Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04953/2018

THE IMMIGRATION ACTS

Heard at Manchester CJC **Decision & Reasons Promulgated**
On 11 February 2019 **On 26 February 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

ODARIE [B]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: In person
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 16 October 2018, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons for reaching that decision were as follows:

> "1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, Odarie [B], was born on 15 May 1995 and is a citizen of Trinidad & Tobago. He entered the United Kingdom in 2004. He came to the attention of the authorities first in June 2011 when convicted of assault and theft. The appellant was subsequently sentenced between June 2011 and June 2016 on nine

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occasions for a total of fifteen criminal offences including common assault and assault on a constable. On 6 January 2015, the appellant submitted an application for leave to remain which was rejected as the incorrect form had been used and no fee had been paid. He was served with notice of removal (RED.001 and RED.003) on 15 October 2015 having been arrested by a police officer. He was served with a further notice of removal (RED.004) on 2 June 2016 and removal directions were set for 16 April 2017. The appellant applied for a judicial review of the decision on 12 April 2017 and, in consequence, removal directions were deferred. The appellant was asked by the respondent on 25 April 2017 to provide reasons why he should not be expected to appeal after he had left the United Kingdom. In response to that request, on 10 May 2017, the appellant claimed asylum. The appellant was refused permission to bring proceedings for judicial review on 14 September 2017. On 12 December 2017 a notice of intention to deport the appellant was issued. On 5 March 2018, a decision was made by the Secretary of State to refuse a protection and human rights claim.

2. The appellant appealed to the First-tier Tribunal (Judge Davies) which, in a decision promulgated on 26 June 2018, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

3. The judge found that the appellant was not a person to whom Section 117C of the 2002 Act (as amended) should apply. Section 117C provides:

> ‘(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.'

4. The judge's reasoning was that the appellant was not a "foreign criminal" as defined by Section 117D(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,

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

(iii) is a persistent offender.'

5. The parties agree that the appellant had not been sentenced to a period of imprisonment of at least twelve months, nor has he been convicted of an offence that had caused serious harm; the question as to whether the appellant is a foreign criminal turns on whether the appellant is a "persistent offender". Judge Davies found that the appellant was not a persistent offender. His reasons for reaching that decision are set out at [29] et seq. The judge found that the offences for which the appellant had been convicted "fall towards the lower end of the scale of criminal offences". The judge was careful not to underestimate the seriousness of some of the offences committed by this appellant. The judge found that the appellant committed many of the offences when "involved with a group of other youngsters of the same age in the area where he lived in Romford in Essex." He noted there was a break of offending of nineteen months between July 2012 and February 2014. He noted that, since January 2017 when the appellant moved to Manchester, he had not committed any further offences. He accepted the appellant's stated remorse for his offending. At [34] the judge stated:

"As at paragraph 57 of the case of Chege [2016] UKUT 187 (IAC) before the Upper Tribunal indicates it is for me to find on the basis of the appellant's whole history whether he is a persistent offender and whether he can be described as someone who keeps on committing criminal offences. I have taken into account the appellant's overall pattern of offending, the frequency of the offences, their nature, their number, the period and periods over which they have been committed and any reasons underlying the offending. I accept as the appellant has indicated the offences were in the main committed in association with others."

6. The case of Chege provides useful guidance:

> “The question whether the appellant "is a persistent offender" is a question of mixed fact and law and falls to be determined by the Tribunal as at the date of the hearing before it.
>
> 2. The phrase "persistent offender" in s.117D(2)(c) of the 2002 Act must mean the same thing as "persistent offender" in paragraph 398(c) of the Immigration Rules.
>
> 3. A "persistent offender" is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or that the continuity of the offending cannot be broken. A "persistent offender" is not a permanent status that can never be lost once it is acquired, but an individual can be regarded as a "persistent offender" for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. The question whether he fits that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts.”

7. At [62], the Upper Tribunal held:

> “The fact that the Secretary of State has decided that the individual has met the requirements of that limb of paragraph 383(c) of the Rules and that therefore, his deportation is conducive to the public good, is obviously something that the Tribunal is entitled to take into account, and it must be afforded due respect; but the Tribunal cannot substitute the Secretary of State's decision for its own decision. It would be wrong in principle for the Tribunal to start with the premise that the appellant has been held to be a persistent offender who shows a particular disregard for the law, and then ask whether anything has happened since that decision to change that view of him. The Tribunal must make up its own mind, looking at the entire offending history and not just the period between the Secretary of State's decision and its own. That is precisely what the First-tier Tribunal Judge did in the present case.”

