IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00054/2015

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 29th February 2016	**On 31st March 2016**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

ORLANZO LENNOX DALEY
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Haywood, Counsel instructed by Owens Stevens Solicitors
For the Respondent: Mr S Walker, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Jamaica born on 15th December 1994. His appeal against deportation was dismissed by Designated First-tier Tribunal Peart and First-tier Tribunal Judge Henderson [the panel] in a decision dated 18th November 2015.

2. The Appellant arrived in the United Kingdom on 2nd October 1999. He came with his mother as a visitor with a visa valid until 20th August 2000. He overstayed and remained in the United Kingdom illegally and then in 2006 made an application for indefinite leave to remain which was granted on 24th November 2009. His mother became a British citizen on 12th October 2012. The Appellant appeals against the deportation order made on 5th February 2015 under Section 3(5)(a) of the Immigration Act 1971 as being conducive to the public good.

3. In summary, the panel found that the Appellant was a foreign criminal in that he had been involved in offences causing serious harm. He was a persistent offender and he had a particular disregard for the law. The panel found that paragraph 399 was not applicable and went on to consider 399A and Article 8. They found that the Appellant had not been resident in the UK for most of his life. His offending behaviour suggested that he was not socially and culturally integrated and there were no very significant obstacles to his integration in Jamaica. Therefore, paragraph 399A did not apply.

4. In considering whether there were very compelling circumstances over and above those in paragraph 398 the judge found that the Appellant had established family life in the United Kingdom with his mother, his half-brother, his half-brother's partner and their children and he was closely involved with his father and half-sister. He was not however the main carer of his mother as he claimed, although he was involved in assisting his brother's partner with childcare. In conclusion, the Appellant was a foreign criminal as defined in Section 117D (2) of the Nationality, Immigration and Asylum Act 2002. Paragraph 399A did not apply and given that the offences had caused serious harm and were persistent in nature the public interest outweighed his Article 8 rights.

5. Permission to appeal was sought on six grounds. Ground 1: The panel had erred in law in their approach to the evidence. It was for the Respondent to prove that the Appellant was a foreign criminal. Although, the Appellant accepted the history given by the police officer he had only three convictions. The matters referred to in D C Landy's statement did not result in convictions. In one case the Appellant was acquitted, in several others no further action was taken or the matter was discontinued and on one occasion the Appellant was in fact the victim rather than the perpetrator of a crime. The Appellant's credibility and that of his witnesses was rejected without sufficient reasons and the panel's assessment of the evidence was fundamentally flawed.

6. Ground 2: The panel did not specifically consider whether the Appellant was a foreign criminal as defined in Section 117D before turning to apply paragraph 398. This was contrary to the case of Chege (Section 117D – Article 8 approach) [2015] UKUT 00165 (IAC).

7. Ground 3: For the Appellant to be a foreign criminal, *an offence* not offending in general has to have caused serious harm. The panel therefore erred in law by concluding that the Appellant's conduct and offending behaviour in general had caused harm. This was contrary to Section 117D which requires *an offence* to have caused sufficiently serious harm. Further, the panel had failed to take into account the sentence imposed, namely nine months' imprisonment suspended for two years. Accordingly, the panel's assessment of serious harm was fundamentally flawed.

8. Ground 4: The panel erred in law in taking into account the entire course of conduct alleged against the Appellant in assessing whether he was a persistent offender. This finding was not sustainable given that he only had three actual convictions. Only offences demonstrated by a conviction were relevant in determining whether the Appellant was a persistent offender. Alternatively, the requirement under the test of persistent offender was that he should currently be a persistent offender. Conduct which commenced in the past must continue into the present or be reasonably approximate to it. The Appellant's last conviction was in 2013 and the last two recent arrests by the police were in situations where he was in fact the victim. In addition, the panel failed to have regard to the fact that the Appellant was a minor when he committed the three offences and he has not been convicted of any offence since he became an adult. Conduct which did not lead to a conviction should not have been taken into account in deciding whether the Appellant was a persistent offender. Under Section 3(5) of the Immigration Act 1971 a person can only be liable to deportation and a court can only recommend deportation where the person has attained the age of 17 at the time of conviction and the person was sentenced to a period of imprisonment. The panel's approach was inconsistent with those provisions in that they relied on conduct against the Appellant from the age of 14 onwards.

