Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07981/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 May 2019	**On 20 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SAJID ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Halim, Counsel, instructed by Mayfair Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

REMAKE DECISION AND REASONS

Introduction

1. This is the remaking of the decision in the Appellant's appeal against the Respondent's decision of 7 July 2017, refusing his human rights claim. That claim was made following the Respondent's prior decision to make a deportation order on 6 July 2017 pursuant to Section 32(5) of the UK Borders Act 2007. This action had arisen as a result of the Appellant's conviction on 9 January 2017 for causing death by dangerous driving contrary to section 1 of the Road Traffic Act 1988 in respect of an incident on 12 December 2014 in which the Appellant's friend, a passenger in his car,

was killed. A sentence of 27 months' imprisonment was imposed, together with a significant period of disqualification from driving.

2. By a decision promulgated on 13 November 2018, the First-tier Tribunal had dismissed the Appellant's appeal against the Respondent's refusal of his human rights claim. In a decision promulgated on 18 March 2019 and annexed to this remake decision, a panel of the Upper Tribunal comprising Mrs Justice Lang and myself found that the First-tier Tribunal had materially erred in law. The panel's summary conclusion for this outcome is set out in para. 22 of its decision:

> "As we announced to the parties at the hearing, we conclude that the judge materially erred in law by failing to take into account, as a relevant factor, the fact that the Appellant represented a low risk of reoffending when undertaking the broad Article 8 balancing exercise once she had concluded that the Appellant could not satisfy the provisions of paragraphs 399 and 399A of the Rules."

3. The panel directed that the remaking of the decision in this case would be undertaken by myself, sitting alone. A Transfer Order to that effect has been obtained and is on file.

The scope of the remaking decision in this appeal

4. The scope of the remaking decision in this appeal is relatively narrow.

5. At para. 36 and 37 of the error of law decision, the panel stated:

> "36. … we have concluded that this matter should indeed be retained in the Upper Tribunal. This is not a case involving procedural unfairness and it is clear to us that there would not need to be extensive findings of fact by the Upper Tribunal. Indeed, the judge has set out a good many findings, none of which need be disturbed. In addition, the judge's conclusions as to the various provisions of the Rules have not been challenged.
>
> 37. The issue for the Upper Tribunal at the resumed hearing will be whether the public interest in deportation is outweighed by "very compelling circumstances over and above" those described in paragraphs 399(a), 399(b) and 399A of the Rules, on the basis of the First-tier Tribunal's preserved findings of fact, and taking into account all relevant factors, including the accepted low risk of reoffending. These factors also fall to be considered within the wider balancing exercise under Article 8 ECHR."

6. Thus, the findings set out in para. 20 of the First-tier Tribunal's decision stand for the purposes of the remaking decision. In addition, the conclusion that the Appellant cannot meet the requirements of para. 399(a), 399(b), and 399A of the Immigration Rules ("the Rules), also stand.

7. The core issue is, in essence, whether the Appellant can show that he has, by virtue of "very compelling circumstances over and above" the exceptions set out in para. 399-399A of the Rules and sub-sections 117C(4) and (5) of the Nationality, Immigration and Asylum Act 2002, as amended ("NIAA 2002"), an Article 8 claim strong enough to outweigh the very powerful public interest in deporting him. This involves an

evaluation of all relevant factors, for and against the Appellant, having due regard to the mandatory considerations in Part 5 of NIAA 2002, the Rules, and any other matters bearing on the question of whether the Respondent's refusal of the human rights claim represents a fair balance between the rights of the individual on the one hand and the public interest on the other.

The evidence before me

8. In remaking the decision in this appeal I have taken full account of the evidence contained in: the Respondent's appeal bundle, under cover of letter dated 20 December 2017 ("RB"); the Appellant's original appeal bundle before the First-tier Tribunal, indexed and paginated 1-147 ("AB"); and a newly admitted letter from the Appellant's Probation Officer, Ms [JB], dated 30 April 2019.

9. At the outset of the hearing Mr Halim confirmed that he was not seeking to call oral evidence from the Appellant. This was in keeping with the observations made by the panel at paras. 36-37 of the error of law decision and direction 3 of those issued to the parties in that decision.

