Upper Tribunal
(Immigration and Asylum Chamber)

Clarke ("Section 117C - limited to deportation") [2015] UKUT 00628 (IAC)

THE IMMIGRATION ACTS

Heard at : Field House **Determination Promulgated**

On : 6 October 2015

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MICHAEL EVANS CLARKE

Respondent

Representation :

For the Appellant: Mr K Norton, Senior Home Office Presenting Officer

For the Respondent: Mr E Anyene, instructed by Calices Solicitors

That section 117C of the Nationality, Immigration and Asylum Act 2002 is applicable only in deportation cases is made clear in section 117A(2) which, in directing the court or tribunal to the considerations involved when looking at the public interest question, clearly distinguishes between those cases that involve deportation from those that do not. Section 117A(2)(b) provides for a distinct category of cases, providing that, in considering the public interest question, the court or tribunal must have regard to the considerations listed in section 117C “in cases concerning the deportation of foreign criminals”.

Accordingly, irrespective of whether or not an appellant may fall within the definition of a “foreign criminal” in section 117D(2), the provisions of section 117C of the 2002 Act only apply in cases involving deportation.

DETERMINATION AND REASONS

1.
This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Clarke’s appeal against the respondent’s decision to remove him from the

United Kingdom under section 10 of the Immigration and Asylum Act 1999, following the refusal of his human rights claim.

2.
For the purposes of this decision, I shall refer to the Secretary of State as the respondent and Mr Clarke as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3.
The appellant is a citizen of Jamaica, born on 10 March 1981. He arrived in the United Kingdom on 20 June 2001 without leave to enter and was given temporary admission and served with a notice to report to an immigration officer which he failed to do. He was listed as an absconder. He did not seek to regularise his stay until 27 October 2004 when he made an application for a residence permit as the spouse of an EEA national whom he had married on 28 July 2004. He was granted a residence permit on 10 August 2005. He was divorced from his EEA national spouse on 27 May 2009. On 9 October 2009 he made an application for a permanent residence card, but that was refused on 26 March 2010. He unsuccessfully appealed against that decision and became appeals rights exhausted on 23 September 2010.

4.
On 25 February 2011 the appellant made an application for leave to remain on form FLR(O) which was refused on 15 October 2012 with no right of appeal. He sought to challenge the decision by way of judicial review and the matter was resolved through a Consent Order in which the Home Office agreed to withdraw the original decision and issue a new decision.

5.
In response to the respondent's enquiries, the appellant submitted a family questionnaire giving details of his family in the United Kingdom, which included his wife, BB, a British citizen, with whom he had lived since 2009 and whom he married on 17 November 2011 and his three British children: his son from a previous relationship with

GB, JMC (born 2005) and his sons from his marriage to BB, LMC (born 2008) and DEC (born 2013).

6.
The appellant's application was refused by the respondent on 25 March 2014 and a decision was made the same day for his removal from the United Kingdom.

Basis for Respondent's Decision

7.
In refusing the appellant's application, the respondent considered and relied upon the suitability requirements of the immigration rules under Section S-LTR and considered that he fell within S-LTR. 1.5 and S-LTR.1.6 by reason of his criminal offending.

"S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good 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.

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."

8.
In so doing, the respondent referred to the appellant's criminal convictions and relied upon a witness statement (MG11) from the Metropolitan Police Service (MPS), provided by an officer working on Operation Nexus, an operation conducted in partnership with the Home Office aimed at tackling high-harm foreign nationals and immigration offenders.

9.
The respondent listed the appellant's criminal convictions, as follows:

•
On 11 March 2007 he was cautioned by the police for common assault against a female who was pregnant at the time.

•
On 2 September 2008 at Wood Green Crown Court he was convicted of two counts of possession of class A drugs (cocaine and heroin) and sentenced to a 12 month Community Order with a supervision requirement.

•
On 21 March 2011 at Portsmouth Crown Court he was convicted of two counts of possession of class A drugs (cocaine and heroin) and sentenced to four months' imprisonment.

10.
The respondent considered that the witness statement (MG11) showed the appellant to be an individual who was funding his lifestyle through dealing class A drugs and who was well-known in the Portsmouth area and noted that the statement listed numerous occasions when the police had been called to deal with the aftermath of domestic abuse the appellant had perpetrated against his partners.

11.
The respondent noted that the appellant had been convicted twice for possession of class A drugs with intent to supply (in fact the convictions were for possessing class A controlled drugs) and considered that he had a propensity to reoffend. Since he fell within S-LTR.1.5 and S-LTR.1.6 the respondent considered that the appellant could not be awarded leave on the basis of his relationships with his wife and children or on the basis of his private life in the United Kingdom. The respondent went on to consider whether there were any exceptional circumstances justifying a grant of leave outside the immigration rules and took account of the best interests of the appellant's children, but concluded that their best interests lay in remaining with their mother in the United Kingdom and that the appellant's removal would not breach Article 8 of the ECHR.