9. Ground 5: The panel erred in concluding that the Appellant was a foreign criminal and in their consideration of whether he can engage one of the exceptions contained in paragraph 399 or 399A of the Immigration Rules. The panel found that the Appellant's offending had caused serious harm or that he was a persistent offender who had particular disregard for the law. In coming to this conclusion the panel took into account irrelevant considerations and failed to take into account the sentence imposed by the trial judge.

10. Ground 6: Contrary to the panel's conclusion the circumstances of the Appellant were otherwise very compelling. The Appellant relied on Maslov v Austria [2008] ECHR 546. The Appellant was a minor when he committed the offences, which was relevant to the assessment of the nature and seriousness of the offences. The conduct before the panel related to offences or alleged offences when the Appellant was a minor. The Appellant had spent 16 out of 20 years of his life in the United Kingdom. He had attended school and obtained GCSEs and he had been granted indefinite leave to remain in November 2009. These amounted to

very compelling circumstances which outweighed the public interest under paragraph 398.

11. Permission to appeal was granted by Designated First-tier Tribunal Judge Zucker on the grounds that it was arguable the panel erred in its approach to resolving the issue of whether the Appellant was a persistent offender.

12. In submissions, Mr Haywood for the Appellant relied on the cases of Chege, Maslov, Bah (EO (Turkey) - liability to deport) [2012] UKUT 00196 and Farquharson (removal – proof of conduct) [2013] UKUT 00146 (IAC). He submitted that the Appellant came to the United Kingdom when he was four years old and had been here for 16 years. He was granted indefinite leave to remain in 2009 and was integrated into the UK. The Appellant was convicted of his first offence at the age of 17 and he had not been imprisoned. The panel's approach to the facts was flawed. The panel looked at the Appellant's offending behaviour rather than at whether there was an offence which caused serious harm.

13. In essence, the panel started with paragraph 398(c) of the Immigration Rules rather than assessing whether the Appellant was in fact a foreign criminal. In assessing whether the Appellant was a persistent offender the test is in the present tense. The Appellant's offences were committed whilst he was a minor. He had not committed any offences as an adult. Further, persistent offender meant conviction of a number of offences when the Appellant had only committed three offences. Further, he had not infringed his suspended sentence. In order to be a persistent offender the Respondent had to show that the offences were current and that the Appellant had a history of persistent offending. The panel had conflated the two issues and therefore their detailed consideration of the point was in fact irrelevant to the test under Section 117D.

14. There was also support from the case of Maslov where it was considered that offending as a minor was different to offending as an adult. Further, there were also exceptions to automatic deportation where a person was convicted at the age of 17. A person under the age of 17 could not be recommended for deportation in any event. Accordingly, the panel wrongly relied on offending behaviour which was not relevant to the assessment of persistent offender. To state that the Appellant accepted the factual summary in the police officer's witness statement did not deal adequately with the relevance of the Appellant's alleged criminal behaviour. The analysis of the facts commenced at paragraph 73 of the decision under the heading '398(c)'. From this it is clear that the panel did not address whether the Appellant was in fact a foreign criminal but went straight into the exceptions to deportation.

15. Mr Haywood submitted that the panel erred in referring to the Appellant's offending in its totality and did not consider whether an offence of robbery caused serious harm. They did not consider the sentence in assessing seriousness. This was relevant given that an immediate custodial penalty

was not imposed. The panel dealt with overall offending in considering the exception but this were not relevant in assessing whether the Appellant was a foreign criminal because the test was in fact different.

16. The panel based their finding that the Appellant was a persistent offender on the entire conduct set out in the police witness statements. This was wrong in law. At paragraph 80 the panel were incorrect to state that the Appellant had committed twelve offences because in relation to one of them he was a victim and in relation to another he was found not guilty. The way that the panel had set out their findings showed that their approach was wrong in law.

17. In assessing the nature and seriousness of the offences the panel should have taken into account whether the offences were committed as an adult. That was not so in this case and the Appellant had received a suspended sentence which had not been activated. This was consistent with the statutory scheme and the exceptions to deportation. These errors were fatal because the panel had failed to consider the appropriate test in relation to whether the Appellant was a foreign criminal.

