Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/26234/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27th March 2018	**On 5th April 2018**

Before

THE HONOURABLE MR JUSTICE EDIS
DEPUTY UPPER TRIBUNAL JUDGE A. L. McGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ERROL ROCHESTER WARD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr. Duffy, Home Office Presenting Officer
For the Respondent: Ms. Quereshi, instructed by Pillai & Jones

DECISION AND REASONS

Mr Justice EDIS:

1. This is an appeal by the Secretary of State for the Home Department (SSHD) against a decision by Judge of the First Tier Tribunal Parker promulgated on 9th November 2017 (the Decision). In it, the judge allowed Mr. Ward's appeal against

the decision of the SSHD in a letter of 4th November 2016 to deport him to Jamaica and to refuse his human rights claim.

2. The case concerns the proper approach to s.117C of the Nationality, Immigration and Asylum Act 2002 which regulates the deportation of foreign criminals. Mr. Ward is a Jamaican national who was

   a. Convicted of attempted robbery on 20th April 2005 at the age of 17 and sentenced to a community order with a supervision requirement of 12 months.

   b. Cautioned for theft on 28th December 2005, now 18.

   c. Sentenced to 7 years' imprisonment after a trial on 17th August 2014 for possessing a loaded handgun with intent to endanger life. This is the conviction which resulted in the SSHD's decision and which is the subject matter of this appeal.

3. The FTT Judge heard oral evidence and made detailed findings of fact. Mr. Ward was born on 10th August 1987 and came to the UK on 18th December 2000 as a visitor for six months. On 28th August 2007 he was granted indefinite leave to remain. There had been a short period of overstaying before that, but by the date of the decision Mr. Ward had been lawfully resident in the UK for 9 years and 8 months. He was then 28 years old. He has family members in the UK, namely his mother and sister.

4. The Judge found that Mr. Ward had always lived with his mother and sister in the UK and had never lived independently. He has no family, friends or property in Jamaica and has never lived independently. He has significant learning difficulties and a very low IQ, which fell within the range of 52-60. The judge had before her a quantity of medical records and opinions which also showed that he suffers from a congenital heart defect.

<u>The offence</u>

5. The offence of which the respondent was convicted was at the highest end of seriousness. He was arrested carrying a loaded handgun while travelling through

Kilburn in London in a convoy of two cars with a number of associates. The criminal purpose of the expedition was never revealed but it was plainly something which required the deployment of a loaded firearm. In cases of this kind the safety of the public is plainly engaged. The judge when sentencing decided that the dangerousness provisions of the Criminal Justice Act were not engaged and imposed a substantial sentence after a trial. It is, we think, important in assessing this case to record that the respondent denied the offence but was convicted by the jury. This requires a degree of scepticism about what is said by him and on his behalf which is not always apparent from the decision of the Judge. The sentencing judge accepted that he was not a ring leader in the expedition and that he may have been exploited by others, but the conviction meant that the jury was sure that he had possessed that firearm with the intention of endangering life. That was a finding about his state of mind, and not that of anyone else. The jury which made it had heard from a doctor during the trial. It means that the jury was sure that his intellectual restrictions did not prevent him from forming an intention to endanger life with the loaded firearm he was carrying. This conviction was the basis of the deportation decision, and placed the respondent in a category where the public interest required his deportation unless there were very compelling circumstances over and above those identified in the statutory provision to which we will now turn.

The statutory framework

6. The Judge considered the case by reference to paragraphs 398, 399 and 399A of the Immigration Rules, rather than s.117A and 117C of the 2002 Act, but this is not necessarily a fatal error. It does, however, mean that her decision did not follow precisely the scheme of the Act which is somewhat different from that of the Rules. It is the Act which applies to the Tribunal's decision making and this, unlike the Rules, is a source of primary law: see the discussion in *NE-A (Nigeria) v. SSHD* [2017] EWCA Civ 239. The provisions are very similar in their effect, but they are somewhat differently structured.

7. The relevant regime is contained in Part 5 of the 2002 Act which, so far as relevant, provides:-

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).

