
**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/06074/2017

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision and Reasons Promulgated** |
|---|---|
| **On 12 February 2019** | **On 04 March 2019** |

**Before**

**The Hon Mr Justice Waksman**
**(sitting as a Judge of the Upper Tribunal)**
**Upper Tribunal Judge Perkins**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**And**

**ROBERT WEEKES**

Respondent

**Representation:**
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Ms J Lowis, Counsel instructed by Duncan Lewis, solicitors

**DECISION AND REASONS**

**INTRODUCTION**

This is an appeal by the Secretary of State from a decision of the First Tier Tribunal (Judge Rayner) dated 11 October 2018. By that decision he allowed the appeal of the Respondent to this appeal, Mr Robert Weekes,

against the decision of the Secretary of State to deport him to Barbados. The Judge found that the deportation decision was a disproportionate response to his offending behaviour.

The basic facts are not in dispute and we take them from the FTT judgment.

On 3 December 1982 Mr Weekes applied for an entry certificate to the United Kingdom, which was granted. He entered and resided in the United Kingdom from 25 December 1982 to 15 January 1983. He applied for an entry certificate on 7 July 1983 and entered the United Kingdom on 15 August 1983. From 1982 until 1989-1991 when he was in prison in Barbados for a drugs related offence, he remained in the United Kingdom, without immigration status. He returned to the United Kingdom on 23 September 1992 and was granted leave to remain until 20 January 1993.

He then married Ms [SF], a British citizen in 1993 or 1994. On 12 February 1993 Mr Weekes applied for leave to remain as the spouse of a settled person, which was granted until 12 February 1994. On 27 January 1994 Mr Weekes applied for indefinite leave to remain, which was granted on 14 April 1994. Mr Weekes and Ms [F] divorced either in 1997 or 1999. On 20 June 2006, the respondent served a notice of intention to deport on Mr Weekes. He appealed and on 10 October 2016, the Asylum and Immigration Tribunal allowed his appeal. Mr Weekes visited Barbados from 26 August to 7 October 2013; from 1 April 2014 to 6 May 2014; and from 2 to 17 September 2016.

On 1 December 2016 the respondent served a second notice of a decision to deport on Mr Weekes. On 28 December 2016 Mr Weekes served representations on the respondent as to why he should not be deported. Those representations were refused on 18 April 2017. He appealed against the refusal in a notice dated 28 April 2017.

The background to both decisions to deport is Mr Weekes' offending. His PNC record is recited in full at paragraphs 9 - 76 of the refusal letter of 18 April 2017. They are not contested. The PNC print out shows that (excluding the conviction in Barbados in 1989 for drugs offences), he has been convicted

on 69 separate occasions for a total of 116 offences. The first offence was dealt with on 28 December 2003, and the final conviction was on 8 April 2015. They comprise 10 offences against the person, 1 against property, three of fraud, 69 of theft, five of public disorder, 12 relating to the police or courts, one drug offence, three offensive weapons, 11 miscellaneous and one non-recordable. The courts have imposed a number of penalties, including imprisonment on a number of occasions. The longest period of imprisonment was 12 months, imposed on 11 October 2005 for an offence of affray.

This is on any view an appalling offending history. We should add that 71 of these offences were committed after he had successfully appealed the first deportation decision. There have been no offences since the second decision being the one under consideration.

The Secretary of State of course applied the relevant immigration rules being 398-399A in connection with its decision. The relevant statutory provisions for the purpose of the tribunal proceedings are s 117B-s 117D of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). They provide as follows:

> **"Section 117B. Article 8: public interest considerations applicable in all cases.**
>
> (1) The maintenance of effective immigration controls is in the public interest …
>
> (4) Little weight should be given to -
>
> (a) A private life, or
>
> (b) A relationship formed with a 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 …
>
> **117C. Article 8: additional considerations in cases involving foreign criminals.**
>
> (1) The deportation of 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 lawfully been 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.**

**117D. Interpretation**

(1) **... 'qualifying partner' means a partner who - (a) is a British citizen ...**

(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,**

(i) **has been convicted of an offence that has caused serious harm, or**

(ii) **is a persistent offender...”**

## THE JUDGMENT OF THE F-TT

Before the F-tT, the Secretary of State said that the foreign criminal provisions applied here because Mr Weekes was a “persistent offender”. This was conceded by Counsel acting for him and the Judge agreed. In fact, he could also be treated as a foreign criminal because, on 11 October 2005, he received two 12 month concurrent sentences of imprisonment at Croydon Crown Court for assault occasioning actual bodily harm and

affray. This therefore brought him within s117D(2)(c)(i) as well as s117D(2)(c)(iii).