The parties' submissions

For the Appellant

10. Mr Halim relied first and foremost on his skeleton argument. He rightly acknowledged the great weight attributable to the public interest. Notwithstanding this, a combination of factors including, primarily, the very low risk of reoffending and risk to the public, the Appellant's Article 8 claim was very strong. The evidence of remorse and rehabilitation was clear and there were mitigating circumstances surrounding the offence itself. It appropriate in this case to place significant weight on the rehabilitation factor. The relevance of deterrence was accepted.

For the Respondent

11. Mr Bramble apologised for the absence of a skeleton argument from the Respondent: he explained that the Senior Presenting Officer who had had charge of the case had recently left.

12. It was submitted that the Appellant's offence was serious and the public interest very strong. In light of the relevant authorities and the facts in this appeal, the Appellant could not succeed.

Legal self-directions

13. In answering the core question in this appeal I have considered the guidance set out in authorities including, but not limited to: Hesham Ali [2016] UKSC 60; NA

(Pakistan) [2016] EWCA Civ 662; MF (Nigeria) [2013] EWCA Civ 1192; AJ (Zimbabwe) and VH (Vietnam) [2016] EWCA Civ 1012; MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC); and RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 (IAC).

14. In the context of this appeal, the essential principles to be applied are as follows:

    (a) The public interest is very strong indeed;

    (b) The test is "extremely demanding";

    (c) Matters covered by the exceptions in paras. 399(a)-399A and section 117C(4) and (5) NIAA 2002 can also be relevant to the assessment of the "very compelling circumstances" test;

    (d) The public interest retains the facets of deterrence, the risk of reoffending, and the public's concern over the issue of foreign nationals offending in the United Kingdom;

    (e) The particulars of the individual's offending are relevant;

    (f) The policy of the Respondent, as expressed in the Rules, is deserving of "considerable weight";

    (g) The relevance of rehabilitation is to be treated with real caution, although it can, in appropriate cases, play a significant role;

    (h) Cases are fact-sensitive.

15. The overall approach was summarised in Hesham Ali thus:

> "The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the Article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in *MF (Nigeria)* - will succeed."

Analysis and conclusions

The facts

16. There is no material dispute as to the factual matrix in which this case falls to be decided.

17. The particular circumstances surrounding the offence for which the Appellant was convicted are set out in: the Sentencing Remarks of HHJ Bright, QC, at Annex H of the Respondent's bundle (a complete copy is on file); the Pre-Sentence Report at 72-76 AB; the OASys report at 77-81 AB; and certain matters are covered by the First-tier Tribunal's preserved findings. On the basis of these sources I make the following findings:

    i. The Appellant was distracted by his mobile telephone when undertaking the manoeuvre leading to the collision, although he was not actually using it at the time;

ii. The victim, the Appellant's friend, was not wearing a seatbelt;

iii. The other vehicle (a recovery truck) was travelling in excess of the relevant speed limit at the time of the collision.

18. As to matters following the commission of the offence itself, again the facts are uncontroversial:

i. The Appellant pleaded guilty to careless driving but was convicted by a jury on the count of causing death by dangerous driving;

ii. From the outset, the Appellant expressed genuine remorse for his actions;

iii. He has suffered from nightmares as a result of what occurred;

iv. The sentencing judge accepted that the offence was a "one off" and there was little chance of further offending;

v. The Appellant represents a very low risk of reoffending;

vi. The same categorisation applies to the issue of risk of serious harm to the public (this has been reduced since the OASys report was produced;

vii. He has complied with all requirements of his licence and supervision by the Probation Service;

viii. The supervision has been effective.

19. In relation to other relevant matters, and based on the unchallenged evidence and preserved findings, I find as follows. The Appellant has no previous or subsequent convictions against his name. He spent the first four years of his residence in the United Kingdom with limited leave and had indefinite leave to remain from 4 December 2012. He currently has no partner and no children in this country. He has various family members residing in Pakistan and there is a vacant property there owned by his father. The Appellant has numerous family members and friends in the United Kingdom and they provide him with financial support. He did not work whilst in Pakistan but has done so in this country. He has established two businesses here, although it appears that he is no longer engaged in them. There are no material health conditions.