Judge Davies was correct, therefore, to direct himself that it was for the Tribunal, considering all the relevant evidence, to make up his own mind as to whether the appellant may be characterised as a persistent offender. The judge was also right to look at the entire offending history and not just the period between the Secretary of State’s decision and his own decision.

8. The grounds of appeal challenge head-on the judge’s finding that the appellant is not a persistent offender. Notwithstanding the Tribunal’s clear findings, the Secretary of State continues to assert that the appellant is a persistent offender. The grounds assert that the Tribunal’s conclusion is devoid of reasoning and reject the judge’s finding that the appellant’s remorse is genuine and that the appellant did not show a propensity to reoffend at the time of the First-tier Tribunal. With respect, the grounds appear to ignore the text of the

decision. At [32] the judge found that, "whilst I accept on the basis of the case law that a break in offending may well not indicate that the appellant is not a persistent offender, I do not believe taking into account the evidence... that the appellant is a... persistent offender." It is not clear to me why the Secretary of State considers that statement to be devoid of reasoning. The judge was accepting that a break in offending may not mean that an individual is not a persistent offender and he made it clear that that was not the only basis for his finding in the appellant's favour.

9. Otherwise, the grounds are essentially a disagreement with the judge's findings. The grounds assert that the appellant is not integrated into United Kingdom society. However, a finding that he was integrated was available to the judge on the evidence and he duly reached it, giving reasons.

10. Matters are further complicated by the grant of permission. Judge O'Brien has effectively ignored the grounds as pleaded but instead has written this:

> "The judge appears to treat the appeal as being against the deportation order and allowed the appeal on the ground that it was not in accordance with the law. However, it was only against the respondent's decision to refuse the appellant's subsequent protection and human rights claim that a right of appeal existed (Section 82(1) NIAA 02). The only ground of appeal available (after it was confirmed that the protection ground was not pursued) was that a removal would be unlawful under Section 6 of the HRA 98 (Section 84(1)(c)). The judge does not appear to consider whether the appellant's removal would be so unlawful. It is arguable therefore that the judge has erred in law."

11. Whilst Judge O'Brien has highlighted a matter of difficulty in Judge Davies' decision, I told Ms Aboni, who appeared for the Secretary of State before the Upper Tribunal, that permission had, in effect, been granted on a basis not pleaded by the Secretary of State. Having found that the appellant was not a persistent offender, the judge concluded as follows:

> "On the basis of my decision it is not necessary for me to go on and consider the question of the appellant's Article 8 claim."

12. Earlier in the decision, the judge had noted that the asylum claim made by the appellant was not pursued. In the light of that unequivocal indication, the judge should have recorded in his decision that the appeal against the Secretary of State's international protection decision was dismissed. However, what Judge O'Brien says is correct. The appellant did not have a separate right of appeal against the making of the deportation order. His only ground of appeal which was pursued before the First-tier Tribunal was that his removal would be unlawful on Article 8 ECHR grounds. All that the judge has done is to make a finding that the appellant is not a persistent offender and has left matters there. As the Tribunal in Chege stated at [6] "if [the appellant] is not a foreign criminal when the First-tier Tribunal came to consider the question of whether the decision to deport him was an

unjustified interference with his Article 8 rights, considerations under Section 117C of the Act would not apply although Section 117B would apply in any event." Judge Davies' decision is silent as to the application of Section 117B of the 2002 Act. In consequence, the judge's analysis is incomplete.

13. I have concluded that the Upper Tribunal should set aside Judge Davies' decision accordingly. However, for the reasons I have given above, I do not see any reason to interfere with the judge's finding that the appellant is not a "persistent offender". Further, I find that the appellant's appeal on asylum grounds should be dismissed. At the beginning of this decision I have set out in some detail the immigration history of the appellant. As I have noted, the removal directions made against the appellant were deferred following judicial review proceedings in April 2017. Although deferred, it would appear that those removal directions may be pursued. The appellant has failed in his appeal on asylum grounds but, for the reasons I have given, it would seem that his Article 8 ECHR appeal remains outstanding. That appeal will need to be determined at a resumed hearing before me in the Upper Tribunal at Manchester. At or before the resumed hearing, it would be very helpful if the Secretary of State were to clarify his position regarding the current status of this appellant and, if it is still intended to remove him from the United Kingdom, on what basis that removal will be effected. I am concerned that the appellant should reach some finality in these proceedings and be left in no doubt as to the continuing status he may have, if any, to remain in this country.