18. Accordingly, the exceptions did not come into play here but if they did they were compelling circumstances in the Appellant's case which outweighed the public interest in deportation. The panel were bound by Chege and had not applied it. They had to decide if the Appellant was a foreign criminal before looking to the exceptions and from the decision it was clear they had adopted the wrong approach.

19. Mr Walker submitted that the Appellant's representative at the hearing before the First-tier Tribunal accepted that the Appellant had committed serious offences. The panel cannot be criticised for the representative's submissions. At paragraph 79 the panel looked at the Appellant's offending history which was set out in the police officer's witness statement. At paragraph 99 they considered the relevant provisions of Section 117D and found that the Appellant was a foreign criminal. There was no material error of law, although there may be an error in the structure of the decision.

20. The panel had made a finding that the Appellant was a foreign criminal and applied the correct test. This finding was open to the panel on the facts as was the finding that the Appellant was a persistent offender. There was no arguable material error of law. The panel considered the judge's sentencing remarks that the Appellant had now shown insight into his offending and this was relevant to the current assessment of whether he was a persistent offender. Their finding that he was, was open to the panel on the evidence.

21. In response, Mr Haywood submitted that the Appellant's length of residence and his convictions as a minor following Maslov were very compelling circumstances sufficient to outweigh the public interest. Mr

Haywood submitted that he was not bound by the way the case was argued before the First-tier Tribunal. As a matter of law the panel had to be satisfied that the Respondent had shown the Appellant was a foreign criminal. Serious harm was not made out on the facts of this case and the Appellant's convictions did not support such a finding. The Appellant did not receive an immediate custodial sentence so it cannot be said that an offence caused serious harm given that the offences were committed when the Appellant was a minor.

22. The panel wrongly looked at the pattern of offending and applied the exceptions to paragraph 398(c). They had failed to apply the correct test and failed to consider whether there was an offence which caused serious harm. The level of harm must be greater than a crime which warranted a suspended sentence given that a twelve months' sentence caused the automatic provisions to be triggered. A persistent offender must be convicted of imprisonment. The Appellant had not received an immediate custodial sentence and therefore he did not pass the serious harm threshold.

Relevant Law

23. In Chege the Tribunal held that:

> "The correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider:
>
> (i) is the Appellant a foreign criminal as defined by s117D (2) (a), (b) or (c);
>
> (ii) if so, does he fall within paragraph 399 or 399A of the Immigration Rules;
>
> (iii) if not are there very compelling circumstances over and beyond those falling within 399 and 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors set out in s117B.

24. The task of the judge is to assess the competing interests and to determine whether an interference with a person's right to respect for private and family life is justified under Article 8(2) or whether the public interest arguments should prevail notwithstanding the engagement of Article 8. It follows from this that if an appeal does not succeed on human rights grounds paragraph 397 provides the Respondent with a residual discretion to grant leave to remain in exceptional circumstances where an Appellant cannot succeed by invoking rights protected by Article 8 of the ECHR.

25. Section 117C states:

"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."

26. Section 117D (2) states:

"In this Part, 'foreign criminal' means a person -
(a) who is not a British citizen,
(b) who has been convicted in the UK of an offence, and
(c) who
(i) has been sentenced to a period of imprisonment of at least twelve months,
(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender."

27. Section 117D (4) states:

"In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time –

(a) do not include a person who has received a suspended sentence unless a court subsequently orders that the sentence or any part of it of whatever length is to take effect;

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to a consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention or ordered or likely to be detained in an institution other than in prison including in particular a hospital or an institution for young offenders for that length of time; and

(d) include a person who is sentenced to imprisonment or detention or ordered or directed to be detained for an indeterminate period provided that it may last for at least that length of time."

28. Paragraph 398 states:

"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 399 and 399A."

29. Paragraph 399 was not applicable in this case because it relates to a person who has a general and subsisting parental relationship with a qualifying child.

30. Paragraph 399A states:

"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."

31. In Farquharson, the Tribunal held:

"(1) Where the Respondent relies on allegations of conduct in proceedings for removal, the same principles apply as to proof of conduct and the assessment of risk to the public, as in deportation cases: Bah was applicable.
(2) A criminal charge that has not resulted in a conviction is not a criminal record; but the acts that led to the charge may be established as conduct.
(3) If the Respondent seeks to establish the conduct by reference to the contents of police CRIS reports, the relevant documents should be produced, rather than a bare witness statement referring to them.
(4) The material relied on must be supplied to the Appellant in good time to prepare for the appeal.
(5) The judge has a duty to ensure a fair hearing is obtained by affording the Appellant sufficient time to study the documents and respond.
(6) Where the Appellant is in detention and faces a serious allegation of conduct, it is in the interests of justice that legal aid is made available."

