Upper Tribunal
(Immigration and Asylum Chamber)

Williams (scope of "liable to deportation") [2018] UKUT 00116 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 January 2018	
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Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE HANSON

Between

MICHAEL ABAYOMI WILLIAMS
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr S Karim, Counsel, instructed by Prime Solicitors
For the respondent: Mr T Wilding, Senior Home Office Presenting Officer

(1) A person who has been deported under a deportation order that remains in force is a person who is liable to deportation within the meaning of section 3 of the Immigration Act 1971 and is therefore unable to bring himself within section 117B(6) of the Nationality, Immigration and Asylum Act 2002.

(2) By the same token, the fact that such a person has been deported does not mean he or she is thereby able to avoid the application of the considerations listed in section 117C.

DECISION AND REASONS

A. Introduction

1. The appellant appeals against the decision of First-tier Tribunal Rodger, promulgated on 11 January 2017, in which she dismissed the appellant's appeal against the respondent's decision on 2 February 2016, to refuse his human rights claim. Permission to appeal to the Upper Tribunal was granted on 21 August 2017.

2. The appellant was born in 1980 in Nigeria. He has three children, all of whom are British citizens. The appellant has a number of criminal convictions, most recently in July 2012, when he was convicted of conspiracy to make false representations to make gain for himself or for another or to cause loss to another or expose others to risk. The appellant was sentenced to a term of 21 months' imprisonment.

3. The respondent notified the appellant in November 2012 of his liability to deportation. An appeal against the decision to deport was dismissed in July 2013.

4. In May 2015, the appellant was removed to Nigeria. It is from that country that his human rights claim was made, the refusal of which generated the present proceedings.

5. Judge Rodger heard evidence from the appellant's mother and from his partner. Having set out the relevant law, the Judge's findings begin at paragraph 49 of her decision. At paragraph 57, the Judge set out her findings regarding the appellant's children. A further child had been born in 2014, only a few months before the appellant was deported.

B. The decision of the First-tier Tribunal Judge

6. The Judge found that the appellant had a genuine and subsisting parental relationship with K and M, his children by Ms W but that he did not have any such relationship with another daughter by a different mother. Although the Judge found that it would be in the children's best interests to remain in the same country as their father, both K and M were being looked after by Ms W.

7. The Judge found that K had been "greatly affected by the absence of her father and … she has received therapy" (paragraph 64). K's position therefore needed to be carefully considered by the Judge, by reference to the expert reports which had been prepared. At paragraph 69, referring to an incident at school where K had cut her own hair, the Judge held that there was "nothing before me such as to persuade me that this was treated as anxiety-related or anything other than normal behaviour of a young inquisitive child". Overall, the Judge found that, although K had had significant difficulties in adjusting to the separation from her father, she was not satisfied that K's reaction to the situation was:

> "a compelling factor or that there is any persuasive risk of significant deterioration once the situation has been made certain by this decision or that the risk of deportation is in any event likely to be such that would be non-treatable to therapy or support, especially when she has previously responded well when she first displayed significant anxiety symptoms when her father was in prison, or that it would be of such severity as to amount to a compelling factor." (paragraph 69)

8. At paragraph 73, the Judge found that:-

> "After having assessed all of the evidence available to me, including the updated letters of … I am satisfied that K has started to adjust to the absence of her father and I am not satisfied that she has become so seriously affected by the absence of her father that there is any significant risk to her mental health."

9. At paragraph 74, again dealing with the position of K, the Judge found she was:-

> "not satisfied that her response is greatly in excess of that of a normal distressing reaction of a child to the separation of a parent that they were close to … Deportation involves distressing experiences due to the separation factor which is a natural consequence of a deportation order. That is why the decision to deport is not taken lightly and which is taken after consideration of Article 8 interests. Whilst it is distressing for [K's] family to see her emotionally suffer from the absence of her father, this has all arisen due to the appellant's own offending behaviour and her response and difficulties in adjusting is not such as to make it a compelling factor such as to outweigh the public interest in the deportation of her father, a foreign criminal who committed a serious offence whilst in the UK."

10. After further paragraphs, in which the Judge considered in detail the appellant's offending behaviour, which was not accompanied by any "persuasive signs of remorse" (paragraph 78), the Judge struck the balance under Article 8(2) as follows:-

