and

using a vehicle whilst uninsured on November 4 2012. On this occasion he was sentenced to 18 weeks imprisonment. He was also dealt with for failing to surrender to custody on November 30 2012 for which he received a 4 week concurrent sentence.

[7] The Respondent initially attempted to deport the Appellant in July 2011 when a notice of intention to make a deportation order was issued on July 11 2011. The Appellant appealed that decision on Article 8 grounds. His appeal was allowed following a hearing on September 22 2011. Following his continued offending the Respondent made a further attempt to deport the Appellant and he was again notified of his liability to deportation in March 2013. He again appealed but his appeal was dismissed following a hearing on April 30 2014 and he was ultimately removed from the United Kingdom on November 11 2014.

3. As the judge noted, the appellant had returned to the United Kingdom in breach of the deportation order in October 2016. He was discovered at the family home in September the following year, at which point steps were taken to remove him once more. His solicitors made representations against that course, relying on the appellant's relationship with his wife and five children, who were born between 2004 and 2016.
4. The respondent refused the appellant's human rights claim on 14 June 2022. He did not accept that it would be unduly harsh to expect the appellant's wife and their children to live with the appellant in Pakistan, or to remain in the UK without him. Nor did he accept that there would be very compelling circumstances which rendered the enforcement of the extant deportation order disproportionate. It was against that decision that the appellant appealed to the First-tier Tribunal.

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

5. The judge's decision is carefully structured and reasoned. What follows is only an outline of the essential conclusions he reached in those 87 paragraphs.
6. The judge's conclusions appear from [35] onwards. The judge directed himself in accordance with the Immigration Rules and the authorities at [35]-[48]. At [49], he confronted Mr Youssefian's submission that the appellant was no longer a foreign criminal for the purposes of s117C of the 2002 Act because he no longer qualified for recognition as a persistent offender, that having been the sole basis on which he was previously found to be a foreign criminal. The judge directed himself carefully in accordance with Chege ("is a persistent offender") [2016] UKUT 00187 and SC (Zimbabwe) v SSHD [2018] 1 WLR 4474 at [50]-[54]. The judge took all of the appellant's offending into account, including a similar offence he had committed in 2021. At [57], he concluded that the appellant was no longer a persistent offender.
7. At [58]-[60], the judge concluded that the appellant was not a person who had been convicted of an offence which had caused serious harm.

In light of those conclusions, and the fact that the appellant had never been sentenced to more than 12 months imprisonment, the judge concluded at [60] that he was no longer a foreign criminal 'for the purposes of his Article 8 claim'. In the following paragraph, the judge stated that he was not required to apply section 117C of the Nationality, Immigration and Asylum Act 2002 as a result of that conclusion.

8. The judge made further reference to statute and the Immigration Rules at [61]-[63]. At [64]-[71], the judge considered the circumstances in which the applicant had re-entered and remained in the United Kingdom. For the detailed reasons he gave in those paragraphs, he concluded that the appellant did not believe that he was only banned from re-entering the UK for a year. He shared the concerns expressed by the previous judge about the appellant's credibility.
9. Having accepted that the appellant enjoyed a family and a private life in the UK, the judge considered from [72] onwards whether it would be proportionate to interfere with those rights. At [72], he noted that there was still 'a very strong public interest in his removal even if he no longer qualifies for recognition as a foreign criminal'. The judge then made reference to more authority before considering the best interests of the children at [74]. The judge concluded that it was in the best interests of the children - all of whom are British - to stay in the United Kingdom and to be raised by both parents. At the end of [74], the judge noted that the appellant could not avail himself of s117B(6) of the 2002 Act because he is 'subject to deportation'.
10. The judge considered Mr Youssefian's submissions on delay from [75]-[76]. For reasons he gave in those paragraphs, he concluded that he could only attach little weight to the delay between the representations being made in support of revocation in 2017 and the decision on those representations in 2022.
11. At [77], the judge directed himself in relation to the public interest in the appellant's deportation, citing further authority from the Court of Appeal. At [78], the judge considered the public interest factors in s117B of the 2002 Act. For reasons he gave at [79]-[83], the judge rejected the submission that the appellant would encounter very significant obstacles to integration on return to Pakistan.
12. At [84]-[87], the judge considered the appellant's arguments based on his family life with his wife and children. There was reference in [84] to the threshold of undue harshness, which the judge said that he had considered although it was not 'directly relevant'. At [85], he directed himself in the following way:

[85] 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 the antithesis of pleasant or comfortable. The addition of the adverb 'unduly' raises an already elevated standard still higher.

