Upper Tribunal
(Immigration and Asylum Chamber)

Rexha (S.117C – earlier offences) [2016] UKUT 00335 (IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 May 2016	.....

Before

THE HONOURABLE MR JUSTICE DOVE

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ERJON REXHA

(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation :

For the Appellant: Mr S Walker, Home Office Presenting Officer

For the Respondent: Mr P Nathan, Counsel, instructed by J McCarthy Solicitors

The purpose and intention of Parliament in incorporating section 117C of the Nationality, Immigration and Asylum Act 2002 was to ensure that all of the criminal convictions providing a reason for the deportation decision are to be examined within the framework provided by that section.

What is required when undertaking the exercise required by sections 117C(1) to (6) is careful scrutiny of those offences which are on a person's criminal record which have provided a reason for the decision to deport.

The IDIs do not fully reflect section 117C(7) in that it is not necessarily the case that, once a foreign criminal has been convicted and sentenced to more than four years' imprisonment, he will never be eligible to be considered under the Exceptions.

DECISION AND REASONS

The Facts

1. For the purposes of this determination we propose to use the nomenclature of the parties as they were before the First-tier Tribunal: Mr Rexha is referred to as the appellant and the Secretary of State for the Home Department the respondent. The appellant is a national of Albania who was born on 22 January 1979. He arrived in the United Kingdom on 26 May 1996 and claimed asylum following which, whilst his application was refused, he was granted exceptional leave to remain until 21 September 1997. Thereafter he was granted further limited leave to remain until 25 February 2002.

2. On 11 January 2002 the appellant was convicted at Harrow Crown Court of possession with intent to supply of 188 Kg of cannabis. He was sentenced to four years' imprisonment. A notice of decision to make a deportation order was served on the appellant on 23 May 2003 and he appealed against that decision. The Adjudicator who heard his appeal, Mr Bailey, allowed his appeal in a determination promulgated on 22 November 2004. He summarised his conclusions as follows:

"Having viewed the appellant's case a whole and having taken into account the factors as set out in paragraph 364 in my judgement I consider that the appellant has provided a credible basis for me to find that the Secretary of State has misused his discretionary powers in issuing a deportation order. Whilst I acknowledge that offence was a serious one there are the other factors that need to be put into the balance. Mr Evans in the bundle of case law he referred me to argued that those cases established the principle that the fact that the appellant was unlikely to reoffend was not in itself to counter balance the seriousness of an office which may be sufficient in itself to merit deportation. The cases in issue did involve offences for which the appellants had been convicted for longer period than the appellant. In my judgement the offence is not so weighty in itself as to nullify with other factors appertaining to the appellant's case. The appellant has shown contrition and there is every reason to conclude as evidenced by the appellant's behaviour since his release from prison that reoffending is unlikely. Indeed with such a lapse of time since he was discharged it is reasonable to conclude that the appellant cannot be regarded as an ongoing risk to the public. The appellant's case has to be put in the context of his family circumstances which I have referred to above in particular the position vis-à-vis his two children. My own conclusions are that the appellant's appeal should succeed and that a deportation under paragraph 364 of the Immigration Rules was not justified in all the circumstances of the appellant's case. In those circumstances it is unnecessary for me to consider the appellant's claim under Article 8 of the Human Rights Act 1998."

3. There was an appeal against Mr Bailey's decision which was dismissed on 20 March 2006. Thereafter he was granted discretionary leave to remain in the United Kingdom until 8 March 2008. On 25 February 2008 he applied for indefinite leave to remain in the United Kingdom on the basis that he had been here for ten years. That application was refused and he subsequently successfully appealed the refusal, the appeal being allowed on 3 July 2008. He was then granted discretionary leave to remain until 31 July 2011.

4. On 13 July 201 0 the appellant was convicted at the West London Magistrates' Court of possession of a Class A controlled drug, namely cocaine, and he was given a conditional discharge of eighteen months together with a requirement to pay costs in the sum of £85.

5. In 2011 the Italian authorities sought to extradite the appellant on the basis that he had committed an offence in Italy in 2002 and been sentenced in his absence to ten years' imprisonment. Eventually he was handed over to the Italian authorities on 23 November 2012.

6. On 26 February 2013 the Italian court quashed his conviction and granted him the right to reopen his case. He was then released from detention in Italy and those criminal proceedings remain outstanding. Following his release from detention he applied for entry clearance to return to the UK but that application was refused. His judicial review in relation to that application was also refused. Ultimately he entered the United Kingdom illegally on 2 June 2013 and made an application for discretionary leave to remain on 7 June 2013. No decision was reached on that application prior to the respondent being provided with a decision giving notice of a decision to make a deportation order against him on 15 January 2015. In response to that decision further representations were made to the respondent. Ultimately on 6 March 2015 the respondent rejected the appellant's human rights claim and decided that the appellant should be deported from the United Kingdom .

7. The decision of 6 March 2015 covered a number of grounds. In particular paragraphs 18 to 23 addressed the appellant's criminal history. It noted what has been set out above in relation to facts surrounding his convictions in 2002 and 2010. The decision then observed as follows:

“23. Although, this conviction did not lead to a further custodial sentence, it is considered that you have demonstrated a clear disregard for the laws of the UK and despite being fully aware that your criminality in the UK would leave you liable for deportation, you have continued to offend. In light of all of the above, it is considered that the seriousness of your criminality is enough to warrant your deportation from the UK .”

8. The appellant appealed to the First-tier Tribunal and the appeal was heard by Judge of the First-tier Tribunal Bird on 1 September 2015. She allowed the appeal. An issue arose in the context of the appeal as to whether or not the respondent was entitled to rely upon the appellant's conviction in 2002. It is the judge’s resolution of this issue, which had consequential impact upon her approach to the application of the Immigration Rules which is the principle basis of this appeal. She explained her conclusions as follows:

“31. The Secretary of State relies on sub-section (6) [of Section 117C] in stating that the appellant has failed to show that there are very compelling circumstances to prevent any such deportation and relies on the appellant's conviction in 2003. The Secretary of State also relies on the pending trial in Italy . The most recent offence which gave rise to this decision is mentioned at paragraph 22 of the Reasons for Refusal Letter for which the appellant was given a conditional discharge of eighteen months. The appellant has not committed any offences since then.

32. It is my view that the application of sub-Section 6 in these circumstances is misconceived and not in accordance with the spirit of Section 117C. The last offence for which the appellant was convicted was in 2010 and he was given a conditional discharge. He was not sentenced on that occasion to a period of imprisonment of at least four years (Section 117C(6)). Of relevance is Section 117C(7) which states:

‘The considerations in sub-sections (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.’

33. I find that what gives rise to the decision to make a deportation order on conducive grounds is the offence which was committed in 2010 for which the appellant received a conditional discharge. This sub-section is phrased in the present tense ‘for which the appellant has been convicted’ [emphasis mine] not was convicted in the past – if that had been the intention of Parliament it wou ld have been

included in the subsection. Of course this does not detract from considering deportation to be in the public interest where the appellant is a persistent offender (Section 117D(2)(c)(iii))).”

9. On this basis, therefore, the judge proceeded to engage with the merits of the appeal reliant on the most recent 2010 conviction and not applying Section 117C (6) as set out below and considering whether there were “very compelling circumstances” over and above the exceptions provided within the Section so as to justify the conclusion that deportation was not required. In her construction of Section 117C it is contended on behalf of the respondent that the judge fell into error and therefore that the decision cannot stand.

The Law

10. The decision reached by the respondent to refuse the appellant's human rights claim gave rise to his right of appeal to the Tribunal under Section 82 of the Nationality, Immigration and Asylum Act 2002. The Immigration Act 2014 incorporated changes within part VA of the 2002 Act in relation to Article 8 of the ECHR and the consideration of the public interest. In particular, in relation to this case Section 117C incorporated a section specifically addressing additional considerations required to be taken into account in respect of cases involving foreign criminals. Section 117C provides as follows:

“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 sub-sections (1), (2), (6) are to be taken into account where a court or Tribunal is considering a decision to deport a foreign criminal was only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.”

11. A “foreign criminal” is defined for the purposes of this Part of the Act in Section 117D(2) as follows:

“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.”

12. Neither party were able to draw to our attention any authority bearing upon the proper construction of in particular Section 117C(6) and (7). Since the conclusion of the hearing the case of Johnson (deportation-4 years imprisonment) [2016] UKUT 00282 has been reported and we note, that although principally concerned with the Immigration Rules, and in particular paragraph 398 of the Rules, the conclusions reached are consonant with the conclusions set out below.

13. Mr Phillip Nathan, who appeared on behalf of the appellant, placed reliance upon the principles set out by Stanley Burnton LJ in the case of Secretary of State for the Home Department v TB (Jamaica) [2008] EWCA Civ 977 . In that case the issue which arose was the status of an earlier decision of an Immigration Judge in a person's case when considering a subsequent application. Mr Nathan relied upon this authority in relation to submissions he made in respect of the status of the earlier determination of the Adjudicator in 2004 set out below. The relevant paragraphs of Stanley Burnton LJ’s judgment (which were adopted and applied by this Tribunal in the case of Chomanga (Binding effect of unappealed decisions) Zimbabwe [2011] UKUT 00312 (IAC)) were as follows:

“32. As a matter of principle, it cannot be right for the Home Secretary to be able to circumvent the decision of the IAT by administrative decision. If she could do so, the statutory appeal system would be undermined; indeed, in a case such as the present, the decision of the Immigration Judge on the application of the Refugee Convention would be made irrelevant. That would be inconsistent with the statutory scheme.