20. In light of the findings of fact, I now adopt a "balance sheet" approach to the assessment of whether the Appellant has disclosed a sufficiently strong Article 8 claim to succeed in his appeal.

Factors counting in the Appellant's favour

21. The primary factor relied on by Mr Halim in this case is the very low risk of reoffending and serious risk to the public. He has described this as representing an "unusual and distinguishing" feature (para. 13.2 of the skeleton argument).

22. I certainly agree that it is a matter of real significance, although, for reasons set out later, I take issue with the elevated importance attributed to it by Mr Halim. It is clear

that, save for the index offence, the Appellant is a man of excellent character. Multiple sources have consistently assessed him as representing what can properly be categorised as a very low risk of reoffending. This has involved a recognition by him of not only what he did but also a genuine commitment to avoiding any recurrence of related misconduct.

23. The risk of reoffending (incorporating the risk of serious harm to the public) is a well-settled facet of the overall public interest, and for good reason: the greater the risk to the public of a foreign national criminal reoffending, the stronger the case for deporting the individual in question.

24. I will deal with the issue of rehabilitation as a free-standing point, below. Suffice it to say here that in my view rehabilitation counts neither in his favour nor against him.

25. As to the particulars of the offence, I take account of the fact that the victim was a friend of the Appellant and that he was not wearing a seatbelt. I also bear in mind that the other vehicle was going too fast. These mitigating circumstances are, to an extent, in the Appellant's favour and they were appropriately reflected in the sentence imposed.

26. The Appellant has a good immigration history, having resided in the United Kingdom lawfully throughout the last eleven years or so. This carries with it some weight, particularly as regards the period spent with settled status.

27. The Appellant has been an economically self-sufficient and productive individual whilst in this country. Although financial independence is effectively a neutral factor, the Appellant's business endeavours have contributed to the economy of the United Kingdom and I place some weight on this factor.

28. There are clear familial and social ties here. Having said, there has been no evidence of any particularly significant relationships and certainly nothing to indicate dependency beyond being supported financially.

Factors counting in the Respondent's favour

29. The public interest in deporting foreign criminals, as expressed by the Respondent in para. 398 of the Rules and by Parliament in section 32(4) of the UK Borders Act 2007 and section 117C(1) NIAA 2002, is very powerful indeed. It effectively "pre-loads" the scales against the Appellant.

30. Without in any way "double-counting" factors, as part of my consideration of the overall public interest, I am placing very significant weight on the issues of deterrence and the public's concern over the deportation of foreign national offenders.

31. At para. 8 of his skeleton argument, Mr Halim states that the "public interest in deportation is commensurate to the risk of future offending…" and suggests (if I have interpreted the passage correctly) that a low risk would therefore reduce that interest or necessarily represent a very significant factor weighing against it.

32. I disagree with this proposition for three reasons. First, the overarching public interest in deporting foreign criminals is, by virtue of the expression of Parliament in particular, a fixity, in the sense that once an individual falls with the category (due to the length of a sentence) it *is* in the public interest to deport them. Second, factors favourable to an appellant will never "reduce" the strength of the public interest; they can only ever go to outweigh it in a particular case. Third, the risk of reoffending is only one of the facets of the public interest and not necessarily the most important of these in cases involving serious offences. It is very difficult to see how a low risk of reoffending would, *in and of itself*, represent a sufficiently strong factor as to outweigh that interest.

33. I turn to the particulars of the Appellant's offence. It was, as correctly stated by the First-tier Tribunal, a serious matter. In so saying, I have taken into account that the sentence imposed was, having regard to all the circumstances, towards the bottom end of the relevant guideline bracket. Against this, there was an aggravating feature in that the Appellant had been distracted by his mobile telephone.

34. In addition, I re-emphasise a point made in para. 21 of the error of law decision. Aside from the primary victim of the incident (the Appellant's friend), it must be recognised that the driver of the other vehicle and the victim's family would inevitably have suffered as a result of the Appellant's actions. This consequence essentially flows from the nature of the offence itself.