…

117C. 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.

8. Mr. Ward had been sentenced to a term of imprisonment of 7 years and so, by s.117C(6) the public interest requires deportation unless there are very compelling circumstances, over and above those described in the 2 exceptions. In the Rules that consideration is conducted by deciding whether the case is within rules 399 or 399A and, if not then the public interest will only be outweighed by other factors where there are very compelling circumstances over and above those described in those rules. The factors identified in the Rules are the same as those contained in the two exceptions in the Act.

<u>The approach of the Judge</u>

9. The Judge's analysis was, as we have said, governed by her use of the Rules rather than s.117C, but in essence she decided that

a. Mr. Ward had not been lawfully resident in the UK for most of his life;

b. He was socially and culturally integrated in the UK; and

c. There would be very significant obstacles to his integration into Jamaica.

10. The Judge did not consider Exception 2, probably because of the very slight difference in phrasing between the Act and the Rules. The Act makes it clear that the necessary "very compelling circumstances" can only be found in circumstances over and above those in the two exceptions. This is the effect of the Rules, but perhaps their wording is not quite so clear on the point. This is relevant because Exception 2 concerns family life but only by reference to partners and children. If a foreign criminal in a less serious category than the respondent cannot qualify by this route, it would be surprising if the relationships of a more serious foreign criminal which are not within the statutorily protected class, such as relationships of adult children with their parents or siblings could be "very compelling circumstances". The "very compelling circumstances" must be over and above factors within *both* exceptions. It is of importance that Parliament decided that a relationship with a qualifying partner or child was a factor of weight for those who had been sentenced to terms of less than 4 years, but that those who had been sentenced to more than 4 years had to show "very compelling circumstances" over and above that. A relationship of an adult child with a parent or sibling is not within Exception 2, because Parliament decided that it was, in most cases, of less significance than relationships with partners and children. It would be surprising if a relationship which is not within Exception 2 could without more amount to a very compelling circumstance over *and above* those described within Exception 2.

11. In her decisions about cultural integration in the UK and significant obstacles to reintegration into Jamaica, the Judge examined the evidence about Mr. Ward's life in the UK and future in Jamaica if deported, and did so with considerable care.

12. She noted in respect of his integration in the UK that

> "… I am not satisfied that the commission of criminal offences – even serious offences – is sufficient for a finding that a person is not culturally and socially

> integrated, particularly in a case such as this where the appellant arrived at the age of 13 and has spent all his life here ever since. The appellant finished his education in the United Kingdom. He has not been able to secure employment owing to his learning difficulties and lack of educational qualifications, but he has lived here throughout with his mother and sister. He has very close relationships with them and knows people in the local community. He has participated in schemes designed to improve the employment prospects of those with learning disabilities. The appellant has no ties in Jamaica and I am satisfied that the appellant is socially and culturally integrated into the United Kingdom."

13. In relation to the significant obstacles to Mr. Ward's reintegration in Jamaica she said that he had no family there and would be returning to a country which he had left at the age of 13. She said that he had always depended on others and had never lived independently. His mother does everything for him. He can make his own breakfast and work the television and the CD player. He has difficulties reading and writing and has very limited numeracy. She analysed a series of reports about him from various experts, including a learning disability specialist practitioner from HMP Wormwood Scrubs who said that he was not capable of living alone, vulnerable to bullying and said

> "I cannot see if he will be able to manage if deported as he is completely dependent on his mum for all his personal and social care needs and would not last very long in a country he is unfamiliar with."

14. Concerns about Mr. Ward's safety in prison had been expressed because he was unwilling to talk to anyone about any threats to him except his mother and a plan was developed to monitor his communications with his mother so that the staff could learn what was worrying him. The Judge pointed out that his mother will not be there in Jamaica. She concluded

> "I am not satisfied that the appellant would be able to live independently in the United Kingdom without support and it follows that he would be unable to do so in Jamaica. ... I am not satisfied that the appellant would be able to access this help [from the NGOs and agencies which may provide support and

> assistance in Jamaica]. His inability to read means that he would not be able to read the report. Further, he is unable to advocate for himself and has relied upon adult intermediaries, generally his mother, to access help here. It is common ground that there is no-one in Jamaica who could help or support him. I am satisfied that there are significant obstacles to the appellant's integration into Jamaica."

