Upper Tribunal
(Immigration and Asylum Chamber)

Shah ('Cart' judicial review: nature and consequences) [2018] UKUT 00051 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 November 2017	.....

Before

THE HON. MR JUSTICE LANE, PRESIDENT

UPPER TRIBUNAL JUDGE BLUM

Between

ISRAR SHAH

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation :

For the Appellant: Mr B. Singh, Counsel, instructed by Messrs Malik Law Chambers (Birmingham)

For the Respondent: Mr I. Jarvis, Home Office Presenting Officer

(1) A judicial review challenge to the decision of the Upper Tribunal to refuse permission to appeal a decision of the First-tier Tribunal is a challenge to the lawfulness of the Upper Tribunal's decision. It is emphatically not an opportunity for a party to raise new grounds of appeal against the decision of the First-tier Tribunal.

(2) Whether or not a person succeeds in obtaining permission of the High Court under CPR 54.7A to judicially review a decision to refuse permission to appeal, with the consequence that the decision is quashed, the Upper Tribunal will need to be satisfied that there is an error of law in the decision of the First-tier Tribunal before that decision can be disturbed. Judicial review grounds which fail to show the decision refusing permission was wrong in law are highly unlikely to lead to such a result.

(3) Those responsible for drafting judicial review grounds which are found by the Upper Tribunal to contain misrepresentations or other falsities may be referred by that Tribunal to the High Court, for consideration whether an explanation is required from the solicitors and/or counsel involved.

DECISION AND REASONS

Introduction

1.
The appellant is a citizen of Pakistan , born on 22 April 1978. He arrived in the United Kingdom on 14 March 1981 when he was just under three years old. The reason for his entry was to join his father. In December 1999, the appellant was granted indefinite leave to remain.

2.
The appellant attempted to become a British Citizen by naturalisation in 2005 but was refused by the respondent as a result of his criminal convictions.

3.
The existence of those pre-2005 convictions is acknowledged in paragraph 6 of the de cision of the First -t ier Tribunal judge , which is the subject of this appeal. There, the judge said that “the appellant’s offending history is not in dispute, it is set out here and given the agreement of the parties, and ant ecedent details before me, I make findings of f act to reflect his relatively lengthy offending history as set out in the Police National Computer Printout provided to me”.

4.
Three convictions, arising after the refusal of the naturalisation application, were said by the judge to be “advanced by the respondent as particularly pertinent”. These are:-

(1)
April 2006: six months custody for four offences of common assault;

(2)
February 2007: twelve weeks custody for assault on a constable;

(3)
March 2016: 40 months custody for robbery .

5.
On 12 October 2016, the respondent served on the appellant a deportation decision , pursuant section 32(5) of the UK Borders Act 2007 . T he appellant responded with submissions, which were treated by the respondent as a human rights claim. The respondent concluded that the appellant did not forward any exceptions towards automatic deportation containing section 32(5) of the UK Borders Act 2007. The appellant appealed against that decision to the First -t ier Tribunal , whose decision we have just mentioned.

The decision of the First-tier Tribunal

6.
The judge’s findings and reasons are set out at paragraph 22 to 73 of his decision. The judge noted that the appellant married his wife in Pakistan in 1996. They have three children, born respectively in February 1998. March 2001 and November 2013. The children are all British citizens.

7.
At paragraph 24 , the judge noted that he had read th e comments of the sentencing judge, who imposed the sentence of 40 months imprisonment for robbery. During the course of the robbery, the sentencing judge noted that the appellant used a weapon, comprising a lump of wood with a spike on the end, which caused injury to his victim. The First-tier Tribunal judge noted that the appellant had

an alcohol problem, which the sentencing judge regarded as a mitigating factor , in this particular case.

8.
The First -t ier Tribunal judge considered the appellant's remorse to be genuine and that he had become drug -f ree whilst in custody , in that he was being given methadone to treat his heroin addiction . The judge considered that the appellant's drug and alcohol dependency were long - standing issues. His family had sent him to the Priory Rehabilitation Unit in 2013, in order to try to address the appellant's addictions, but without success.

9.
The support of the appellant from his wife and family had been, in the judge's words, "unfailing and remains constant". The appellant's father had a nine-bedroom family home where the appellant could live in the future. The judge accepted that the appellant's motivation to address his addiction was "higher than it has been previously".