The Judge considered whether Exception 1 applied. He did so by reference to paragraph 399A of the Immigration Rules but that makes no difference here. Mr Weekes failed at the first hurdle here because he had resided lawfully in the UK for 26 years but was 58 at the time of the decision and so had spent less than half his life lawfully here. Although not strictly necessary for his decision, the Judge went on to consider the other requirements. He found that Mr Weekes was "socially and culturally integrated" here. He also found that there would be "very significant obstacles" to his reintegration in Barbados. See paragraphs 68-70 of the decision. So were it not for an insufficient period of lawful residents here, Mr Weekes would have made out Exception 1. That would then have been a bar to deportation.

The Judge also considered the application of Exception 2, by reference to paragraph 399 (b) of the Immigration Rules. He accepted that Mr Weekes had a "genuine and subsisting relationship" with a Ms [B]. She had met him first in 2010 as a neighbour, kept in touch with him when she moved away but then started the relationship with him in September 2015. For the purposes of this Exception, the Judge considered that Ms [B] was a "partner" of Mr Weekes and she is a British citizen. However, although he did not underestimate the difficulties which Ms [B] would face if she joined Mr Weekes in Barbados he did not consider that it would be "unduly harsh" for her to live there. Nor would it be unduly harsh for her to remain in the UK without him. In particular, as to the latter, and as set out at paragraph 64 of the judgment, while Mr Weekes was undoubtedly integrated into Ms [B]'s family she had no particular health or emotional issues requiring his presence or attention. Her depression and anxiety long predated her relationship with Mr Weekes and her high blood pressure and pre-diabetes required no significant input and she had a large family who both supported her and for whom she provided support. While his departure would be "difficult" for her, that would be the extent of it.

Accordingly, Mr Weekes could only avoid deportation if he could establish that the public interest in his deportation is "outweighed by other factors where there are very compelling circumstances over and above those described in paragraph 399 or 399A as stated in paragraph 398(c) of the Immigration Rules". See paragraph 398.

So far as Mr Weekes' offending behaviour is concerned although the Judge pointed to various gaps in his offending history he accepted that up to 8 April 2015 "there could hardly have been a better example … of someone who could be described as a "persistent offender who shows a particular regard for the law". But by the time of the refusal letter of 28 March 2017 there had been no offences for nearly 2 years. The Judge accepted that Mr Weekes had changed his lifestyle and was expressing genuine remorse. That said, his initial approach to the Community Order imposed upon him in April 2015 was not promising. The supervisor noted that he had no intention of stopping problematic alcohol use which he did not see as an issue. However, by November 2015 it was noted that Mr Weekes had said that he had not drunk for 5 months and felt more healthy, that he had met a lady and as she did not drink this helped and he seemed determined to remain abstinent. In 2016 he obtained employment as a transport agent and produced a number of positive testimonials from 2017 to 2018. The Judge also noted that he had started his rehabilitation at least 18 months before the issue of the second decision to deport so it was not as if any changes came only after he learned of such a decision and in an attempt to present a good picture for deportation purposes.

The key parts of the judgment are as follows:

> "79. On the positive side of the balance, I repeat and stress the fact that Mr Weekes has turned his life around to such an extent that I accept that there is no prospect of recidivism. Mr Weekes' resolve to remain abstinent from alcohol and drugs and stop offending has survived the shock of the deportation proceedings and I am satisfied is genuine.
>
> 80. I give significant weight to the length of time that Mr Weekes has lived in the United Kingdom, which has been more or less continuous since 1982. That is a total of 36 years, at least 24 of which has been lawful and settled. All his ties are in the United Kingdom and he has none in Barbados. He would have no support in Barbados, and he is at a stage of his life where he would find it hard to re-establish himself there. For

the reasons given above, I do find that Mr Weekes is culturally and socially integrated into the United Kingdom, and that there would be 'very significant obstacles' to his reintegration into Barbados. Although that does not satisfy the requirements of the Immigration Rules or of the 2002 Act because Mr Weekes has not spent half his life in the United Kingdom lawfully, the length of time he has lived here is significant and relevant.

81. Similarly, the family life ties of Mr Weekes with Ms [B] do not satisfy the provisions of either the Immigration Rules or of section 117 of the 2002 Act. Given Ms [B]'s family ties in the United-Kingdom, I do not consider it likely that she would accompany Mr Weekes to Barbados. Mr Weekes' deportation would therefore fracture that relationship, and remove from Ms [B]'s family a valuable support. That would also be devastating for Mr Weekes, and may be too much for him to cope with without recourse to alcohol, drugs and offending behaviour."