The requirement recognises that there is level of harshness which is “acceptable” or “justifiable” in the context of the public interest in the deportation of foreign criminals – HA (Iraq) 2022 UKSC 22 In applying the test I take into account the children’s best interests and I also recognise that non-physical harm should not be regarded as intrinsically less significant than physical harm.

13. Two paragraphs numbered [86] followed. In the first, the judge considered what was said by the Independent Social Worker, Mr Chester. In the second, he noted that there was no ‘realistic prospect’ that the children would relocate to Pakistan in the event of the appellant’s deportation and he concluded, ultimately, that the appellant’s removal would not ‘be unduly harsh on either Ms Bibi or the children’. In the final paragraph, the judge found as follows:

[87] It is clear from s117B (1) that the maintenance of effective immigration control is in the public interest. That is the will of Parliament which must be given the appropriate weight. It follows that significant weight must be given to upholding the integrity of the immigration system in relation to deportation. That is not lessened by assessment that the Appellant is no longer to be classified as a “foreign criminal” (a description used in paragraph 399D). He had not lost that categorisation when he entered the United Kingdom in October 2016 as he was then still entitled to be classified as a “persistent offender”. The Appellant’s offending between 2008 and 2013 was sufficient to warrant his removal from the United Kingdom particularly as he had been warned after his first successful attempt to avoid removal what the likely consequences of any further offending would be. The Appellant’s family circumstances are not sufficient to displace the strong public interest in the maintenance of effective immigration control particularly when it comes to those who seek to avoid the normal consequences of deportation by entering the United Kingdom without seeking to revoke the order. I therefore dismiss his appeal under Article 8. He can be removed.

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

13. In his application for permission to appeal, Mr Youssefian advanced no fewer than seven grounds of appeal. Judge Seelhoff considered the grounds to arguable. He grouped grounds 1-3 and grounds 4-7, noting that the first group of grounds related to the judge’s use of the threshold in section 117C despite his conclusion that those thresholds did not apply. He considered that the second group of grounds, which concerned the evaluation of the evidence, would ‘necessarily be made out’ if the first group of grounds were made out.
14. The respondent filed no response to the grounds of appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. At the outset of the hearing, therefore, we turned to Ms Ahmed to ascertain her stance on the first three grounds. She accepted immediately that the judge had erred in law in making reference to undue harshness and to very compelling circumstances, since those thresholds did not apply in light of the judge’s conclusion that the appellant was no longer a foreign

criminal. Ms Ahmed submitted that this accepted error was not material to the outcome of the appeal, however, because the judge had merely 'borrowed from' section 117C and the determination was otherwise replete with correct self-directions on the law, as regards statute, the Immigration Rules and the authorities. Section 117C had applied in the past, Ms Ahmed noted, and the appellant was certainly a foreign criminal when he entered the UK in breach of a deportation order. It was clear from the judge's analysis of the evidence that the outcome would have been the same without reference to section 117C.

15. We rose to consider Ms Ahmed's submissions. On resuming the hearing, we indicated that we were unable to accept Ms Ahmed's submission that the accepted errors of law in the judge's decision were immaterial to the outcome. We indicated that we did not need to hear from Mr Youssefian and that we would set aside the judge's decision.
16. Mr Youssefian invited us to preserve the finding that the appellant was not a persistent offender. We asked Ms Ahmed whether there was any reason that we should not do so. She helpfully confirmed that the appellant's last offence was the one which had been considered by the judge and that she could not think of any reason why the finding should not be preserved. Mr Youssefian invited us to remit the appeal to the FtT with that finding preserved. We expressed some reluctance to take that unusual course, whereupon Mr Youssefian asked us to consider Ortega [2018] UKUT 298 (IAC). We indicated that we would do so, and reserved our decision on whether to retain the appeal in the Upper Tribunal or to remit it to the FtT and, in either case, whether we would preserve the finding that the appellant is not a persistent offender.

## **Analysis**

17. Whilst we recall the caution which we must exercise before interfering with the analysis of a specialist fact-finding Tribunal, we have come to the clear conclusion in this case that the judge's decision cannot stand.
18. This was, as Mr Youssefian observed in his lengthy grounds, a rather unusual case. The appellant was deported for a series of offences but none of those offences attracted a sentence of more than twelve months' imprisonment. He was not automatically designated a 'foreign criminal' under the UK Borders Act 2007, therefore, and it was for the respondent to establish that he was a foreign criminal by one of the other two routes available in statute. On any proper view, his offending had not caused serious harm. It was therefore said by the respondent that he was a persistent offender who showed a particular disregard for the law. That submission prevailed before the First-tier Tribunal in 2014 and the appellant's deportation was held at that stage to be a proportionate response to his offending. Permission to the Upper Tribunal having been refused, he was duly deported to Pakistan.
19. In the years that passed between the appellant's deportation and his second appearance before the FtT, he had committed only a single