10.
Despite all this, the judge found, in paragraph 32, that the length of the appellant's addiction " as corroborated by his lengthy and persistent criminal offending, is significant, the addictions are of long-standing". Accordingly, despite the express resolve of the appellant, the judge found that there was "a significant risk of relapse from his present progress in custody in view of his pre vious self-confessed relapse from drug rehabilitation, and previous inabilities to break addictions despite motivation a nd support to do so."

11.
The judge noted that in June 2006 , the appellant received a decision to make a deportation order, which was subsequently withdrawn. In April 2007, the appellant had received a warning letter after his twelve-week sentence was imposed. This indicated that revocation of the appellant's in definite leave to remain would be considered if he came to the adverse attention of the authorities. This led the judge to conclude:-

" In my judgment, the perilous consequences of his continued offending were abundantly clear, despite those warnings he was unable to shake the addiction that bedevils him, that is an indicator of the depths of that addiction and is reflected in the risk that I find of further relapses in the future" (paragraph 33) .

12.
The judge found that the appellant's marriage was genuine and subsisting. The appellant's wife gave evidence, making clear her commitment. She said she had last been in Pakistan two and a half years ago and that her father and brother remain in that country. However, according to the appellant's wife, "her father only barely gets on with the appellant and could not support him in the event that he had to return to Pakistan ". (Paragraph 34) .

13.
At paragraph 35, the judge began his assessment of the position of the appellant's children, bearing in mind the duties imposed by section 55 of the Borders, Citizenship and Immigration Act 2009. In particular, the judge had read "the h eart felt letter of the appellant's older boys". The judge accepted that the boys " would miss their father deeply, and would wish to help him. They clearly have some insight into their father's difficulties and wish to be able to support him in the future".

14.
The appellant’s oldest child, having become an adult, was “acting to an extent as a father figure in the absence from home o f the appellant. But I do not find that he is [in any way] an adequate substitute for his father” (paragraph 36) .

15.
The middle child was not behaving well at school. There was evidence that the appellant ’s absence was having an adverse impact on the child. The judge made a further finding that there would be a “self-evident impact” on the youngest of the children, as a result of the appellant’s absence.

16.
The judge, accordingly, concluded at paragraph 38 that it would be in the best interests of each of the children for the appellant to be able to live with the family unit. The judge concluded that the children, having lived their entire lives in the United Kingdom and having no real or practical knowledge of Pakistan , could not enjoy the full support of the welfare state in the United Kingdom , if they were to leave with the appellant. Although r egular Skype type contact between the appellant and the children would be possible, it would not remove the risk of adverse impact , as identified by the judge.

17.
So far as the appellant’s wife was concerned, the deportation of the appellant would have “a severe impact upon ” her marriage. Indeed, the judge found, that, despite contact during holidays and electronic communication at other times, “ deportation might be fatal to a marriage”.

18.
At paragraph 43, the judge reiterated the adverse impact which deportation would have on the children, finding additionally that a strain would be placed upon the appellant’s wife “ as the remaining parent”.

19.
At paragraph 46, the judge note d that the appellant’s continuing treatment by medication for his heart. The judge noted that there was no evidence that such medication was unavailable in Pakistan and he found in any event the appellant’s family would be able to assist in the funding of such medication.

20.
Applying RG (automatic deport – section 33(2)(a) exception) Nepal [2010] UKUT 273, the judge gave “careful consideration to th e factors set out at paragraph 7 0 -73 of Maslov v Austria [2009] INLR 47 ECH R” . (Paragraph 48). Particular care was required in relation to consideration of the A rticle 8 impact o n those who were lawfully resident in the United Kingdom at the time when the offence was committed. The judge noted that the appellant’s wife children were lawfully resident at that time.

21.
In p aragraph 49, the judge identified that a requirement in Maslov v Austria was to strike a fair balance between an appellant’s right to family and private life and the prevention of disorder and crime. In doing so, the relevant criteria were (i) the nature and gravity of the claimant’s offences ; (ii) the length of his stay in the host country ; (iii) a ny period which elapsed between the commission of the offences and the impugn ed measure and the claimant’s conduct during that period ; and (iv) the solidity of the social, cultural and family ties with the host country and the country of destination.

22.
At p aragraph 50, the judge noted t he gravity of the offence of robber y committed by the appellant , including what was described as a “serious offence of violence”. The judge also considered the robbery offence as constituting “ an escalation in the type of offen ding undertaken by the appellant”. On the other hand, the judge expressly noted that the appellant had been in the United Kingdom for 37 years since he was two years of age. In effect he has been raised and spent almost all of his life in the UK ”. The appellant, however, had a “lengthy record of offending over many years, and the nature of the offending is escalating”.