35. The fact that the Appellant has been unable to meet the requirements of the exceptions contained in the Rules section 117C NIAA 2002 is relevant. There are no ties in the United Kingdom which can represent significant factors in his favour and nothing material in the way of him re-establishing himself in Pakistan. I place considerable weight on the inability to meet the exceptions.

36. Turning finally to immigration-based matters. It is true that the Appellant has been in this country lawfully throughout. However, until the grant of indefinite leave to remain in December 2012, his status was precarious and, in the circumstances of this case, I must take that into account when attributing weight to the totality of the Appellant's private life.

Rehabilitation: a "neutral" factor

37. The significance of rehabilitation has been addressed recently in RA. At para. 33 the Upper Tribunal stated:

> "33. As a more general point, the fact that an individual has not committed further offences, since release from prison, is highly unlikely to have a material bearing, given that everyone is expected not to commit crime. Rehabilitation will therefore normally do no more than show that the individual has returned to the place where society expects him (and everyone else) to be. There is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance (see SE (Zimbabwe) v Secretary of State for the Home Department [2014] EWCA Civ 256, paragraphs 48 to 56). Nevertheless, as so often in the field of human rights, one cannot categorically say that rehabilitation

> will *never* be capable of playing a significant role (see LG (Colombia) v Secretary of State for the Home Department [2018] EWCA Civ 1225). Any judicial departure from the norm would, however, need to be fully reasoned."

38. In my view, no material weight can be attached to the issue of rehabilitation in this case. This is essentially for the reason that the Appellant was not a person who needed rehabilitating in the first place. His offence was a "one-off" and there was no history in respect of which he had to show he had genuinely moved on from, as it were. Thus, in reality no rehabilitation (in the true sense of the word) has taken place, but I conclude that this not count against the Appellant but rather is of neutral value in the balancing exercise.

39. Even if some weight in the Appellant's favour were attributable to this factor, in the circumstances of this case it would certainly not be "significant".

Evaluative judgment on the competing factors

40. I have carefully weighed up all factors counting for and against the Appellant. In respect of the matters resting on his side of the balance sheet, I have conducted the evaluation on a cumulative basis.

41. I conclude that he has, by a not insignificant margin, failed to demonstrate that there are "very compelling circumstances above and beyond" those set out in the exceptions contained in the Rules and section 117C NIAA 2002, or at all.

42. Although Mr Halim has certainly said everything that could be said in the Appellant's cause, and has done so with skill and professionalism, the cornerstone of his case – the very low risk of reoffending – simply does not, whether seen in isolation or in combination with other matters, attain the requisite significance to outweigh the numerous strong factors on the Respondent's aside of the balance sheet.

43. No other specific aspects of the case disclose anything of sufficient importance.

44. In my view, the Respondent's refusal of the Appellant's human rights claim strikes an eminently fair balance between, on the one hand the rights of the latter, and on the other the public interest relied on by the former.

45. The Appellant's appeal is therefore dismissed.

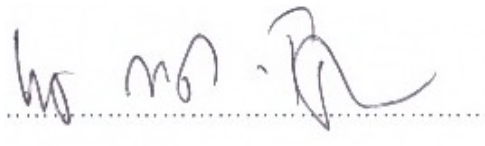
Anonymity

46. I make no anonymity order in this case. One has not been sought, nor is it appropriate for me to issue one in any event.

Notice of Decision

The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and that decision has been set aside.

I re-make the decision by dismissing the appeal



Signed Date: 17 May 2019
H B Norton-Taylor
Deputy Judge of the Upper Tribunal

ANNEX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07981/2017

THE IMMIGRATION ACTS

Heard at Field House
On 26 February 2019

Decision & Reasons Promulgated

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Before

THE HON. MRS JUSTICE LANG
DEPUTY UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SAJID ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Halim, Counsel, instructed by Mayfair Solicitors
For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is a challenge by the Appellant against the decision of First-tier Tribunal Judge Kaler (the judge), promulgated on 13 November 2018, by which she dismissed his appeal against the Respondent's decision of 6 July 2017, refusing his human rights claim.