33. The principle that the decision of the Tribunal is binding on the parties, and in particular on the Home Secretary, has been consistently upheld by the Courts. In R (Mersin) v Home Secretary [2000] EWHC Admin 348, Elias J said:

“In my opinion there is a clear duty on the Secretary of State to give effect to the Special Adjudicator's decision. Even if he can refuse to do so in the event of changed circumstances or because there is another country to which the applicant can be sent, there is still a duty unless and until that situation arises. It would wholly undermine the rule of law if he could simply ignore the ruling of the Special Adjudicator without appealing it, and indeed Mr. Catchpole [counsel for the Home Secretary] does not suggest that he can. Nor in my opinion could he deliberately delay giving effect to the ruling in the hope that something might turn up to justify not implementing it. In my judgment, once the adjudicator had determined the application in the applicant's favour, the applicant had a right to be granted refugee status, at least unless and until there was a change in the position.”

34. In R (Boafo) v Home Secretary [2002] EWCA Civ , [2002] 1 WLR 44, Auld LJ said at [26] in a judgment with which the other members of the Court of Appeal agreed, ‘… an unappealed decision of

an adjudicator is binding on the parties.' In R (Saribal) v Home Secretary [2002] EWHC 1542 (Admin), [2002] INLR 596, Moses J said:

"17. The decision in ex parte Boafo demonstrates an important principle at the heart of these proceedings. The Secretary of State is not entitled to disregard the determination of the IAT and refuse a claimant's right to indefinite leave to remain as a refugee unless he can set aside that determination by appropriate procedure founded on appropriate evidence."

35. Of course, different considerations may apply where there is relevant fresh evidence that was not available at the date of the hearing, or a change in the law, and the principle has no application where there is a change in circumstances or there are new events after the date of the decision: see Auld LJ in Boafo at [28]. But this is not such a case."

Conclusions

14. In our judgment the expression "has been convicted" in the context of Section 117C(6) and (7) does not limit the application of that Section to solely the conviction immediately prior to and prompting the making of a decision to deport. Whilst it may be said that the phrase is expressed in the present perfect tense, we can see little sense when examining the public interest identified in Section 117C(1) and (2) to limiting the application of these provisions designed to protect the public interest to solely the most recent episode of criminal behaviour by a foreign criminal. We are satisfied that the purpose and intention of Parliament in incorporating this section providing for additional considerations and specific treatment of foreign criminals was to ensure that all of the criminal convictions providing a reason for the deportation decision were to be examined within the framework provided by Section 117C.

15. We see no reason for construing Section 117C(7) as limiting the considerations relevant to sub-Sections (1) to (6) to solely the most recent offence or offences for which the person has been convicted. Firstly, that is not what the Section expressly says. It does not say in Section 117C(7) that only the offence or offences immediately prior to the deportation decision are the be taken into account. Secondly, the use of the phrase "only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted" expressly requires an examination of the decision to identify which parts of the criminal's antecedent history provide the basis for the decision. It will be a matter for the respondent to decide in each case which parts of a candidate for deportation 's criminal past is to be relied upon in support of the making of a deportation order. It may well be that in the vast majority of cases the totality of the criminal offending will provide the reason for the decision. Equally, there may be cases where some of the person's criminal past could not properly be relied upon. This could occur, for instance, because of their youth at the time of the offending or because of the passage of a significant period of time, or because the offending was rooted in beliefs or circumstances now quite irrelevant to the justification for a deportation order being made. Thus, in our view what is required is careful scrutiny pursuant to Section 117C(7) of those offences which are on the person's criminal record which have provided a reason for the decision to deport. All of those convictions are then relevant to undertaking the exercise required by Section 117C(1) to (6).

16. Applying that construction to the present case gives rise to the following consequences. Firstly , we are satisfied that the judge's construction of Section 117C in paragraph s 32 and 33 of her determination were in error and the determination cannot stand. Secondly, when the decision of 6 March 2015 is scrutinised and in particular paragraph 23, it is clear that those offences which formed a reason for the decision to deport included both the 2002 and the 2010 conviction. Thus the

respondent was entitled to rely upon Section 117C(6) as the foreign criminal in this case had been sentenced to a period of four years in relation to an offence which formed a reason for the decision. As set out above, the judge did not consider, because of her approach to Section 117C, whether there were any “very compelling circumstances over and above those described in Exceptions 1 and 2” in the appellant's case.