Appellant's Grounds of Appeal before the First-tier Tribunal

12.
The appellant appealed against that decision. In his grounds of appeal he stated, in regard to his criminal convictions that he was in possession of drugs because he was addicted to them and not because he had any intention of supplying them. He claimed to be reformed and to be no longer taking drugs.

13.
The appellant asserted that he was in a genuine and subsisting relationship with his wife, a British citizen. He stated that he shared the responsibility for the upbringing of their two children. He also

shared the responsibility of his eldest child with that child's mother. He stated that he had a close bond with his children and that his removal would be disproportionate as it would break up the family unit and separate him from his children. He claimed also to have established a private life in the United Kingdom, having resided here for 13 years.

Appeal in the First-tier Tribunal

14.
The appellant's appeal was heard in the First-tier Tribunal on 30 September 2014 by First-tier Tribunal Judge Pullig.

15.
At [17] to [24], Judge Pullig recorded the documentary evidence before him.

16.
For the respondent, the evidence included: a Police National Computer Printout (PNC) dated 6 November 2013 listing the appellant's convictions as at that date; a further updated PNC dated 29 September 2014; the witness statement MG11 together with supporting evidence and details of the police investigations into the appellant's activities; and the appellant's completed family questionnaire including evidence about his relationship with his children.

17.
For the appellant, the evidence included: witness statements from the appellant, his wife, his former partner, his mother-in-law; evidence of cohabitation with his wife; evidence relating to the appellant's children; photographs of the appellant with his children; various certificates of awards; probation reports; letters of support; and evidence of the appellant's involvement in drug rehabilitation programmes.

18.
Judge Pullig noted that the appellant had recently been convicted of a further offence, the supply of a controlled drug class A crack cocaine, for which he was sentenced on 14 August 2014 to a two year prison sentence suspended for two years with twelve months' supervision order and a victim surcharge of £120.

19.
The author of the witness statement (MG11), an officer with the Metropolitan Police Nexus team, gave evidence at the hearing and Judge Pullig recorded his evidence. He recorded the evidence in the witness statement, which set out details of further incidents in which the appellant was involved but which did not result in conviction, including matters relating to drugs, allegations of assault involving BB and other allegations or suspicions of wrongdoing. With regard to the allegations of assault it was noted that there were three incidents involving BB, but on each occasion no further action was taken. The other areas of concern were mainly domestic incidents involving the appellant's ex-wife, his wife and the mother of his other child, but where no allegations were pursued against the appellant and where no action was taken. Judge Pullig also referred to the list, in the officer's statement (MG11), of the appellant's associates, each of whom had numerous convictions for drugs offences. With regard to the officer's oral evidence, the judge recorded that he believed that most of the domestic incidents involved no further action because the appellant was controlling his partners who were unwilling to pursue prosecution. The officer could not understand why the appellant's sentence for the last conviction, on 14 August 2014, was so lenient and he considered that the appellant was an active drug dealer.

20.
The appellant himself gave evidence before the judge about his relationship with his children and his past drug addiction, claiming to be currently totally abstinent. His wife gave oral evidence, as did GB.

21.
Judge Pullig viewed BB's claim, that the appellant had never been violent towards her, with considerable scepticism, but he accepted that they were married and that there was a relationship between them, albeit one not without its problems. He accepted the police officer's conclusions about the appellant being a drug dealer and did not accept the appellant's claim that he had no intent to supply. The judge, however, considered that the evidence pointed to the appellant having a positive relationship with each of his three children and found that he played a really significant role in LMC's upbringing in particular. He found that the children's interests, and particularly those of LMC, were best served by the appellant's continued presence in the United Kingdom.

22.
Having made those findings, the judge went on to consider Article 8. He found that the appellant could not succeed under the immigration rules because he failed to meet the suitability requirements. He found that the appellant failed under S-LTR.1.5 and S-LTR.1.6: as regards S-LTR.1.5 on the basis that it was the Secretary of State's view that his offending caused serious harm and that it was debateable whether he could be considered as a persistent offender; and as regards S-LTR.1.6 on the basis of his character, associations and conduct.

23.
The judge then went on to consider Article 8 in its wider context outside the rules. In so doing, he took account of the public interest considerations in section 117 of the Nationality, Immigration and Asylum Act 2002, which had come into effect since the respondent's decision but which, in accordance with the guidance in YM (Uganda) v Secretary of State for the Home Department [2014] EWCA Civ 1292, nevertheless applied in the appeal before him and which he was bound to consider. With respect to section 117B(6)(a) he accepted that each of the appellant's children was a "qualifying child" and that the appellant had a genuine and subsisting relationship with each child. He found that it would be unjustifiably harsh for the children to go to Jamaica and that it would not be reasonable to expect any one of the children to leave the United Kingdom. He noted that, in accordance with section 117B(6), the public interest did not, therefore, require the appellant's removal. He then went on to consider proportionality and addressed each of the factors in section 117B. He considered the appellant's criminal offending and the evidence in that regard.