32. In Bah, the Tribunal held:

"In a deportation appeal not falling with section 32 of the UK Borders Act 2007, the sequence of decision making set out in EO (deportation appeals: scope and process) Turkey [2007] UKAIT 62 still applies but the first step is expanded as follows:

i) Consider whether the person is liable to be deported on the grounds set out by the Secretary of State. This will normally involve the judge examining:

a. Whether the material facts alleged by the Secretary of State are accepted and if not whether they are made out to the civil standard flexibly applied;

b. Whether on the facts established viewed as a whole the conduct character or associations reach such a level of seriousness as to justify a decision to deport;

c. In considering b) the judge will take into account any lawful policy of the Secretary of State relevant to the exercise of the discretion to deport and whether the discretion has been exercised in accordance with that policy;

ii) If the person is liable to deportation, then the next question to consider is whether a human rights or protection claim precludes deportation. In cases of private and family life, this will require an assessment of the proportionality of the measures against the family or private lie in question, and weighing of all relevant factors.

iii) If the two previous steps are decided against the appellant, then the question whether the discretion to deport has been exercised in accordance with the Immigration Rules applicable is the third step in the process. The present wording of the rules assumes that a person who is liable to deportation and whose deportation would not be contrary to the law and in breach of human rights should normally be deported absent exceptional circumstances to be assessed in the light of all relevant information placed before the Tribunal."

Discussion and Conclusion

33. In her reasons for deportation dated 3rd October 2014, the Respondent considered paragraph 396 of the Immigration Rules which states that where a person is liable to deportation the presumption shall be that the public interest requires deportation. The Respondent did not accept the Appellant's human rights claim and decided that the Appellant's deportation was conducive to the public good. In coming to this conclusion the Respondent took into account his criminal convictions and his behaviour as a whole taking into account evidence gathered by the police in operation Nexus [Nexus evidence].

34. At paragraph 31 of the reasons for deportation letter the Respondent states: "Your client's deportation is conducive to the public good and in the public interest because your client has been convicted of two offences

one of which has been deemed serious enough for conviction in a Crown Court rather than a Magistrates and the fact that the Secretary of State considers your client to be a persistent offender it is therefore, in accordance with paragraph 398 of the Immigration Rules, the public interest requires your deportation unless an exception to deportation applies. The exceptions are set out in paragraphs 399 and 399A of the Immigration Rules."

35. The Respondent concluded that the exceptions did not apply and there were no 'very compelling circumstances' such that the Appellant should not be deported. She found that the public interest outweighed the Appellant's Article 8 rights. The Respondent did not expressly state, in her refusal letter, that the Appellant was a foreign criminal within the definition of Section 117D (2).

36. On appeal the panel fell into error in failing to adopt the approach set out in Chege. The Tribunal started their consideration with paragraph 398 (c) of the Immigration Rules instead of Section 117D (2) of the 2002 Act.

37. The Appellant was convicted of two robberies which took place on 28th August 2012. The Appellant and another male asked to use the victims' mobile phone and then refused to return it. As the victims tried to recover the phones the other male revealed a handgun and a knife in his waistband and the victims ran off. The Appellant denied the offences and was convicted and sentenced to nine months imprisonment suspended for two years.

38. On 24th December 2012 the Appellant, on being arrested outside his home for breach of a curfew, dropped a kitchen knife and kicked it under a parked car. He was found guilty of possession of an offensive weapon and sentenced to a community order.

39. On these facts the Appellant did not satisfy the definition of foreign criminal under Section 117D (2). He had not been sentenced to a period of imprisonment of at least 12 months. Neither of the robbery offences could be said to have caused serious harm and this was reflected in the suspended sentence given by the judge after the trial. The Appellant was not a persistent offender because he only had three convictions for offences committed in August 2012 and December 2012. The suspended sentence had not been activated. The fact that the Appellant's representative accepted that the Appellant had committed serious offences was insufficient to satisfy the definition in Section 117D (2).