23.
At paragraph 51, the judge kept in mind the judgment of Lord Reed in H e sham Ali [Iraq] v SSHD [2016] UKSC 60 in which Lord Reed endorsed a “structured approach to proportionality”. A ccording to Lord Reed, “the critical issue for the Tribunal would generally be whether, giv ing due weight to the strength of the public interest in the deportation of the offen d e r in the case before it, the article 8 claim is sufficiently strong to add weight. In general, only a claim which is very strong indeed – very compelling… will succeed”.

24.
In p aragraph 53, the judge began his analysis , by reference to the Immigration Rules. At p aragraph 53, the judge noted that the appellant, having received a sentence of 40 months ’ imprisonment, fell within paragraph 39 8 (b) of the Rules and that accordingly the judge needed to consider the provisions of paragraph 399.

25.
Given that the appellant had a genuine and subsisting parent al relationship with the child under the age of 18, who was British, the judge considered whether it would be “unduly harsh for h is children to live in Pakistan ”. In light of the judge’s findings, as set out earlier, he concluded that “despite their father’s offending , … it would be unduly harsh for them to live in Pakistan ”.

26.
The next que stion, addressed by the judge at paragraph 55, was whether it would be unduly harsh for the children “to remain in the United Kingdom ”. Again, the judge had regard to his previous findings. He r ecognised the likelihood of emotional impact up on the children, if parted again from their father. The judge continued:-

“But I must also take account of the significant public interest as set out in the law that I must apply. There is a strong public interest in the deportation of foreign criminals. The present case is concerned with persistent offending, escalating in its nature, and consisting of significant violence. I note my findings as to risk of relapse and further offending. When balancing all of these matters I do not find that it would be unduly harsh for the appellant’s children to remain in the United Kingdom without their father.”

27.
The judge then turned to paragraph 399(b). He reiterated that the appellant had a genuine and subsisting marriage with his wife in the United Kingdom and that they married when the i r immigration position was settled and lawful. The judge recognised that it would be unduly harsh for the wife to accompany the appellant to Pakistan “because of their children and the need for their children to remain in the United Kingdom ”. Accordingly, the judge acknowledged that he had to consider whether it would be “unduly harsh for the appellant’s wife to remain in the UK without him”. As to this , the judge found as follows:-

“Again I keep in mind that such a course would be a profound and fatal impact to their marriage. But they will be able to remain in contact and there is no bar to visits and holidays such that direct contact continues. But again I remind myself of the observations above as to the seriousness of the offending, risk of relapse and the public interest. When weighing all of those factors I do not find that it would be unduly harsh for the appellant’s wife to remain in the United Kingdom when her husband is deported.” (paragraph 56)

28.
At paragraph 57 of the decision, the judge moved to consider paragraph 399 A of the Immigration Rules. The judge noted that the appellant had been lawfully resident in the United Kingdom for most of his life and was socially and culturally integrated into the country. The judge further observed that the appellant had family support and financial support from his parents in the United Kingdom . Although his wife’s relatives were living in Pakistan and he accepted that these persons could not offer the appellant’s financial support and would be ashamed of deportation of their son-in-law, the judge did find that “his wife’s family offer at least a degree of support”.

29.
At paragraph 58, the judge noted that it was not suggested that the appellant lacked “applicable language skills, he would be locating to a country in which he was born, and he has Pakistani nationality. I also find that his family supporting in United Kingdom will ensure appropriate access to medical treatment in Pakistan .” At paragraph 59, the judge noted that the fact that alcohol was not as readily available in Pakistan as it was in the United Kingdom , “ may assist his rehabilitation and it is not a bar to deportation”.

30.
In p aragraph 61, the judge reminded himself that, in examining those circumstances, he had found the appellant to have a genuine and subsisting relationship with his wife and children. Accordingly, the judge acknowledged that he “must balance the potential interference with family life and with the separate and overlapping article 8 interests of the appellant’s wife and children with the strong public interest and the deportation of foreign criminals such as the appellant”.

31.
At p aragraph 62, the judge a pplied the judgments of the Court of Appeal AJ (Zimbabwe) and VH (Vietnam) [2016] EWCA C iv 1012, in which it was held that it would be rare for the best interest s of a child to outweigh the strong public interest in deporting foreign criminals. It would undermine the specific exemptions and rules i f the interests of the child in maintaining a close and immediate relationship with the deportee were, as a matter of course, to “trump” the strong pub l ic interest in deportation. Paragraph 399 A o f the rules identified, according to the court, the particular circumstances w h ere it was accepted the interests of the child would outweigh the public interest in deportation. The conditions were onerous and would only rarely arise. Emotional damage to a child would not be unusual whenever a parent was deported and the child unable to live with that parent outside of the United Kingdom . Separating a parent and child could not, without more, be a good reason to outweigh the very powerful public interest in deportation.