2. That claim was made following the Respondent's decision to make a deportation order on 6 July 2017 pursuant to Section 32(5) of the UK Borders Act 2007. This action had arisen as a result of the Appellant's conviction on 9 January 2017 for causing death by dangerous driving contrary to section 1 of the Road Traffic Act 1988 in respect of an incident on 12 December 2014 in which the Appellant's friend, a passenger in his car, was killed. A sentence of 27 months' imprisonment was imposed, together with a significant period of disqualification from driving.

The relevant legal framework

3. The core legal framework applicable to the Appellant's appeal before the judge was as follows.

4. Paragraphs 398 – 399A of the Immigration Rules ("the Rules") state:

> "**398.** Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
>
> **399.** This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

5. Sections 117A-D of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") set out in primary legislation the public interest considerations which a court or tribunal must take into account in an appeal based upon Article 8. The provisions of relevance to the appeal before us state:

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).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or

remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) …

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.

117D Interpretation of this Part

(1) In this Part—

"*Article 8*" means Article 8 of the European Convention on Human Rights;

"*qualifying child*" means a person who is under the age of 18 and who-

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

"*qualifying partner*" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act).

(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

The judge's decision

6. At [20] the judge sets out numerous findings of fact. Significantly, for the purposes of the appeal before us, these included an acceptance that the Appellant presented a low risk of reoffending.

7. Under the subheading of "Conclusions", the judge proceeds to express the view that the Appellant's conviction was a serious one. She goes on to state that because the Appellant did not have a partner or a child in this country, neither paragraph 399(a) or 399(b) of the Rules applied. In respect of paragraph 399A, the judge quite rightly concluded that the Appellant had not been in the United Kingdom lawfully for most of his life and therefore, on this basis alone, could not meet all of the requirements of that particular provision.

8. In light of these conclusions the judge went on to consider the question of whether the Appellant could show that his case disclosed "very compelling circumstances over and above those described in paragraphs 399 and 399A". She directed herself to

the factors set out in sections 117B and 117C NIAA 2002 and emphasised the need to attribute great weight to the public interest in the deportation of foreign criminals.

9. [28] of the judge's decision reads as follows:

> "The test is not what is best for him but what is best for the public interest. Section (sic) 398 tells me that it is in the public interest to deport a person who has been convicted of a sentence of over 12 months."

10. In the following paragraph the judge goes on to say:

> "I recognise the Appellant's remorse, the effect that the events of the accident have had on him, and also that he is assessed at low risk of re-offending, but that is relevant when a potential deportee has a partner or children in the UK. I do not find the circumstances of this Appellant amount to 'very compelling circumstances over and above those described in paragraphs 399 and 399A'."

11. Reference is then made in the next two paragraphs to the factors which do not concern us in this appeal.

12. At [32] the judge purports to consider wider aspects of the Article 8 claim. These include the following:

    i. the nature of the offence;

    ii. the aim of preventing crime and deterring others from committing crimes;

    iii. the public interest in deporting foreign criminals;

    The conclusion drawn is the strong public interest outweighed the Appellant's private life rights.

The grounds of appeal and grant of permission

13. The succinct grounds of appeal make two points: first, that the "binary proposition" apparently stated in [28] of the decision represented a misdirection in law; second, that the judge failed to have any regard to the risk of reoffending, specifically when considering wider Article 8 factors.

14. Permission to appeal was granted by First-tier Tribunal Judge Lambert on 10 December 2018.

The hearing before us

15. Mr Halim relied on the grounds of appeal. He emphasised what was said to be the error committed in [28] of the judge's decision.

16. In terms of the reoffending issue, he submitted that this must be a relevant factor in any case in which an individual was seeking to rely on circumstances above and beyond those contained in the two exceptions provided for in the Rules and NIAA 2002. The judge's failure to take this issue into account and weigh it in the balance was, Mr Halim submitted, an error. He submitted that the error was material as the

reoffending issue had represented what he described as the "mainstay" of the Appellant's case before the judge.