24.
The judge then concluded that " it is therefore with considerable reluctance that I find the strength of the factors weighing in favour of his removal are outweighed by the appellant's relationship with his children, in particular [LMC], taking account of their best interests and the provisions of Section 117B(6) ." Accordingly he allowed the appeal under Article 8.

The Secretary of State's appeal

25.
The respondent sought permission to appeal Judge Pullig's decision on the grounds that he had failed to consider that the appellant was a persistent offender and thus a foreign criminal, in accordance with section 117D of the 2002 Act, and that section 117C therefore applied. No challenge was made to the judge's decision on any other basis.

26.
Permission was granted on 7 July 2015.

Appeal in the Upper Tribunal

27.
At the hearing before me I put it to Mr Norton that my understanding of section 117C was that it applied only in deportation cases, whereas this was a removal case. Mr Norton agreed that he was in some difficulty with the wording of section 117C. His submission was, however, that it was implicit within section 117C that it could apply in circumstances such as those of the appellant, although he agreed that there was no authority to that effect.

28.
Mr Anyene submitted that section 117C did not apply and that the judge's determination should stand.

Legislative framework

29.
Part 5A of the Nationality, Immigration and Asylum Act 2002, as inserted by s19 of the Immigration Act 2014, states 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.

117D Interpretation of this Part

(1) In this Part—"Article 8" means Article 8 of the European Convention on Human Rights;

"qualifying child" means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more; "qualifying partner" means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(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.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

(4) 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 consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a 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.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

Consideration and findings .

30.
It is of particular note that the respondent does not seek to challenge the judge's findings under section 117B(6): there is no challenge to the finding that the appellant has a genuine and subsisting parental relationship with his children and neither is there any challenge to the finding that it would not be reasonable to expect the children to leave the United Kingdom. There has never been any suggestion by the respondent, either in the grounds seeking permission or by Mr Norton before me, that Judge Pullig erred in his understanding or application of section 117B(6).

31.
The sole challenge made by the respondent to Judge Pullig's decision is that he did not go on to apply the provisions of section 117C of the 2002 Act, on the basis that the appellant was a foreign criminal.

32.
The first point to be made in that respect is that that was not an argument pursued by the respondent at the hearing before Judge Pullig. It is clear from the judge's summary of the submissions at [112] to [118] and from his detailed record of proceedings that the respondent relied only upon the provisions in section 117B and made no reference to section 117C at the hearing. It is therefore somewhat disingenuous for the Secretary of State to now criticise the judge for having failed to consider the respondent's case on a different basis to that upon which it was presented before him.

33.
It is nevertheless now the respondent's case that the judge, having found at [160] that paragraph S-LTR.1.5 of the immigration rules applied to the appellant, ought to have made findings on (a) whether or not the appellant was a persistent offender and (b) whether he was therefore a foreign criminal as defined in section 117D(2) of the 2002 Act and that, if he was, he ought to have then gone on (c) to consider s117C. The rationale behind this is, no doubt, that the relevant test under section 117C, when considering the weight to be attached to the appellant's relationship with his children, would not be that within the more generous section 117B(6)(b) " it would not be reasonable to expect the child to leave the United Kingdom ", as applied by Judge Pullig, but rather the " unduly harsh test " within section 117C(5) which did not necessarily require that the child leave the United Kingdom and was thus a more stringent test, as considered in the recent case of KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 00543 . That was indeed a distinction noted and relied upon by Judge Pullig at [168].

34.
However (a) and (b) are only of relevance if section 117C applies, since if it does not, nothing material arises, in this case, from a finding that the appellant falls within the definition at section 117D(2) of a "foreign criminal".

35.
I turn, therefore, to the respondent's assertion in the grounds that if the appellant is a "foreign criminal" as defined in section 117D(2), then section 117C applies. As I pointed out to Mr Norton, I

have difficulty following such a proposition, given the wording of section 117 and considering that the appellant is not the subject of deportation proceedings.

36.
It is indeed the case that the heading for section 117C, “Article 8: additional considerations in cases involving foreign criminals”, suggests that the ensuing considerations apply in all cases involving “foreign criminals”, as defined in section 117D(2), and to that extent there is arguably some force in the respondent’s assertion. However it seems to me that the actual provisions within the body of section 117C do not, in fact, permit of such an interpretation, given that they specifically refer to deportation, commencing at section 117C(1) with the statement that “ The deportation of foreign criminals is in the public interest ” and continuing in sections 117C(2) to (7) thereafter.