Notice of Decision

The decision of the First-tier Tribunal which was promulgated on 22 June 2018 is set aside.

The judge's finding that the appellant is not a "persistent offender" shall stand.

I have remade the decision in respect of international protection. The appellant's appeal on international protection (asylum) grounds is dismissed.

The appeal on Article 8 ECHR grounds shall be considered at a resumed hearing of the Upper Tribunal (Upper Tribunal Judge Lane) at Manchester Civil Justice Centre on a date to be fixed (time estimate two hours) (no interpreter).

No anonymity direction is made."

2. In remaking the decision, I am aware that the appellant appeals against the decision of the Secretary of State to refuse his protection and human rights claims. His asylum claim has already been dealt with as has the issue as to whether or not he is a "persistent offender" (see paragraph [13] of my error of law decision).

3. The appellant gave brief evidence at the resumed hearing. The standard of proof is the balance of probabilities in the Article 8 ECHR appeal. He confirmed that he is now 23 years old and he has lived in the United Kingdom since he was 9 years old. He went to school here but did not finish his GCSEs. He has never worked in the United Kingdom but all his

family are living here; he has no family members living in Trinidad. His family in the United Kingdom include a grandmother, aunt and uncles. He lives with one of his aunts who is unwell although he was unaware of the nature of her illness. The appellant explained that while other members of his family had over the years acquired status in the United Kingdom his grandmother had never got around to obtaining such status for him.

4. I reserved my decision.

5. Mr McVeety, who appeared for the Secretary of State, helpfully raised the issue as to whether the appellant might qualify (should he make an application) for leave to remain under paragraph 276ADE(1)(v):

> '(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment);'

6. The problem for the appellant is that he also has to satisfy the general suitability requirements (S-L). In particular, the appellant has to show that, notwithstanding his criminal record, he is a suitable person to be granted leave to remain by reference to the provisions of S-LTR 1.6:

> 'The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.'

7. Mr McVeety submitted that the appellant's only family life as an adult was with other adults including his aunt. There was little evidence of the details of the appellant's private life.

8. I have had regard to Section 117 of the 2002 Act (as amended):

> 'Article 8: public interest considerations applicable in all cases
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
>
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
>
> (b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

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

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

9. The appellant speaks English as his first language. He has not relied upon public funds for his maintenance. He is not, of course, a foreign criminal as defined in the Act (see above). In his favour, he has lived in the United Kingdom for a very considerable portion of his life and, even if one were to remove from the calculation the limited periods he has spent in prison, he has certainly spent more than half his life here. My own impression of the appellant is that he has taken steps to improve his conduct. He told me at the initial hearing that he had committed offences when in bad company whilst living in Essex. He appears and I find as a fact that he has achieved a degree of personal and social stability since he has begun living with his family in the north of England. It is true that he has not produced any specific evidence about his private life ties in this country but the operation of paragraph 276 of Appendix FM is an indication that any individual who has spent more than half his life before the age of 25 years living in the United Kingdom is likely to have established a substantial private life here.

10. Notwithstanding his previous criminality, I found the appellant to be an honest and truthful witness. I accept what he says about his family in this country and also the absence of any family members in Trinidad. In considering Article 8 ECHR, I have to determine whether there are, in effect in reality, insurmountable obstacles preventing the appellant's return to Trinidad and Tobago. I find that he would experience very significant obstacles to reintegration into society there. He has not been in Trinidad for more than fourteen years. All his formative years as an individual have been spent in the United Kingdom since the age of 9 years. I found this a difficult case to determine but, upon a consideration of all the evidence, and having regard to the fact that he substantially meets the requirements of paragraph 276ADE, I have concluded that it would not be proportionate to remove him to Trinidad. I make that finding fully aware of his past offending and of the public interest concerned with the removal of those who, notwithstanding a length of residence, have never established a legal status in this country.

Notice of Decision

11. The appellant's appeal against the decision of the Secretary of State to refuse his human rights claim is allowed on human rights grounds (Article 8 ECHR).

12. No anonymity direction is made.

Signed Date 21 February 2019

Upper Tribunal Judge Lane