32.
The judge said that “I find such a powerful public interest in this case and that informs my assessment of the proportionality of the suggested interference with the article 8 rights for concern ”. The judge recognised the impact of deportation of the appellant’s wife and children. It would carry a risk of emotional damage and would split a family unit that was living together prior to the appellant’s

incarceration. The particular offence in question, however, was according to the judge, very serious, as was reflected in the prison sentence imposed. It also represented “the culmination of an escalation of offending despite warnings of possible removal of status in the UK ” (paragraph 63).

33.
At paragraph 64, the judge began his consideration of section 117 C of the Nationality, Immigration and Asylum Act 2002. Given that the appellant h ad received a sentence of 40 months imprisonment , the judge noted that he must consider the proportionality of his deportation by reference to the exceptions set out in that section. The judge referred to NA (Pakistan) & o the rs [2016] EWCA Civ 662 as holding that the general scheme in section 117 C (2) to (7) was similar to that set out in the Immigration Rules, which also drew a distinction between those sentence d to less or more than four years. Medium offenders under section 117 C c ould escape deportation if it fell within the safety net of “ E xception 1” (long residence provisions) or E xception 2 “(parents/partner p rovisions)”. Serious offenders could not make use of those “safety nets”.

34.
In paragraph 65, the judge noted that the appellant was “a so - called medium offender”. He reminded himself that this meant the appellant was required to be deported unless E xception N o. 1 or E xception N o 2 applied. Exception No 1 required the appellant to have be en lawfully resident in the United Kingdom for most of his life; to be socially and culturally integrated in the United Kingdom; and that there would be very significant obstacles t o the appellant’s integration in the country to which he was proposed to be deported. The judge said that “I have set out my reasons above in paragraph 57-60 explaining why there is no such very significant obstacle” in the case of the appellant.

35.
In p aragraph 66, the judge turned to E xception No 2. This applies where the proposed has a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualif ying child. In such a case, the exception applies where the effect of deportation on the partner or child would be unduly harsh. As t o this, the judge stated that “m y reasoning on this question has been set out in paragraph s 54-56 above . I do not find that the effect of deportation would be unduly harsh ” .

36.
In p aragraph 67, the judge weighed the proportionality of the potential impact upon the A rticle 8 Rights of “all concerned, against the public interest”. The judge noted that the balancing exercise take s account of the fact that the appellant’s wife and children “are undoubtedly in a position in which their best interests individually and separately would be served by the appellant remaining. His deportation risks emotional harm and considerable practical difficulties”. The j udge also recognised that “the fundamental nature of family life of all concerned will change considerably and possibly in some respects irrevocably. I note the status of the children and appellant’s wife from the length of time that has been spent in the UK ”.

37.
At paragraph 69, the judge also noted the appellant’s progress in custody, which was achieved despite “ his continued denial of full responsibility” for his offence.

38.
On the other side of the balance was the fact that this “was a serious offence of significan t impact upon the victim and involving violence”. The judge considered that the strength of the public interest

in deportation of a person convicted of such an offence was “clearly reflected in the applicable provisions and decisions as set out previously”.

39.
The judge held, in conclusion, that the appellant had not made out any of the exceptions to deportation. He concluded that the proposed interference in the family life of the appellant and that of his family was, in all circumstances, “not disproportionate when all of the reasons and factors above were weighed, and the guidance of the public interest is taken into account”.

Permission to appeal: the First-tier Tribunal

40.
Following receipt of First Tier Tribunal ’ s decision, the appellant applied to the First -t ier Tribunal for permission to appeal to the Upper Tribunal. In those grounds, an assertion was made that the First -t ier Tribunal judge had failed “ to sufficiently identify the level of seriousness of the offence with reference to the sentencing guideline” and that this “renders the consideration of the unduly harsh s entence unsafe”. The grounds also contended that the judge failed to give adequate reasons, including for the finding that there were not very significant obstacles to the appellant’s integration in Pakistan .

41.
On 3 April 2017, the First -t ier Tribunal refused permission to appeal. The appellant then sought permission to appeal from the Upper Tribunal.