17. For his part, Mr Wilding suggested that [28] was, at its highest, simply a case of what he notably described as "judicial misspeak". In reality, the judge had approached her task appropriately.

18. In respect of [29] Mr Wilding submitted that in light of the legal landscape as it was at the time of the hearing (that being before the Supreme Court handed down its judgment in KO and Others [2018] UKSC 53 ("KO (Nigeria)"), the judge had been right to say that the issue of reoffending would only have been relevant to a family life case; in other words one in which the Appellant had been relying on a relationship with a partner and/or a qualifying child.

19. In respect of paragraph 399A of the Rules, the issue of reoffending did not enter the picture as the focus of that provision was on barriers to an individual's reintegration into his home country. Mr Wilding suggested that on a proper reading of [29], [32], and the finding of facts set out at [20(xi)], it could properly be said that the judge had taken the reoffending issue into account when considering the wider Article 8 issue.

20. Mr Wilding then submitted that even if the judge had failed to take this matter into account and had therefore erred, there was nothing material in this. If one placed the reoffending issue into the balance, weighing, as it would have done, in the Appellant's favour, it could not have made any difference to the outcome of the appeal.

21. In reply, Mr Halim submitted that the relevant factor of reoffending was simply not considered at all and that Mr Wilding was asking us to read too much into the judge's assessment. He submitted that the judge's error was indeed material. It was not a question of whether the Appellant would have succeeded if the relevant factor had been taken into account, but simply whether this could have made a difference to the outcome. He also emphasised the particular nature of the evidence underpinning the reoffending issue. The offence had been a "one-off", the evidence in the OASys report and Probation Service letter was highly favourable to the Appellant, and it was a fact that the victim of the offence had been the Appellant's friend (we think it appropriate to add that other victims of the offence, albeit to an obviously lesser extent, included the family of the deceased and the driver of the truck which hit the Appellant's car).

Decision on error of law

22. As we announced to the parties at the hearing, we conclude that the judge materially erred in law by failing to take into account, as a relevant factor, the fact that the Appellant represented a low risk of reoffending when undertaking the broad Article 8 balancing exercise once she had concluded that the Appellant could not satisfy the provisions of paragraphs 399 and 399A of the Rules.

23. Before turning to our reasons for reaching this conclusion, we can briefly dispose of the first ground of challenge. We reject Mr Halim's contention that [28] represents

any error in approach. Reading this passage sensibly and in light of the decision as a whole, it is apparent to us that the judge was in reality simply making two uncontroversial points. First, that the scales were, by virtue of the powerful public interest, weighed against the Appellant from the outset. Second, that whatever the Appellant may have wanted to happen as a matter of preference (in particular remaining in the United Kingdom rather than having to return to Pakistan), the Article 8 exercise involves deciding whether he was entitled to remain as a result of a very strong claim.

24. Turning to the reoffending issue, the first thing to note is that the judge had made a clear finding of fact that the Appellant represented a low risk.

25. On a sensible reading of [29], we conclude that the judge was saying that the issue of reoffending was relevant to the family life provisions of the Rules (namely paragraphs 399(a) and 399(b)) but was not relevant to the private life provision, that being paragraph 399A. In terms of the legal landscape as it was at the time she made her decision, the judge was correct. Following KO and Others we now know of course that wider public interest considerations do not feature in the assessment of unduly harshness.

26. However, that is in a sense by-the-by. What is clear is that the judge, having found that the Appellant could not satisfy the relevant provisions of the Rules, then needed to consider whether he was able to show "very compelling circumstances over and above, the matters set out in those provisions". In so doing, she was bound to take into account all relevant factors. We know from NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 that these factors could potentially have included matters related to the particular provisions of the Rules, but were not restricted thus. By its nature, the proportionality exercise outside the context of the Rules is wider in its scope.

27. We conclude that the issue of reoffending was a relevant factor which fell to be weighed in the balance. It is, after all, an important, but not of course the only, facet of the overall public interest in deportation cases (see, for example, OH (Serbia) [2008] EWCA Civ 694, at [15] and AJ (Zimbabwe) [2016] EWCA Civ 1012, at [11(6)]). It simply cannot be said that this factor is irrelevant.

28. Our view on this is reinforced by consideration of an alternative scenario. If the judge had allowed the Appellant's appeal without factoring in the risk of reoffending and despite the hypothetical fact that he represented a high risk, the Respondent would have had a strong case to assert that an error of law had been committed.

29. In light of the above and bearing in mind that we must view the judge's decision holistically and in a sensible manner, we turn to see if the reoffending factor has been evaluated adequately, or indeed at all.

30. In our view, there is nothing within [29] or [32] to indicate that it has been. We are not prepared to infer from the fact that the judge had made a finding on the evidence at [20(xi)] that this issue had indeed been implicitly considered. Reoffending is a sufficiently important matter to warrant specific consideration and in this case. There has been none and this is an error of law.

31. We have thought carefully about whether the judge's error is material. We acknowledge that reoffending is only one element of the public interest and we also of course recognise the very high threshold represented by the "very compelling circumstances over and above" test. However, and perhaps by a relatively narrow margin, we agree with Mr Halim's submission that the judge's omission is material.

32. The Appellant need not show that had the reoffending issue been taken into account his appeal *would* have succeeded, only that it *could* have. We also bear in mind and attach some significance to the specific nature of the evidence underpinning the reoffending issue in this case. It is quite clear that the offence was indeed a "one-off", that there was favourable assessments by the Probation Service, and that the Appellant had displayed genuine remorse for what had happened. All of this would arguably add an additional dimension to the reoffending factor.

33. In light of the above, we conclude that the judge has materially erred in law and we set her decision aside.

Disposal

34. Having set the judge's decision aside we expressed to the parties our preliminary view that this matter should be retained in the Upper Tribunal and the decision be remade at a resumed hearing.

35. Having taken instructions, Mr Halim sought to argue that the matter should instead be remitted to the First-tier Tribunal on the basis that this would give the Appellant back an additional "layer" of appeal, so to speak.

36. However, having regard to paragraph 7.2 of the Practice Statement we have concluded that this matter should indeed be retained in the Upper Tribunal. This is not a case involving procedural unfairness and it is clear to us that there would not need to be extensive findings of fact by the Upper Tribunal. Indeed, the judge has set out a good many findings, none of which need be disturbed. In addition, the judge's conclusions as to the various provisions of the Rules have not been challenged.

37. The issue for the Upper Tribunal at the resumed hearing will be whether the public interest in deportation is outweighed by "very compelling circumstances over and above" those described in paragraphs 399(a), 399(b) and 399A of the Rules, on the basis of the First-tier Tribunal's preserved findings of fact, and taking into account all relevant factors, including the accepted low risk of reoffending. These factors also fall to be considered within the wider balancing exercise under Article 8 ECHR.

38. In furtherance of this course of action, we issue directions to the parties, below.

Notice of Decision

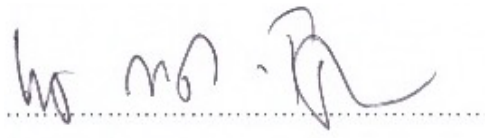
The decision of the First-tier Tribunal contains a material error of law and we set it aside.

We adjourn this appeal for a resumed hearing in the Upper Tribunal on a date to be fixed.

No anonymity direction is made.

Directions to the parties

1. **The resumed hearing shall be listed before Deputy Upper Tribunal Judge Norton-Taylor alone.**
2. **Both parties are to provide skeleton arguments:**
   - **2.1: the Appellant's skeleton argument shall be filed with the Upper Tribunal and served on the Respondent no later than 21 days before the resumed hearing;**
   - **2.2: the Respondent's skeleton argument shall be filed with the Upper Tribunal and served on the Appellant no later than 14 days before that hearing.**
3. **As matters stand, there is no need for further oral evidence. If the Appellant's representatives are of the view that such evidence is essential, they must explain in writing why this is the case and do so within 21 days of this Decision being promulgated;**



Signed Date: 15 March 2019

Deputy Upper Tribunal Judge Norton-Taylor