15. The task of the judge, having made those findings, was now to remind herself that in order to avoid the deportation of the respondent it was necessary to find very compelling reasons over and above them. We do not believe that this means that it is necessary to ignore all the evidence which supported those conclusions, and only to consider what other material there is which might amount to such reasons. No doubt the existence of very significant obstacles to integration in Jamaica is not a merely binary question. It may be that in a particular case those obstacles may not just be very significant, but may actually mean that it will be impossible for a person to integrate into Jamaica. The necessary exercise, however, requires the court to acknowledge that the statutory scheme which requires the deportation of foreign criminals who have been sentenced to four or more years in prison even though they face very significant obstacles to integrating in the country to which they are to be deported. This is the effect of the decision of the Court of Appeal in *NA (Pakistan) v Home Secretary* [2016] EWCA Civ 662, [2017] 1 WLR 207. The Court concluded at [29] that a foreign criminal facing deportation is not "altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that 'there are very compelling circumstances, over and above those described in Exceptions 1 and 2'". The position is rather that:

> "*... a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paragraphs 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those exceptions and those paragraphs, which made his claim based on article 8 especially strong*".

16. "Very significant obstacles" is nevertheless a substantial threshold and to it is to be added the fact that the statutory scheme also applies to those who are socially and culturally integrated in the United Kingdom. The statutory scheme thus contemplates the removal on policy and safety grounds of those who will suffer really serious adverse consequences as a result. What may amount to "very compelling reasons" over and above this starting point will be a matter for judgment in each case, but that judgment is made within that statutory context.

17. The Rules, but not the amended ss117A-C of the 2002 Act, were considered in *Ali v Home Secretary [2016] UKSC 60, [2016] 1 WLR 4799*. Lord Reed JSC, with whom the other members of the Court agreed, explained the effect of the Rules at [38]. His observations must now be read with the qualification that the tribunal is now required not merely to have proper regard to the policy of the SSHD as reflected in the Rules, but to apply the law as enacted by Parliament. He said this at [38]:

> *"The implication of the new rules is that paragraphs 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of paragraphs 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in the SS (Nigeria) case [2014] 1 WLR 998 . The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State."*

18. Lord Reed said this at [46]:

> *"... in particular, that a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life; that great weight should generally be given to the public interest in the deportation of a foreign offender who has received a custodial sentence of more than 12 months; and that,*

where the circumstances do not fall within paragraphs 399 or 399A, the public interest in the deportation of such offenders can generally be outweighed only by countervailing factors which are very compelling, as explained in paras 37–38 above."

19. Where those circumstances are said to include the rehabilitation of the foreign criminal since the offending, the Court of Appeal has given guidance. In *OH (Serbia) v Home Secretary [2008] EWCA Civ 694, [2009] INLR 109* , Wilson LJ (as he then was) derived at [15] the following propositions from earlier case-law. Once again, this describes the position before the enactment of s.117A and 117C of the 2002 Act:

"*(a) The risk of reoffending is one facet of the public interest but, in the case of very serious crimes, not the most important facet.*

(b) Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.

(c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes. [In *Ali v Home Secretary*, Lord Wilson JSC said at [70] that he now regretted this reference to society's "*revulsion*" (that being, he considered, "*too emotive a concept to figure in this analysis*"), but he adhered to the view that he was "*entitled to refer to the importance of public confidence in our determination of these issues*"].

(d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the [Secretary of State] and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the [Secretary of State] in the context of the facts of the case. Speaking for myself, I would not however describe the tribunal's duty in this regard as being higher than 'to weigh' this feature."