40. Since the Appellant was not a foreign criminal within the definition in Section 117D (2), Section 117C did not apply. However, it is worth noting that under Section 117C (7), only convictions can be taken into account.

41. There is no definition of foreign criminal under the Immigration Rules, but the wording of paragraph 398(c) is similar. I accept that it refers to offending rather than an offence, but I find that both phrases should be

construed as meaning an offence or offences of which a person has been convicted. This is consistent with Section 117C (7) and 117D (2) which expressly refers to 'has been convicted'.

42. I am of the view that it would be illogical to construe the wording of paragraph 398(c) in a manner inconsistent with Section 117D (2) and 117C. The explanatory notes to the 2014 Act supports this view. Therefore, in assessing serious harm or persistent offending, the same considerations apply. Accordingly, I find that the Tribunal erred in law in taking into account the Nexus evidence which did not result in convictions in assessing serious harm and persistent offender at paragraphs 75 to 85.

43. I accept Mr Haywood's submission that the panel did not initially apply Section 117D but looked at paragraph 398 of the Immigration Rules and in looking at the Immigration Rules they fell into error by considering conduct and a pattern of offending which was not relevant to the test of whether the Appellant was a foreign criminal.

44. Accordingly, I find that paragraph 398(c) does not apply and the Appellant did not have to show that he came within the exceptions in paragraphs 399 or 399A or that there were very compelling circumstances outside those considered under the Immigration Rules.

45. In Chege at [23], the Tribunal found that the exceptional circumstances referred to in paragraph 397 were not the same as very compelling circumstances over and above those described in paragraph 399 and 399A capable of outweighing the public interest in deportation referred to in paragraph 398. In the present rules the question of whether there are exceptional circumstances is a question to be asked only when it has already been decided that removal would not result in a breach of the UK's obligations under Article 8.

46. I find that the panel erred in law in their application of the Immigration Rules and Section 117D and 117C. The approach which should have been adopted in this case was that set out in Bah. I set aside the decision and remit the appeal to the First-tier Tribunal for a re-hearing.

47. The Nexus evidence was accepted by the Appellant and therefore it is not necessary for the police officers to attend and give evidence. The issue is to determine whether on these facts, taken as a whole, the Appellant's conduct and character or associations reach such a level of seriousness as to justify a decision to deport under 3(5)(a) of the 1971 Act.

48. If the First-tier Tribunal find that the Appellant is liable to deportation, then the next issue will be whether his deportation would breach Article 8. This

will require an assessment of proportionality taking into account all relevant factors. The Appellant was a juvenile when he committed the robbery offences and had just turned 18 when he was arrested outside his home in possession of an offensive weapon. The basic principles concerning the issue of the public interest in deportation are set out in Masih (deportation –public interest – basic principles) Pakistan [2012] UKUT 00046 (IAC).

49. If the Appellant's deportation would not breach Article 8 then the issue will be whether the discretion to deport has been exercised in accordance with the Immigration Rules. Paragraph 396 and 397 state that there is a presumption in favour of deportation and it will only be in exceptional circumstances that the public interest in deportation is outweighed.

Conclusion

50. I find that there is a material error of law in the decision of the First-tier Tribunal. I have decided in accordance with paragraph 7.2 of the Practice Statements of 25th September 2012 that the decision dated 18th November 2015 should be set aside and the appeal remitted to the First-tier Tribunal.

Notice of Decision

The Appellant's appeal to the Upper Tribunal is allowed.

The decision is set aside and remitted to the First-tier Tribunal.

No anonymity direction is made.

J Frances

Signed Date: 14th March 2016

Upper Tribunal Judge Frances

DIRECTIONS

(i) The Tribunal is directed pursuant to section 12(3) of the Tribunals, Courts and Enforcement Act 2007 to reconsider the appeal at a hearing before a

First-tier Tribunal Judge other than Designated First-tier Tribunal Judge Peart or First-tier Tribunal Judge Henderson.

(ii) I direct that the Appellants serve on the Respondent and the Tribunal not less than 7 days before the hearing a fully paginated and indexed bundle of documents on which they intend to rely.

(iii) The Appellant and Respondent to file and serve skeleton arguments no later than 7 days before the hearing.

(iv) No interpreter is required. Time estimate three hours.

J Frances

Signed Date: 14th March 2016

Upper Tribunal Judge Frances