> "81. Having weighed up the pros, namely my assessment of the best interests of the children and the reaction of [K] to her father's absence, the fact that the children will be separated from their father for at least 10 years unless they join him in Nigeria (which they are not expected to do but is simply an option, albeit not a reasonable option, for the family), the fact that none of this is the fault of the children but that they are the victims and will suffer emotionally from the separation from their father, and that the appellant is a low risk re-offender, but weighing all of the above against the significant weight of the public interest in deporting foreign criminals and the legitimate interest in deterring other foreign persons committing crimes in the UK, the fact that they are being cared for well by their main carer and have the support from their grandmother who is able to provide [assistance] in nurturing and developing their dual ethnicity backgrounds, and that they are receiving the appropriate support and assistance to meet their needs, I am not satisfied that the compelling factor test has been made out as there are no exceptional circumstances that mean the continuation of the order for 10 years is outweighed by compelling factors. The appellant was rightly deported back to his home country following his own offending behaviour, which he did despite the presence of his family in the UK, and there are no compelling factors such that outweigh the significant public interest in maintaining the deportation order and revoking it prior to the elapse of a 10 period. The deterrent factor would not be achieved by the initial deportation alone and the deterrent factor continues to be a relevant consideration when weighing up the balance. Further, the decision is not contrary to the human rights convention as the decision is lawful, necessary and proportionate to the legitimate aim of maintaining effective immigration control, deporting foreign criminals and protecting the interests of UK society."

C. Grounds of challenge: 3 to 8.

11. We can dispose of grounds 3 to 8 rapidly. They are all, in essence, challenges to the primary fact-finding of the Judge and to her striking of the requisite balance, by reference to the relevant legislation and Immigration Rules. So far as the findings regarding K are concerned, the grounds are wrong to contend that the Judge was underplaying the adverse impact on K of maintaining the appellant's exclusion from the United Kingdom. As we have seen, the Judge was, most definitely, aware of the adverse impact on K. She did not, however, consider that that impact was of such a character as to outweigh the strong public interest in maintaining the deportation of the appellant. The Judge was fully entitled to that conclusion. In reaching it, we are entirely satisfied that she overlooked nothing of material value in the evidence before her.

12. The suggestion in ground 7 that an apology from the appellant, recorded at paragraph 15, indicated that he had shown remorse is misconceived. The Judge was entitled to find, in all the circumstances, that no genuine remorse had been demonstrated.

13. The final challenge, in ground 8, is based on the assertion that the Judge considered factors in isolation. A reading of her decision, however, makes it evident that that is simply false.

D. Grounds 1 and 2

14. We therefore turn to the first two grounds, which plainly were the ones that led to permission to appeal to the Upper Tribunal being granted.

15. At paragraph 53, Judge Rodger rejected submissions on behalf of the appellant that section 117B(6) of the Nationality, Immigration and Asylum Act 2002 applied to the facts of this case. Ground 2 contends that this was wrong and that the Judge made a similar error at paragraph 54, in deciding that s117C applied to the appellant.

16. Both of these provisions are to be found in Part 5A of the 2002 Act. That Part, so far as relevant, provides as follows:-

> "**117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts -
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard -

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

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

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

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English-

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

(b) are better able to integrate into society.

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

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to -

(a) a private life, or

(b) a relationship formed with a qualifying partner,

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

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

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

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."

17. Mr Karim's case for contending that the Judge wrongly failed to apply section 117B(6) and wrongly applied section 117C is a simple one. As soon as the appellant had been deported, he was no longer, according to Mr Karim, a person liable to deportation. Accordingly, section 117B(6) meant that the appellant was a person "who is not liable to deportation", with the result that the public interest did not require the appellant's removal in circumstances where he had a genuine and subsisting parental relationship with a qualifying child and it would not be reasonable to expect the child to leave the United Kingdom. Since both of those conditions were satisfied, on the findings of the Judge, the public interest in maintaining the appellant's exclusion from the United Kingdom fell away.

18. So far as it concerns section 117C, Mr Karim submitted that the provisions of that section fell to be read as applying only in relation to a person who has not yet been deported. Someone such as the appellant, who had been deported, was not covered by the provisions. This meant the respondent could not rely upon the "unduly harsh" test in subsection (5).

E. Discussion

19. In Secretary of State for the Home Office v ZP (India) [2015] EWCA Civ 1197 the Court of Appeal had to consider the application of paragraph 390 *et seq* of the Immigration Rules, as then in force, in a case of a person who had been deported.

20. Paragraph 391 provides as follows:-

> "391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:
>
> (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than four years, unless 10 years have elapsed since the making of the deportation order
>
> …
>
> Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors."

21. At paragraph 24 of the judgments, the Court rejected the suggestion that paragraph 391 required a fundamental difference in approach in considering post-deportation revocation applications, compared with that which was followed in considering pre-deportation applications under paragraphs 390A/398-399A.

22. At paragraph 25, the Court (per Underhill LJ) said:-

> "It is inherent in the making of a deportation order that there must be a period before the deportee becomes eligible for re-admission: otherwise it would be a mere revolving-door. Mr Biggs did not contend that the ten-year prescribed period applicable to foreign criminals sentenced to between one and four years' imprisonment was itself irrational or that it inherently involved any breach of Article 8. That being so, the default position must be that the deportee should "serve" the entirety of the prescribed period in the absence of specific compelling reasons to the contrary."