Permission to appeal: the Upper Tribunal

42.
The grounds of application to the Upper Tribunal began by stating that the First -t ier Tribunal ’s decision was unlawful under section 6 of the Human Rights Act 1998. It then contended that the judge had “ma de a mistake as to a material fact which could be established by objective and uncontentious evidence, where fai rness resulted from a fact that a mistake was ma de”. One searches in vain in the remainder of grounds for any explanation of this assertion. The grounds do not return to it and the only conclusion that can be drawn is that this particular challenge was inserted in error.

43.
The third challenge in the grounds was a repetition of the contention t hat the decision was unlawful under s ection 6 of the 1998 Ac t. The fourth challenge can be summarise d as an alleged failure o n the part of the First -t ier Tribunal “to give reasons or adequate reasons for findings o n material matters”.

44.
Paragraph 5 of the g rounds contend ed that “the appellants” (sic) submit that the respondent has “only considere d their private life under the I mmigration R ules”. What this has to do with the decision of the First -t ier Tribunal is unclear. In any event, even a glance at the respondent’s decision of 12 October 2016 serves to show that th is con tention is false. The respondent directly engage d with Article 8 issues, in reaching her decision.

45.
At paragraph 7 of the grounds , th e First -t ier Tribunal judge was said to have “failed to consider the issue of fairness properly with regard to the evidence and the determination”. The case of Marghia

[2014] UKUT 366 (IAC) is cited in this regard. But n o explanation whatsoeve r is given as to why the judge ha d failed to consider “the issue of fairness”.

46.
The grounds then return ed to a matter raised in the application to the First -t ier Tribunal for permission to appeal; namely that the judge “failed to sufficiently identify the level of seriousness of the offence with reference to the Sentencing Guidelines”. This criticism finds no reflection in any case law to which the Upper Tribunal ’ s attention has been drawn. It is, in any event, perfectly apparent from the decision of the First -t ier Tribunal that the judge was acutely aware of the nature and seriousness of the appellant’s offence of robbery, which was the catalyst for the decision to deport.

47.
The groun d s then attempt ed to criticise the judge for a failure to give adequate reasons, including in relation to the issue of “very significant obstacles” to integration. Although the judge “found that the appellant (sic) can be financially supported by his family; howev er the FJ ha s not considered the practicality with regard to relevant factors. Such as, albeit not limited to, the age and ability of the family members in the UK and the length of time financial support i s expected to continue”. As is plain from the decision, however, the judge had heard oral evidence on this matter and made a clear finding on it in paragraph 57 of his decision .

48.
The final challenge i n the ground s was that the judge had “made a misdirection of law on the materia l matter – children”. The grounds contend ed that the judge had “ failed to undertake sufficient consideration of the children’s welfare and best interests”. Again, a reading of the determination makes it abundantly plain that the issue of the children had been considered carefully and in great detail by the judge.

49.
Unsurprisingly, the Upper Tribunal, faced with these ground s, refused permission to appeal on 25 April 2017. The refusing judge said this:-

“2. Contrary to the assertion made in the grounds, the judge gave detailed consideration to all relevant matters in considering the appellant’s human rights claim, including the nature and seriousness of his offending, the risk of re-offending, the previously withdrawn deportation order and the best interests of his children. With regard to the appellant’s , wife and children, the judge gave particularly careful consideration to the question of whether it would be unduly harsh for them to be separated from him. His conclusions in that respect, [55] and [56], refer red back to his earlier findin gs at [35] to [44] considering the impact upon them, of his deportation, but also to a proper account at [55] and [56] of the public interest, thus consistent with the relevant case law. The judge gave full and cogent reasons for his findings and the conclusions that he reached were unarguably fully and properly open to him on the evi dence before him. The grounds d o not disclose any arguable errors of law in the judge’s decision”.

50.
Both sets of grounds, as well as grounds of appeal to the First -t ier Tribunal , attach ed to the n otice of a ppeal, w ere settle d by Mal i k Law Chambers.

Judicial review of the Upper Tribunal’s decision to refuse permission to appeal

51.

Following the refusal by the Upper Tribuna l of the application for permission to appeal, Mali k Law Chambers , on behalf of the appellant, filed an application in the High Court for permission to bring judicial review proceedings against the Upper Tribunal ’ s refusal.

52.
Two grounds of challenge were set out in the grounds of application to the High Court. The first was that the First -t ier Tribunal “had erred in law in its assessment of ‘very significant obstacles to interrogation’ (sic) stipulation in Paragraph 399A of the Immigration Rules ” .