82. I consider finally whether, in the terms of Hesham Ali, **"*giving due weight to the strength of the public interest in deportation in the case before them, the factors brought into account on the other side lead to the conclusion that deportation would be disproportionate.*"** As noted above, I find that the 'due weight' to be afforded to the strength of the public interest in the deportation of Mr Weekes is significant, but tempered and mitigated by a number of factors. Mr Weekes does not satisfy any of the exceptions to deportation. There are however factors, in his situation that are insufficient within the Rules or statute to satisfy the exemption, but are nonetheless significant. These include the length of time that he, has lived both lawfully and precariously in the United Kingdom, which is well in excess of half his life; that he is culturally and socially integrated into the United Kingdom; that there would be, because of his age and lack of support, very significant obstacles to his integration into Barbados; and his relationship with Ms [B]. What however amounts to "compelling circumstances over and above those described in paragraphs 399 and 399A" for Mr Weekes is his rehabilitation and reformation, established before the notice of deportation. That has now been firmly established and has effectively removed one of the reasons for deportation, namely the discouragement of recidivism. Therefore, balancing the tempered need for deportation in Mr Weekes' case with significant personal family and private life factors, and his total self-regulated rehabilitation, I find that Mr Weekes' deportation is a disproportionate response to his offending behaviour, and allow this appeal."

Therefore, while the Judge saw the need for deportation being "tempered" by family and private life factors, the key driver for the finding of very compelling circumstances was the fact of his rehabilitation. We should add that the last sentence of paragraph 81 did not appear to be supported by any particular evidence and indeed Ms Lowis, who represented Mr Weekes before us as well as at the FTT, disavowed any reliance upon it. That is all very well but the Judge appears to have thought it important even though,

on one view, it suggests that Mr Weekes' rehabilitation may not be as secure as the judge had suggested in other parts of his judgment because the implication is that if he cannot continue his relationship with Ms [B] (or perhaps another partner in the future) he might well relapse.

**THE LAW**

It is trite law that the very compelling circumstances threshold is a high one. It connotes a "very strong claim indeed" see Laws LJ in *SS (Nigeria) v SSHD* [2013] EWCA Civ. 1192. In assessing whether this threshold is met, the countervailing considerations to the great weight which should normally attach to the public interest in deportation of foreign offenders must be very compelling in order to outweigh them. See paragraph 38 of the judgment of Lord Reed in *Hesham Ali* [2016] UKSC 60. But the factors to consider can include the deportees conduct since the offence was committed as well as factors relating to private or family life see paragraph 26 of that judgment.

It is also clear that even where Exceptions 1 or 2 have not been a made out for some reason, the facts relating to them can form part of the "very compelling circumstances" considerations. Thus, in *NA (Pakistan) v Home Secretary* [2016] EWCA Civ. 662, Jackson LJ stated at paragraph 29 of his judgment that:

> "... A foreign criminal is entitled to rely upon such matters [falling within Exceptions 1 and 2] but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 ... Or features falling outside the circumstances described in those exceptions … Which made his claim based on article 8 especially strong."

And at paragraph 32 in respect of a "medium" offender (i.e. one who has received a sentence of imprisonment between 12 months and 4 years):

> "... If all he could advance in support of his article 8 claim was a "near miss" case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were "very compelling circumstances over and above those described in Exceptions 1 and 2", he would need to have a far stronger case than that by reference to the interests protected by article 8 to bring himself within that fallback protection. But again, in principle, there may be cases where such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for article 8 purposes that they

> do constitute such very compelling circumstances whether taken by themselves or in conjunction with other factors relevant to article 8 but not falling within the factors described in Exceptions 1 and 2. The decision-maker, B at the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation."

A recent formulation of the interrelationship between the "very compelling circumstances" exercise and factors relating to Exceptions 1 and 2 is to be found in *SSHD v Garzon* [2018] EWCA Civ 1225 at paragraph 26 of the judgment of Macfarlane LJ (with whom Sales LJ agreed), when upholding a finding of very compelling circumstances:

> "… The purpose of an Article 8 evaluation which is conducted after a foreign criminal has failed to bring his case within s117C or the express provisions in the rules, is to look at the same factors again, together with other relevant factors not specifically covered within the terms of the statute or the rules, within the context of Article 8 albeit with due regard to the public policy in favour of deportation of foreign criminals and expressly taking account of the "very compelling circumstances" threshold ..."

Finally, on substantive law we turned to the significance of the rehabilitation of the deportee when assessing very compelling circumstances. The authorities were reviewed in some detail in *SSHD v Olarrewaju* [2018] EWCA Civ 557. At paragraph 17 of the judgment of Newey LJ (with whom Simon LJ agreed) he referred to the dicta of Moore-Bick LJ in Taylor v Home Secretary [2015] EWCA Civ 845 who said that:

> "I would certainly not wish to diminish the importance of rehabilitation in itself, but the cases in which it can make a significant contribution to establishing the compelling reasons sufficient to outweigh the public interest in deportation are likely to be rare.... Rehabilitation is relevant primarily to the reduction in the risk of re-offending. It is less relevant to the other factors which contribute to the public interest in deportation."