additional offence. Having directed himself meticulously on the authorities, and having surveyed the offending as a whole, the judge concluded that the appellant was no longer a persistent offender, with the result that he was no longer a foreign criminal. Those might not have been conclusions which we would have reached but that is immaterial; there is no cross appeal and Ms Ahmed did not invite us to go behind that finding. The consequence of that finding, as Mr Youssefian submitted in his first three grounds of appeal, was that the notions of 'undue harshness' and 'very compelling circumstances' which are routinely applicable in deportation (and revocation of deportation order) cases were of no application in this particular case. The judge apparently appreciated this, as is clear from what he said at [61], [84] and [87] of his decision.

20. Despite the judge's self-direction that these thresholds were not applicable, it is quite clear that they were the benchmarks against which the appellant's family life claim was assessed. That is most obvious from [85] and the second [86], in which the judge's assessment of the impact of deprivation on the appellant's children started and concluded with reference to the threshold in section 117C(5): undue harshness. We also note that there is reference to the threshold of very compelling circumstances in [62] and [77] of the judge's decision. In the latter paragraph, the judge noted that 'something very compelling is required to outweigh the public interest in deportation'.
21. Ms Ahmed was correct in our judgment to accept that the judge erred in law in each of these parts of his decision. Having noted that section 117C could play no part in his analysis because the appellant was not a foreign criminal, it is not clear to us why these statutory tests came to feature in the decision at all.
22. Ms Ahmed submitted that these misdirections of law were not material to the outcome of the appeal. We are unable to accept that submission, largely for the reasons given by Mr Youssefian. As he points out in his grounds of appeal, the thresholds of 'undue harshness' and 'very compelling circumstances' are designed to raise the bar for foreign criminals and to emphasise that something more is required to overcome the public interest in that category of case. The appellant did not fall into that category of case, however, and the judge was required to assess proportionality without reference to section 117C considerations. It is not at all clear to us that the judge would have reached the same conclusion in this appeal if he had evaluated the appellant's family life without reference to those thresholds.
23. In order for an error of law to be immaterial, it must be shown that the same result would inevitably have been reached were it not for the error: Detamu v SSHD [2006] EWCA Civ 604 refers. That is obviously a demanding test, and it is not one which Ms Ahmed is able to pass in this case. Although we accept that there are many aspects of this decision which are carefully reasoned and demonstrably the product of considerable thought, the judge fell into serious error and set himself off

on the wrong path by his reference to the thresholds of undue harshness and very compelling circumstances. Given his conclusions concerning the best interests of the children, we cannot say with any certainty that he would inevitably have concluded that the decision was a proportionate one if he had not erred in considering the family life through the prism of section 117C. The result of his error is that one side of the proportionality balance was improperly skewed to a significant extent in the respondent's favour. Whilst we acknowledge the significant weight which must necessarily attach to the appellant's conduct in entering in breach of a deportation order, we cannot accept that the outcome of this appeal would have been a certainty if the judge had adopted the correct approach.

24. We will set aside the decision of the judge. We accept Mr Youssefian's submission that there is no reason to set aside the finding that the appellant is not a persistent offender. It is a finding of fact which is untouched by legal error and which can be properly ring-fenced in the manner considered in AB (preserved FtT findings; Wisniewski principles) Iraq [2020] UKUT 268 (IAC); [2020] Imm AR 1451 and we accept Mr Youssefian's submission that the decision in Ortega (remittal;bias; parental relationship) [2018] UKUT 298 (IAC); [2019] Imm AR 126 shows that there is no reason not to preserve a finding of fact when remitting to the FtT. Given the nature of the finding, which represents a distinct finding on a discrete question posed by statute, we do not think that its preservation will render the task of the FtT more difficult.
25. We add this for the avoidance of doubt, however. The finding that the appellant is not a persistent offender is not set in stone. Were he to commit any further offences before the hearing in the FtT, that finding would be nothing more than a starting point from which a judge would be free to depart on the basis of new evidence, akin to the position in Devaseelan [2003] Imm AR 1.

### **Notice of Decision**

The decision of the First-tier Tribunal contained errors of law which require it to be set aside to the extent described above. The appeal is remitted to the FtT to be heard by a judge other than Judge Carey. The finding that the appellant is not a persistent offender is preserved.

**Mark Blundell**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

28 May 2024