53.
Paragraph 5 of the Judicial Review g rounds state s that the Court of Appeal “has recently granted permission to appeal… in two appeals”. The solicitors were said to be the same in the present case “and the arguments that are made below are exactly the same”. This factor was said in the grounds to satisfy the “ second-tier appeals test” which is a feature of “ C art ” judicial review challenges of the present type.

54.
At paragraph 13 of the Judicial Review grounds, we find the argument which is said to be “the same” in the present case as in the cases where the Court of Appeal ha d granted permission . The ground involves the respondent’s polic y “Immigration - Directorate Instructions , Family Life (as a partner or parent) and private life : (10) route on very significant obstacles to integration”. Paragraph 15 of the grounds sets out para 8.2.3.4 of these instructions under the rubric “assessing whether there are very significant obstacles with integration in to the country of return”. Th e decision maker is told that he or she must consider all the reasons put forward by the applicant as to why there would be obstacles to integration and consider these individually and accumulatively.

55.
Further considerations are said to include the person ’ s exposure to a level of understanding of the cultural norms in the country of return. This involves h aving regard to where the person has spent time in the United Kingdom . W here such time has been spent “living mainly amongst the diaspora community from that country , … it may be reasonable to conclude that they have cultural ties with that country even if they have never lived there or have been absent from that country for a lengthy period.”

56.
Other factors are the length of time spent in the country of return and family, friends and social network. A p erson with such family, friends and network in the country of return “should be able to turn to them to suppor t to help them to integrate in that country”.

57.
Parag raph 16 of the j udicial r eview g rounds submits that the use of the phrase s “must” and “should” in the instructions “clearly means that it is mandatory to give express and clear consideration to the listed factors ” . At paragraph 18, the submission is made that the appellant has a basic public right to have the case considered “ under the above referred policy”. It is then submitted that it is “clear that the factors listed in this said policy have not been considered at all by the FTT in assessing where there are “very significant obstacles to his integration ” in to Pakistan . A ccordingly, the submission is made that “the FTT ’s decision is wrong in law. The UT should have granted permission to appeal”.

58.

The second ground of application to the High Court was that , in paragraph 55 of the determination , the First -t ier Tribunal judge had said " the present case is concerned with persistent offending". The grounds of application submit that this "was a material misdirection in law". Reference i s made to the decision of the Upper Tribunal in Ac hege [2016] UKUT 187 (IAC) , which gave guidance as to whether a person could be regarded as a "persistent offender" for the purpose of the Rules and the 2002 Act. The appellant was said "not to be a persistent offender in this sense". He is not a person who just keeps on breaking the law. He has three conv ictions . They are serious, of course. However, those convictions do not make him a persistent offender. It is noted that there is a gap of some 9 years between his second and third convictions. The FTT's decision is therefore wrong in law".

59.
I n August 2017, a deputy judge of the High Court granted permission to bring judicial review. Given that there was then no request under CPR 54.7A(9) for a substantive hearing, the decision of the Upper Tribunal to refuse permission to appeal was quashed, pursuant to the CPR , on 21 August 2017.

60.
On 12 September 2017, the Vice President of the Upper Tribunal, Immigration and Asylum Chamber granted permission, in the light of the decision of the High Court in this case. Significantly, the Vice President said that " The parties are reminded that the Upper Tribunal ' s task is that set out in s .12 of the 2007 Act".

Discussion

61.
The first point that emerges from this unfortunately lengthy procedural history is that both the First -t ier Tribunal and the Upper Tribunal were right to refuse permission to appeal, by reference to the grounds of challenge contained in t he respective applications for permission t o those Tribunals . The First -t ier Tribunal judge had plainly undertaken a comprehensive and rigorous analysis of the evidence, by reference to the relevant law. The judge w eighed the public interest in deportation , having regard to the appellant's criminality, against the factors relied upon by the appellant for resisting deportation. Th ese involved the effects on him of deportation , including whether there would be very significant obstacles to integration, as well as the effects on his wife and children, both in their own respective right and in conjunction with hi s . The analysis of the judge proceeded, first by reference to the I mmigration Rules and then by reference to Article 8, having regard to the provisions of section 117(C) of the 2002 Act.

62.
A judicial review challenge to the decision of the Upper Tribunal to refuse permission to appeal a decision of the First-tier Tribunal is a challenge to the lawfulness of the Upper Tribunal's decision . It is emphatically not an opportunity for a party to raise new grounds of appeal against the decision of the First -t ier Tribunal.