At paragraph 18 he referred to the observations of Wilson LJ in the earlier case of *OH (Serbia) v Home Secretary* [2008] EWCA Civ 694 at paragraph 15 when he stated that:

> "(a) The risk of reoffending is one facet of the public interest but, in the case of very serious crimes, not the most important facet.
>
> (b) Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.

> (c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.
>
> (d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the respondent and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of the case. Speaking for myself, I would not however describe the tribunal's duty in this regard as being higher than 'to weigh' this feature."

At paragraph 26 of his judgment Newey LJ summarised the law here as meaning that "the significance of rehabilitation is limited by the fact that the risk of reoffending is only one facet of the public interest."

As to the approach to be taken when considering the decision of the FTT in relation to the balancing exercise, the judgment shows that the balancing exercise has really not been conducted at all, then that is likely to be fatal to the decision. For example, see *OH (Serbia*) referred to above. On the other hand, where the FTT has engaged in a very clear and comprehensive assessment of all the factors paying particular attention to the great weight to be attached to the public interest in deportation, where the complaint is simply one of a wrong allocation of weight to all the factors, this will not usually lead to a successful challenge unless the decision itself was insupportable on the evidence or otherwise perverse. See paragraph 30 of the decision of McFarlane LJ in *SSHD v Garzon* [2018] EWCA 1225, where he accepted that another specialist tribunal might have reached the contrary conclusion. Hence the necessary conclusion by the Court of Appeal in *Olarewaju* that since the only reasonable conclusion was that there were no very compelling circumstances, the finding of the FTT that there were was a decision not reasonably open to it.

## ANALYSIS

We accept that this is not one of those cases where the FTT clearly failed to take into account the relevant factors or give, as a starting point, great weight to the public interest in deportation.

However, we consider that this is a case which goes beyond a mere disagreement with the apportionment of weight undertaken by the Judge. Rather, we consider it to be one of those cases where his decision was not one which was reasonably open to him. While he was entitled to take into account as part of the mix the private and family life factors which went to the (unsuccessful) claims under Exceptions 1 and 2, their significance must be limited. In the case of Exception 2, by reference to Ms [B], the claim failed on all counts, albeit that the Judge thought that it would be problematic for Ms [B] here after Mr Weekes was deported. In respect of Exception 1, it would be fair to say that Mr Weekes "just missed" in the sense that had he been here lawfully for another 3 or 4 years, he would have met the first requirement and the Judge held that he would have met the other requirements if engaged. But that still requires showing very compelling circumstances in addition. It is impossible in our view to see how Mr Weekes' rehabilitation can be sufficient given the limited weight which it will usually attract. That is especially so here where(a) the offending history was appalling and only ended in 2015 (b) it remains the case that Mr Weekes continued to offend even after his original deportation appeal had succeeded and (c) the last part of paragraph 81 of the judgment was obviously an important finding in the eyes of the FTT and yet (i) it appears to be no more than speculation or (ii) or if soundly based, suggests that in truth, Mr Weekes' rehabilitation is precarious. We reject the submission made by Ms Lowis that despite the number of offences, the offending as a whole can generally be described as "nuisance" only. Indeed, the history of the offending as a whole leads us to describe it as "serious". The only conclusion we can reach is that the FTT in the circumstances gave far too much weight to the rehabilitation than could possibly be justified.

Accordingly, while giving due deference to the balancing exercise conducted by the FTT as we must, its decision falls clearly outside the bounds of decisions reasonably open to it. Accordingly, the appeal by the Sec of State succeeds. We set aside the decision of the First-tier Tribunal.

Given the nature of the challenge to the First-tier Tribunal's decision there is no need for a further hearing. All the points favourable to the Appellant have been identified and, in our judgement for the reasons given above, cannot amount to "very compelling circumstances over and above those described in paragraph 399 or 399A". Further there is nothing before us that has not been considered above that could lead to the appeal being allowed.

It follows that we substitute a decision dismissing Mr Weekes' appeal against the Secretary of State's decision.

Notice of Decision

The Secretary of State's appeal is allowed. We set aside the decision of the First-tier Tribunal and substitute a decision dismissing Mr Weekes' appeal against the Secretary of State's decision.

Signed 

Mr Justice Waksman
Sitting as a Judge of the Upper Tribunal

Dated 28 February 2019