17. Mr Nathan submitted that the decision could nonetheless be effectively upheld on the basis that not only was there a misunderstanding in the decision reached that Mr Bailey had based his decision on Article 8 (which he had not) but also that as a consequence of the findings in paragraph 8.4 of his determination set out above, the respondent was not entitled to rely upon the 2002 conviction as Mr Bailey had found that it was not properly a justification as it did not properly found a conclusion that the deportation of the appellant in this case was not conducive to the public good. As a result of the decision in TB (Jamaica) the respondent was fixed with the conclusion of Mr Bailey that that offence did not justify deportation and it was not therefore open for the respondent to rely upon that conviction in paragraph 23 of the decision of 6 March 2015.

18. We are unable to accept that submission. It appears clear to us that the exceptions identified in paragraph 35 of TB (Jamaica) applied in this case. Not only have the factual circumstances of the appellant's case moved on considerably since the point in time when that determination was reached in excess of ten years prior to this decision, but also there had been a change in the law through the introduction of the provisions in the Immigration Act 2014 which are at the heart of this appeal. Whilst in our view it was necessary for the respondent to give consideration to which of the offences within the appellant's criminal past were relied upon as reasons for the decision to deport him, the respondent was not, in the circumstances, precluded by Mr Bailey’s findings from relying upon the 2002 conviction as part of the overall appraisal of the appropriateness of deportation in his case.

19. We note that in the respondent's grounds reliance is placed upon the respondent's Immigration Directorate Instructions – Chapter 13: Criminality Guidance in Article 8 ECHR cases. It is of course obvious to observe firstly, that these Instructions were not placed before the judge and therefore it could not sensibly be regarded as a criticism of her that she did not take them into account. Secondly, they cannot be determinative of the correct construction of Section 117C. They provide as follows:

“2.2.2 Once a foreign criminal has been sentenced to a period of at least four years' imprisonment, he will never be eligible to be considered under the exceptions. This applies even if deportation was not pursued at the time of the four years' sentence because there were very compelling circumstances such that deportation would have been disproportionate, and the foreign criminal goes on to reoffend and is sentenced to a period of imprisonment of less than four years. This is because his deportation will continue to be conducive to the pubic good and in the public interest for the four year sentence as well as any subsequent sentences.”

20. The contents of the IDI have had no bearing on the construction of Section 117C that we have arrived at above. We note that broadly speaking it reflects our interpretation of the meaning of that section to some extent. It is not, however, entirely consistent with the interpretation since, for the reasons we have set out above, it is not necessarily the case that once a foreign criminal has been convicted and sentenced to more than four years’ imprisonment that he will never be eligible to be considered under the Exceptions. The Secretary of State in reaching her decision on deportation may conclude that that conviction and sentence should not properly form a reason for the decision to deport (for instance, for the reasons which we set out above). In the light of the provisions of Section

117C (7) that conviction would then not form part of the exercise required by Section 117C (1) to (6). Since the IDI was drawn to our attention we felt it appropriate to make this observation.

Disposal

21. Mr Nathan submitted with some force that there were sufficient factual findings in the judge's determination to justify the conclusion that in any event very compelling circumstances were demonstrated in the appellant's case and that the Tribunal could uphold the Immigration Judge's decision notwithstanding any error that might be found as to the interpretation of Section 117C.

22. We recognise the strength of the points which he makes in relation to the uncertainties that remitting the matter would involve not simply for the appellant but more particularly for his family. Those are issues which are clearly of concern. Nonetheless, and not without some hesitation, we have concluded that it is not possible some time after the judge's decision was reached and in circumstances where she made no direct findings in respect of whether very compelling circumstances have been demonstrated to reach our own conclusions on those points. We are satisfied that the appropriate form of disposal is for this matter to be remitted to the First-tier Tribunal for the decision to be re - made by a Judge of the First-tier Tribunal other than First-tier Tribunal Judge Bird.

Decision

23. The appeal is allowed and the decision of Judge of the First-tier Tribunal Bird dated 16 September 2015 is quashed.

24. This matter is to be remitted to the First-tier Tribunal for it to re-make the decision pursuant to Section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, by a Judge of the First-Tier-Tribunal other than First-tier Tribunal Judge Bird.

25. No anonymity direction is made.

Signed Date: 4 July 2016

Mr Justice Dove

TO THE RESPONDENT

FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date: 4 July 2016

Mr Justice Dove