63.
That, however, is precisely what the judicial review grounds in the present case a ttempted to achieve and regrettably did achieve, to the extent that the deputy judge was pe rsuaded to grant permission on the basis of them.

64.
Up to that point , the criticism of the First -t ier Tribunal judge 's approach to the issue of "very significant obstacles to integration" had been on the basis that the judge had allegedly failed to give

adequate reasons for his decision. T hat challenge was rightly rejected by th e First -t ier Tribunal and the Upper Tribunal and is manifestly not made out. The judge was well aware of the considerable length of time that the appellant had spent in the United Kingdom . H aving considered all the evidence, however, the judge made an un arguably sound finding in this regar d at paragraphs 57-60 of his decision.

65.
For the first time, the judicial review grounds raise d an entirely different basis of challenge in respect of the issue of “very significant obstacles to integration”; namely, that the respondent ha d issued instruction s to case workers as to how they should assess the matter and that the First -t ier Tribunal judge ha d not considered “the factors listed in the s aid policy” (paragraph 18 of the judicial review grounds) .

66.
There is, however, no indication whatsoever that the instructions were drawn to the attention of the First -t ier Tribunal judge . It is tri te law that a person seeking to rely upon a policy should draw it to the attention of the T ribunal. In any event, the categorisation of the instructions as a policy is misconceived. In the immigration field, a policy of the respondent concerns the circumstances in which the respondent may be expected , as a general matter, to grant leave to remain or take some other decision under the Immigration Acts. Here, the instruction is merely a form of aid e memoir e to case workers on how to consider whether there will “be very significant obstacles to integration” in a particular case. The judge’s own assessment of the matter was not rendered defective because he did not adopt this aide memoire . What mattered was whether he considered all relevant factors. St rikingly, the judicial review grounds do not begin to explain why the judge’s conclusions on this issue might have been different, had he been referred to the instructions.

67.
The Upper Tribunal has not been told, either by Mr Singh, who appeared on 7 November, or otherwise, how it is said that the cases apparently pending in the Court of Appeal are “exactly the same” as the present case. As far as can be ascertained, the Court of Appeal granted permission so that it might consider the construction of paragraph 276ADE(vi), whose wording corresponds to that in paragraph 399A(c); namely “very significant obstacles to integration …”.

68.
Th e grant of permission in those cases , however, does not begin to explain why, on the facts of the present case, the First-tier Tribunal judge’s decision on paragraph 399A(c) should thereby have become arguably wrong in law or why the Upper Tribunal’s decision refusing permission to appeal should likewise be regarded as legally flawed. In particular, w e have not been told that the reason for the Court of Appeal’s grants of permission involved a claim, of the kind raised in the present judicial review grounds, concerning the significance of the respondent’s instructions to case workers. This is particularly pertinent, since the Court of Appeal has already had occasion to consider the meaning of “integration” in section 117C(4)(c) of the 2002 Act in Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813, in which it held:

“It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms Parliament has chosen to use” (paragraph 14).

69.

The wording in section 117C(4)(c) is materially identical to that in paragraph 399A(c) of the I mmigration R ules. It is manifest that the judge in the present case directed himself precisely by reference to the relevant words in those rules . The argument being advanced in the judicial review grounds appears, therefore , to amount to the proposition that, because the Court of Appeal will in due course be considering the meaning of the expression “very significant obstacles to integration”, every case in which th e expression has fallen to be construed and applied by judicial fact-finders must be regarded as arguably wrong in law. Such an argument is obviously bogus. It is inimical to the proper operation of any appellate system.

70.
W e therefore make our decision on the basis that :-

(a) the appellant did not challenge the respondent’s deportation decision by reference to an alleged failure to follow the instructions to case workers ;

(b) the First -t ier Tribunal judge was not shown those instructions and told that he should follow them in reaching his own decision on whether there would be very significant obstacles to the appellant’s integration in Pakistan;

(c) neither the grounds of appeal to the First -t ier Tribunal n or those to the Upper Tribunal referred to the instruction s, in relation to whether an arguable error of law had been made by the First -t ier Tribunal judge ;

(d) accordingly , the issue of the respondent’s instructions cannot be raised as a new ground of appeal without the permission of the Upper Tribunal , which the appellant has in any event not sought ;

(e) in any event, the fact that the judge did not have regard to the instructions was not an error of law on his part, let alone a material one.

71.
The second ground in the j udicial r eview application concern s the observation of the Firs t-t ier Tribunal judge at paragraph 55 of his decision, that “the present case is concerned with persistent offending” . T he contention is that the judge erred in this regard, in that the judge apparently failed to follow the decision of the Upper Tribunal in Ache ge .