23. In IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932, the Court of Appeal was, again, required to consider a case involving a deportee who wished to return to the United Kingdom and who accordingly applied for the revocation of the deportation order made against him. The Court had no doubt that section 117C of the 2002 Act applied to the appellant in that case. Indeed, Arden LJ described it as "effectively common ground that, under section 117C of the Nationality, Immigration and Asylum Act 2002 … the deportation order may only be revoked if its retention is determined to be "unduly harsh"" … (paragraph 2). The court held that "the undue harshness standard in section 117C … means that the deportee must demonstrate that there are very compelling reasons for revoking a deportation order before it has run its course. Section 117C is to be read in the context of the Immigration Rules which make that clear" (paragraph 3).

24. At paragraph 52 Arden LJ held as follows:-

> "52. The function of section 117C is to set out the weight to be given to the public interest to be taken into account in the proportionality exercise to be carried out under Article 8 of the Convention in the case of a foreign criminal. Section 117C(1) states that the deportation of foreign criminals is in the public interest. In this context, and indeed in the other uses of the word "deportation" in this section, the word "deportation" is being used to convey not just the act of removing someone from the jurisdiction but also the maintaining of the banishment for a given period of time: if this were not so, section 117C(1) would achieve little."

25. At paragraph 56, the Court addressed the submission that the undue harshness test in section 117C(5) had in some way substituted a new and lower test for that which preceded it under the Immigration Rules, as considered in ZP (India). The court rejected this submission before holding as follows:-

> "59. Mr Howells realistically accepts that A would have to show a material change of circumstances between the dismissal of the appeal against the deportation order and the revocation application. As Underhill LJ held in *ZP India*, the starting point must be that the assessment of what was in the public interest at the date on which the deportation order was made cannot be of any less weight at the later stage when revocation is sought. This means that objections to the making of a deportation order which were unsuccessful at the time it was made are unlikely to be successful grounds for obtaining the revocation of a deportation order after removal from the jurisdiction."

26. The Tribunal considers it is bound by IT (Jamaica) to hold that section 117C applies not only to those subject to a deportation order, who have not yet been removed from the United Kingdom, but also to those subject to such an order, who have been removed or otherwise left the country. The Court's finding on that matter was part of its *ratio*.

27. Even if that were not the case, the Tribunal rejects Mr Karim's submission on the scope of section 117C. Section 117A(2)(b) requires a court or tribunal to have regard to section 117C considerations "in cases concerning the deportation of foreign criminals". It is, we consider, evident that the present appeal concerns the deportation of the appellant for the simple reason that he is the subject of a deportation order. If, therefore, he were to return to the United Kingdom of his own accord, without executive or judicial authority, he would be in breach of that order.

28. Accordingly, the references to "deportation" in section 117C fall to be read as covering the deportation regime, whether before or after removal has been effected (or the person concerned has voluntarily departed).

29. Mr Karim also faces the difficulty that, if the position were otherwise, then, as the Court of Appeal pointed out, much of the force of section 117C would be lost. Indeed, the position would be one of absurdity. A person who, a few hours before, was subject to the provisions of section 117C would suddenly be free from them altogether. Underhill LJ's "revolving-door" would be worked off its bearings.

30. We turn to section 117B(6). Mr Karim submits that, whatever might be the position with section 117C, his client "is not liable to deportation" for the simple reason that

he has been deported. Again, however, the submission founders on the fact that "the deportation of foreign criminals" covers everyone who is the subject of a current deportation order.

31. We do not consider that Mr Karim is able to draw any assistance from the fact that the 2002 Act does not define the expression "liable to deportation" by reference to section 3(5) and (6) of the Immigration Act 1971. Section 3(5) provides that a person who is not a British citizen is liable to deportation if the Secretary of State deems deportation to be conducive to the public good; or if another person to whose family the person belongs is or has been ordered to be deported. Section 3(6) provides that a person "shall also be liable to deportation" if, after the age of 17, he is convicted of an offence which is punishable by imprisonment and on his conviction is recommended for deportation by a court. The *in pari materia* rule applies to section 3 of the 1971 Act and Part 5A of the 2002 Act. No express definition or linkage is required for the phrase in the latter to take its meaning from the former.

32. Mr Karim's stance in relation to section 117B(6) likewise falls foul of the "absurdity" principle of statutory construction. This is so, both on its own terms and because if – as the Court of Appeal has held – section 117C applies to a person who is outside the United Kingdom and subject to a deportation order, then there would be a complete contradiction between the application of section 117C to that person and the application to him of section 117B(6).

33. For these reasons, we find that Judge Rodger did not err in law either in relation to her refusal to have regard to section 117B(6) or in relation to her decision to have regard to section 117C.

Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. The appeal is accordingly dismissed.

Signed Dated: 1 March 2018

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber