Upper Tribunal
(Immigration and Asylum Chamber)

MZ (Hospital order: whether a 'foreign criminal') Pakistan [2020] UKUT 00225(IAC)

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 11 March 2020	.....

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MZ

(ANONYMITY DIRECTION MADE)

Respondent

Representation :

For the Appellant: Mrs Pettersen, Senior Home Office Presenting Officer

For the Respondent: Ms Khan, instructed by Batley Law

An individual sentenced to a hospital order following a finding under section 5 (1) (b) of the Criminal Procedure (Insanity) Act 1964 that he 'is under a disability and that he did the act or made the omission charged against him' is neither subject to section 117C of the 2002 Act (as amended) nor to paragraphs A398-399 of the Immigration Rules. He is excluded from the statutory provisions by section 117D(3)(a) and from the Immigration Rules concerning deportation.

[Note: The difference between OLO and Andell to which the judge refers at paras [10] to [13] is now resolved in SC (paras A398-339D: 'foreign criminal': procedure) Albania [2020] UKUT 187 (IAC).]

DECISION AND REASONS

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 was born on 12 October 1996 and is a male citizen of Pakistan. He entered the United Kingdom on 4 December 2007. On 30 September 2015, a jury at Sheffield Crown Court found that the appellant had caused injury to his cousin by use

of a knife. The appellant was made subject to a hospital order pursuant to section 37/41 of the Mental Health Act 1983 without restriction of time. On 9 November 2018, he was served with a deportation decision and, on 30 November 2018, he submitted a human rights claim. That claim was refused by the Secretary of State by a decision dated 9 January 2019. The appellant appealed to the First-tier Tribunal which, in a decision promulgated on 10 October 2019, allowed the appeal on human rights grounds (Article 8 ECHR). The Secretary of State now appeals, with permission, to the Upper Tribunal.

2.
Before the First-tier Tribunal, the respondent argued that the appellant was subject to the provisions of section 117C of the 2002 Act (as amended):

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

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) …

(b) …

(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) …

3.
There are two grounds of appeal. First, the Secretary of State submits that the judge erred in law by concluding (see First-tier Tribunal decision at [31]) that the appellant was not to be regarded as a foreign criminal for the purposes of section 117 of the 2002 Act (as amended) because he had not been convicted of an offence. The second ground raises a similar challenge in respect of the Immigration Rules. The judge considered that she was not bound by the judgement of the Court of Appeal in KE (Nigeria) [2017] EWCA Civ 1382. She held KE only applied to an individual who had been convicted of an offence and not (as in the case of the appellant is this appeal) a person who had been found unfit to plead.

4.
In KE, the Court of Appeal at [69] held:

The words of section 117(4)(d), on their plain and ordinary meaning, clearly and unambiguously include offenders who have been sentenced to a hospital order. They expressly include a person who is ordered or directed to be detained for an indeterminate period. As I have described (see paragraphs 3 and following above), a hospital order is an order for the detention of an offender in a hospital. Hospital orders are necessarily for an indeterminate period, until a clinician considers release appropriate. In the Respondent's case, the hospital order was supported by a restriction order requiring his detention for an indeterminate time, until the Secretary of State consented to his release or the First-tier Tribunal ordered it. Even if the offender is conditionally released, as the Respondent has been, he is liable to recall: both orders run until (and authorise the offender's detention until) his absolute discharge.

5.
It is important in the present context to have regard to the facts of KE . These are summarised at [38-39]. Unlike the appellant in the instant appeal, KE had been convicted of offences:

Between September 1999 and November 2003, the Respondent was convicted of five offences of burglary, using threatening words or behaviour, and indecent assault. As a result of those, he was first sentenced to detention in a young offender institution, when aged about 19; and, on his release, his step-mother had lost her accommodation and moved into a hostel. He has not lived with her since.

On 23 January 2004, the Respondent was convicted of two counts of affray, both of which occurred on 19 August 2003 whilst he was on bail for the indecent assault. He took a machete, which, first, he waved at men in the hostel in which he was living; and then he went outside with the weapon where he waved it at two women who were understandably terrified. On 23 April 2004, on each count concurrently, he was sentenced to a hospital order and a restriction order without limit of time. We do not have a full transcript of the judge's sentencing remarks – which, with any available pre-sentence reports, are always likely to be helpful to a court or tribunal considering a challenge to a decision to impose or not revoke a deportation order on grounds of disproportionality – but, from the documents that we do have, it is clear that, at the time of the affray offences, the Respondent suffered from a mental disorder and that disorder caused him to act with the knife as he did. That was the conclusion of the Upper Tribunal (see paragraph 46 of their determination, quoted at paragraph 57 below), with which I agree.

6.
In the instant appeal, the First-tier Tribunal was required to determine whether the appellant falls under the provisions of section 117C. He falls within those provisions if he is a person convicted of an offence. Section 117D(3)(a) provides that a person subject to an order under section 5 of the Criminal Procedure (Insanity) Act 1964 has not been convicted of an offence. The appellant argued that his detention in hospital was subject to the provisions of sections 4A and 5 of the 1964 Act:

4A Finding that the accused did the act or made the omission charged against him.

(1) This section applies where in accordance with section 4 (5) above it is determined by a judge that the accused is under a disability.

(2) The trial shall not proceed or further proceed but it shall be determined by a jury—

(a) on the evidence (if any) already given in the trial; and

(b) on such evidence as may be adduced or further adduced by the prosecution, or adduced by a person appointed by the court under this section to put the case for the defence, whether they are satisfied, as respects the count or each of the counts on which the accused was to be or was being tried, that he did the act or made the omission charged against him as the offence.

(3) If as respects that count or any of those counts the jury are satisfied as mentioned in subsection (2) above, they shall make a finding that the accused did the act or made the omission charged against him.

(4) If as respects that count or any of those counts the jury are not so satisfied, they shall return a verdict of acquittal as if on the count in question the trial had proceeded to a conclusion.

(5) Where the question of disability was determined after arraignment of the accused, the determination under subsection (2) is to be made by the jury by whom he was being tried.

5. Powers to deal with persons not guilty by reason of insanity or unfit to plead etc.

(1) This section applies where—

(a) a special verdict is returned that the accused is not guilty by reason of insanity; or

(b) findings have been made that the accused is under a disability and that he did the act or made the omission charged against him.

(2) The court shall make in respect of the accused—

(a) a hospital order (with or without a restriction order);

(b) a supervision order; or

(c) an order for his absolute discharge.

(3) Where—

(a) the offence to which the special verdict or the findings relate is an offence the sentence for which is fixed by law, and

(b) the court have power to make a hospital order, the court shall make a hospital order with a restriction order (whether or not they would have power to make a restriction order apart from this subsection).

(4) In this section—

“hospital order” has the meaning given in section 37 of the Mental Health Act 1983;

“restriction order” has the meaning given to it by section 41 of that Act;

“supervision order” has the meaning given in Part 1 of Schedule 1A to this Act.

7.
The appellant was not subject to a special verdict that he was not guilty by reason of insanity (see section 5 (1) (a) of the 1964 Act). The appellant was found to be unfit to plead. In his sentencing remarks, Mr Recorder Wheeler stated: ‘Mr Z, the jury have reached the determination that you did in fact cause the injury to Mr H by using a knife which resulted in a wound of some 7 cm in length. This is a finding of fact the jury have come to. It is not a conviction ’ [my emphasis].

8.
It is apparent that the appellant was subject to section 5 (1) (b) of the 1964 Act; findings were made against him, a person under disability, that he had perpetrated the act with which he was charged. It would have been helpful to have had sight of the formal documents produced by the Crown Court following the making of the hospital order. However, from the material before me, I am satisfied that the appellant was a person subject to an order under section 5 of the 1964 Act. He was not, therefore, a person convicted of an offence. That conclusion is consistent with the comments of the sentencing judge (see above). It follows that the appellant is, for the purposes of section 117C, not a foreign criminal because he has not been convicted of an offence. He does not fall within the definition of 'foreign criminal' in section 117D because, although he has been sentenced to detention under a hospital order (see section 117D(4)(c) and KE), he has not been convicted in the United Kingdom of an offence (section 117D(2)(b)). The First-tier Tribunal, therefore, did not err in law by finding that the appellant is not a foreign criminal for the purposes of section 117C.

9.
The remaining grounds of appeal concern the judge's assessment of the appellant's circumstances under HC 395 (as amended). I record here that the appellant has not claimed that he is in a relationship with another person or that he has any children. Paragraphs A398, 398, 399 and 399A provide:

A398. These rules apply where:

(a) **a foreign criminal** liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention; [my emphasis]

(b) ...

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest 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, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399...

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

10.
At [34-37], the judge discusses the conflicting decisions of the Upper Tribunal in OLO (paragraph 398 – 'foreign criminal') [2016] UKUT 00056 and Andell (foreign criminal – paragraph 398) [2018] UKUT 198. In OLO, the Upper Tribunal held that the term 'foreign criminal' in paragraph A398 should be construed consistently with the definition in section 117D of the 2002 Act. In Andell, on the other hand, the Upper Tribunal concluded that the words 'foreign criminal' are 'simply words denoting the person is a criminal and a foreigner' [25]; the Tribunal considered that it was unnecessary for the definitions in the Rules and in the statute to be construed identically.

11.
In the instant appeal, the judge held at [36-38] as follows:

36. I accept the submission made on behalf of the Appellant that OLO should be preferred because of the detailed analysis in the case of the explanatory notes to the Immigration Act 2004 and the legislative history, and the fact that Andell was decided without reference to OLO.

37. In any event, even if Andell is correct, I accept that the Appellant cannot be classified as a criminal because he has not been convicted of an offence and therefore does not fall within paragraph 398 of the Immigration Rules. Even if I am wrong on this and his behaviour can be categorised as offending, he does not come within 398 (a) or (b) because those paragraphs expressly require convictions. 398 (c) applies where in the view of the Secretary of State, offending has caused serious harm, or the person is a persistent offender who shows a particular disregard for the law. The Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

38. If he does come within 398C arguably his offending caused serious harm. However, the incident occurred following an argument with a cousin and must be considered in the context of his mental illness. His health has now improved and provided he complies with his medication the risk to the public is minimal. Whilst in the UK he remains on conditional discharge and can be recalled to hospital if his behaviour leads to concerns.

12.
It is clear from what the judge says at [37-39] that she proceeded on the basis that the appellant may be classified as a foreign criminal for the application of the immigration rules ('..even if Andell is correct...' 'If he does come within 398C… '). Leaving aside the question as to whether it was even necessary for the judge to consider whether the Immigration Rules had any relevance, having concluded (correctly) that the statutory provisions did not apply, it is clear that the appellant, whilst he may be 'foreign', cannot properly be described as a 'criminal'. The jury in the appellant's trial had found that he had 'done the act…charged against him' (section 4A of the 1964 Act). In other words, the jury found that the actus reus had been present; however, it made no finding that the appellant had possessed the mens rea for the offence. Therefore, since there had been no finding that the appellant possessed both elements required for a criminal act, it cannot in law be said that he had 'committed an offence', that he is an 'offender' or, indeed, that he is a 'criminal'.

13.

Whilst I am inclined to agree with what the judge says at [36] regarding Andell and OLO for the reasons she gives, there is no need for me to reconcile those decisions in this appeal. That is because the appellant is not, for the reasons I give at [12] above, a 'foreign criminal' for the purposes of paragraphs A398-399 of the Immigration Rules. That conclusion stands notwithstanding that the appellant may have been 'sentenced' to a hospital order (see KE).

14.
Since the provisions as regards foreign criminals do not apply to this appellant, he falls to be considered under paragraph 276ADE:

Requirements to be met by an applicant for leave to remain on the grounds of private life

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM; and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(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); or

(vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.

15.
At [41], the judge wrote:

In any event, if I am correct in my conclusion that the Appellant does not fall within the definition of foreign criminal I find that he satisfies paragraph 276 ADE (1) (v) of the Immigration Rules as he is under 25 and has spent more than half of his life in the UK. For the reasons given above I find that he can demonstrate very significant obstacles to integration in Pakistan.

The problem with this part of the judge's analysis is that she failed to consider whether the appellant may fall for refusal under those parts of Appendix FM referred to at sub-paragraph (i). Certainly, those parts of the suitability requirements which concern foreign criminals do not apply to the appellant but the more general provisions of S-LTR 1.6 ('…character, associations or other reasons make it undesirable to allow them to remain in the United Kingdom') may do so and those provisions the judge did not address.

16.
That leaves the application of paragraph 276ADE (vi). The judge addresses that provision at [39]. Although the judge refers to 'very compelling circumstances (sic)' I am satisfied that her analysis applies equally to the words of the correct test:

If 398C applies to the Appellant, it is conceded that he cannot meet the requirements of 399A because he has not resided in the UK lawfully for at least half his life. Nevertheless, whilst taking account of the strong public interest in deporting foreign criminals who commit serious offences, in this case I accept the submissions made on the Appellant's behalf that there are very compelling circumstances. He has lived in the UK since age 11, has no experience of independent living or of gainful employment. He suffers from a moderate learning disability and schizoaffective disorder and requires 24-hour care and supervision in a supported living environment. Without that support he risks relapse and would be at risk of exploitation by others. I have found above that there is nobody upon whom he could rely on in Pakistan. Furthermore, significant stigma attaches to mental illness in Pakistan, the Respondent's response to country of origin information records that the "stigma against mental illness is rampant in Pakistan. It is sustained by popular belief in spiritual cures... The Pakistani government also plays a large role in the continued stigmatisation of mental illness. It has a lack of psychiatric hospitals or mental health practitioners. The Respondent's CPIN Pakistan: Medical and Healthcare Issues records that there are no truly specialised institutions for the treatment of mental disorders. There are only five government run psychiatric hospitals for a population of 180 million and there are fewer than 300 qualified psychiatrists practising in Pakistan. Mental health is the most neglected field in Pakistan and the majority of psychiatric patients go to traditional faith healers and religious healers.

17.
I find that here the judge's analysis is both concise and accurate. The respondent has raised no challenge to this part of the decision and I find that it is apparent from the judge's findings that there exist very significant obstacles to the integration in Pakistan of this young appellant, who has resided in the United Kingdom for many years, who suffers from a serious schizoaffective disorder the management of which requires continuous treatment and monitoring and who has nobody in Pakistan able or willing to assist him. The appellant is not subject to the Immigration Rules or statutory scheme concerning the deportation of foreign criminals and he satisfies the rules for a grant of leave to remain on the basis of his private life. Accordingly, I find that, by allowing the appeal, the judge did not err in law and that the Secretary of State's appeal should be dismissed.

Notice of Decision

The appeal of the Secretary of State is dismissed.

Signed Date 17 March 2020

Upper Tribunal Judge Lane

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.