37.
That section 117C is applicable only in deportation cases is made clear in section 117A(2) which, in directing the court or tribunal to the considerations involved when looking at the public interest question, clearly distinguishes between those cases that involve deportation from those that do not. Section 117A(2)(b) provides for a distinct category of cases, providing that, in considering the public interest question, the court or tribunal must have regard to the considerations listed in section 117C “ in cases concerning the deportation of foreign criminals ”.

38.
Accordingly, irrespective of whether or not an appellant may fall within the definition of a “foreign criminal” in section 117D(2), the provisions of section 117C of the 2002 Act only apply in cases involving deportation.

39.
In the case of the appellant, he is not subject to deportation proceedings and is to be removed under section 10 of the Immigration and Asylum Act 1999. He does not, given the length and nature of his current and past sentences [1] , fall within the definition of “foreign criminal” under section 32(1) of the UK Borders Act 2007 (as opposed to the definition in section 117D(2) of the 2002 Act), and could not therefore be subject to automatic deportation. Nevertheless it was always open to the respondent to make a decision to deport him on conducive grounds under section 3(5) of the Immigration Act 1971. Indeed it is relevant to note that the police officer, in his witness statement (MG11), concluded with a submission that the appellant’s presence in the United Kingdom was not conducive to the public good. However, for whatever reason she had, the respondent chose not to exercise her powers to make a decision on that basis and chose instead to issue a removal decision under section 10.

40.
It is relevant to mention at this point that, whilst Mr Norton’s submission was that it was implicit within section 117C that it could apply in circumstances such as those of the appellant, it has never been suggested that the definition of “deportation” includes administrative removal. That the two terms and their effect are entirely distinct is made clear in the provisions of Part 13 of the immigration rules, in particular paragraph 363A, which states that

“363A. Prior to 2 October 2000, a person would have been liable to deportation in certain circumstances in which he is now liable to administrative removal. However, such a person remains liable to deportation, rather than administrative removal where: (02.10.2000 Cm 4851)

(i) a decision to make a deportation order against him was taken before 2 October 2000; or (02.10.2000 Cm 4851)

(ii) the person has made a valid application under the Immigration (Regularisation Period for Overstayers) Regulations 2000. (02.10.2000 Cm 4851)”

41.
Accordingly, as a result of the respondent’s decision not to pursue deportation proceedings, section 117C could not and cannot apply to the appellant. It was on that basis that Judge Pullig, taking account at [167] of section 117A(2), properly conducted his assessment of the public interest by reference only to section 117B and, in so doing, clearly recognised the limitations imposed therein, as seen at [168], [175] and [176] when considering the weight to be attached to the public interest and the interests of the appellant’s children. It is very likely, considering the judge’s findings and in particular those at [175] and [176], and considering the reluctance he expressed in allowing the appeal, that had this been a deportation case, the outcome of the appeal would have been different. It is also very likely that without the provisions in section 117B(6), the outcome would have been different.

42.
However the judge was only able to determine the appeal on the basis of the decision made by the Secretary of State and in accordance with the statutory provisions approved by Parliament. Accordingly he determined the appeal on the only basis that he could and the challenge made by the respondent to his decision in that respect is therefore simply unarguable. Furthermore, on the basis upon which the challenge was put by the respondent, the fact that the judge made no specific finding as to whether the appellant was a foreign criminal as defined in section 117D(2) is immaterial.

43.
Mr Norton accepted before me that the challenge was only put on the narrow and limited basis of the applicability of section 117C. Accordingly that has to be the end of the matter. Judge Pullig, having properly considered the limited basis upon which he was able to determine the appeal, reached a decision that he considered to be inevitable, but was in any event entirely open to him on the evidence before him. In the absence of any challenge to his assessment under section 117B, the respondent’s case, as put in the grounds and before me by Mr Norton, has no merit.

44.
The only question for me to determine is whether or not Judge Pullig made any errors of law in his decision. It is not for me to consider the merits of the case. For the reasons given above, and in particular considering that the judge was only able to determine the appeal on the basis of the decision made by the Secretary of State and in accordance with the statutory provisions approved by Parliament, I find that the respondent has failed to establish that Judge Pullig erred in law in allowing the appeal on the basis that he did.

DECISION

45.
The making of the decision of the First-tier Tribunal did not involve an error on a point of law. I do not set aside the decision. The Secretary of State’s appeal is dismissed and the decision of the First-tier Tribunal to allow the appellant’s appeal stands.

Signed

Upper Tribunal Judge Kebede

[1] In accordance with Section 38(1) of the UK Borders Act 2007, a person who is sentenced to a period of imprisonment of at least 12 months does not include a reference to a person who receives a suspended sentence .