72.
At paragraph 21 of the judicial review grounds, it is asserted, in terms, that the appellant “has th ree conventions” (sic - presumabl y , convictions) . It is contended that those three convictions “do not make him a persistent offender”.

73.
Once again, this ground fails to disclose any error on the part of the Upper Tribunal, in refusing permission to appeal. The allegation that the j udge erred in law by referring to “persistent offending, escalating in its nature” in p aragraph 55 of the decision finds no expression whatsoever in the grounds of appeal to the Upper Tribunal (or to the First -t ier Tribunal).

74.
Furthermore , and in any event, the criticism of paragraph 55 is completely misconceived. Ache ge was concerned with the issue of whether a person, who has not been sentenced to imprisonment of one or more years, may, nevertheless, be treated for the purposes of the Immigration Acts as a “foreign criminal”. In the present case, the appellant had, of course, been convicted of a n offence of

robbery and sentenced to 40 months imprisonment. He was, therefore, a “foreign criminal” on that basis.

75.
The point the First -t ier Tribunal judge was making in paragraph 55 was that, looking at the overall criminal activities of the appellant, in the context of weighing the strength of the public interest in deportation, it was relevant to note that he had engaged in persistent offending , which had escalated in its nature.

76.
The assertion in paragraph 21 of the j udicial r eview grounds that the appellant has only three convictions is patently false. As we have recorded at the beginning our decision , (see paragraph 3 above) the First -t ier Tribunal judge stated that the appellant’s offending history “is not in dispute”. The judge had before him the antecedent details of the appellant , as set out in the P olice N ational C omputer printout. The three convictions mentioned at (1) to (3) of paragraph 6 of the decision were merely the ones which were advanced by the respondent as “particularly pertinent in the present decision”.

77.
We do not appear to have the Police National Computer printout. However, we have no reason at all to doubt what the First -t ier Tribunal judge said about it at paragrap h 6. On the contrary, we note that in paragraph 52 of the respondent’s deportation decision of 12 October 2016, it is said t hat :-

“between 2002 and 2016 you have received 18 convictions for 33 offences. The fact that you have repeatedly offended without being deterred by your previous convictions or sentences indicates that you have a lack of regard for the law, a lack of regards for your offending behaviour, and a lack of understanding of the negative impact your offending behaviour has on others”.

78.
Mr Singh, who appeared for the appellant on 7 November, had been instructed only the day before. He had had no previous involvement in this case. Mr Singh , quite understandably, found himself in difficulty in advancing the criticisms of the judge, as set out in the judicial review grounds. He acknowledged that the appellant’s challenge to the First -t ier Tribunal ’s decision was, in essence, a pervers ity challenge. As such, we ha ve no hesitation in finding that the challenge must fail. There is nothing remotely perverse in the judge’s decision.

79.
As will be apparent, the Tribunal considers that the judicial review grounds in the present case were seriously problematic. The Upper Tribunal’s practice , following the quashing of the Upper Tribunal’s refusal of permission to appeal, is to grant such permission , in the light of the observations of the High Court, unless it is apparent from the documentation then available to the Tribunal that the High Court may have been misled as to the actual position. In such a case, the outstanding permission application is listed for oral hearing.

80.
It is, however, important to stress the following matters. Regardless of the fact that a person succeeds in obtaining permission under CPR 54.7A to judicially review a decision of the Upper Tribunal to refuse permission to appeal, with the consequence that the decision is quashed, th e Upper Tribunal will nevertheless need to be satisfied that there is an error of law in the First-tier Tribunal’s decision, before that decision can be disturbed [1] . Judicial review grounds which, upon analysis, fail to show

that the decision to refuse permission was wrong in law are highly unlikely to lead to such a result. Those responsible for drafting j udicial review grounds which, upon comprehensive analysis at a hearing of the kind described in paragraph 79 above or (as in the present case) following the grant of permission to appeal, are found to contain misrepresentations or other falsities may be referred by the Upper Tribunal to the High Court , for that Court to consider whether to require an explanation from the solicitors and/or counsel concerned (see Hamid v Secretary of State for the Home Department [2012] EWHC 3070 (Admin)).

Decision

81.
The decision of the First -t ier Tribunal contain s no error of law. The a ppeal is dismissed.

Signed

2 January 2018

The Hon . Mr Justice Lane

President of the Upper Tribunal

Immigration and Asylum Chamber

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[1] See the Vice President's observation, cited in paragraph 6 0 above.