20. In *Taylor v Home Secretary* [2015] EWCA Civ 845. Moore-Bick LJ, with whom McCombe and Vos LJJ agreed, said at [21]:

"*I would certainly not wish to diminish the importance of rehabilitation in itself, but the cases in which it can make a significant contribution to establishing the compelling*

> *reasons sufficient to outweigh the public interest in deportation are likely to be rare. The fact that rehabilitation has begun but is as yet incomplete has been held in general not to be a relevant factor: see SE (Zimbabwe) v Secretary of State for the Home Department [2014] EWCA Civ 256 and PF (Nigeria) v Secretary of State for the Home Department [2015] EWCA Civ 596 . Moreover, as was recognised in SU (Bangladesh) v Secretary of State for the Home Department [2013] EWCA Civ 427, rehabilitation is relevant primarily to the reduction in the risk of re-offending. It is less relevant to the other factors which contribute to the public interest in deportation*."

21. We would add that rehabilitation is not an absolute standard, or guarantee. A person may make great efforts at rehabilitation but experience shows that there very frequently remains at least a risk of further offending. The risk of re-offending is not extinguished but reduced. That is a further reason why tribunals should be careful before allowing evidence of rehabilitation to displace the clear statutory presumption in favour of deportation of those who have been sentenced to four years or more in prison.

The approach of the judge to "very compelling circumstances"

22. The judge identified Mr. Ward's learning disabilities as being the factor which might amount to very compelling circumstances because they created "*a high degree of dependency on his mother and, to a lesser extent, his sister.*" The judge found that he would be at real risk if returned to Jamaica, saying

> "*The appellant's learning difficulties are key in this decision as they are the reason that the appellant would encounter significant obstacles to integration in Jamaica but more fundamentally would, I find, struggle to survive. He has nowhere to live and nobody top support him. I am not satisfied that he would be capable of finding gainful employment or living independently. His size and learning disabilities render him liable to bullying and abuse. He is a vulnerable person. His mother fears that if left in Jamaica he would not last long on the streets. Having regard to the evidence about the appellant's inability to live independently and his vulnerabilities I do not believe that the appellant's mother's fears are exaggerated."*

23. The judge then reminded herself of the public interest in deportation and said the risk of re-offending was a "significant matter". Although no clear finding on the level of risk was made, the judge referred to a number of pieces of evidence which

suggested that the risk may have reduced. This came from Mr. Ward himself, and from various people to whom he had spoken while in prison. The Disabilities Specialist Practitioner referred to above reported that she felt that while in Wormwood Scrubs Mr. Ward had "*developed and matured into a sensible and more aware individual*". In her final paragraph she appeared to accept the "*low risk of reoffending in the recent OASys report*", and to regard that as decisive in relation to the public interest in deportation. She had earlier accurately set out what that report actually said. She said

> "*The appellant was assessed, in the OASys report, as being at a low risk of reoffending. The risk of serious harm in the event of re-offending was assessed as "low" as far as children, known adults, and staff were concerned but "high" in respect of the public. I understand this latter categorisation to be significantly based upon the serious nature of the index offence."*

Discussion and decision

24. There is a clear tension between the findings of the judge about vulnerability and rehabilitation. On the one hand Mr. Ward is so vulnerable and easily led that he will not be able to live independently in Jamaica or the United Kingdom. This, she said at [68], "*has led to him being involved in offences in the past*". On the other, he has developed and matured so that he will not fall into crime again as a result of the influence of others. That tension is not addressed or resolved in the judgment.

25. Further, and in any event, the judge appears to us to have fallen into error by failing to apply the guidance summarised at [19] and [20] above. Rehabilitation is treated by the judge as the complete answer to the public interest in deportation, whereas it is actually irrelevant to significant features of the public interest as identified above.

26. Finally, it appears to us that she may have accepted the evidence of Mr. Ward that the offence of possession of the firearm with intent to endanger life may have been committed because of threats to himself and his family by his associates (whom he said he did not know). There is nothing in the sentencing remarks to support this and Mr. Ward was convicted after a trial. He ran a defence which was rejected. It

may not, as the judge said, follow automatically that his account of duress was rejected by the jury but the possibility that it may not have been should only properly be contemplated after careful scrutiny of the proceedings in the Crown Court. The sentencing judge accepted that he may have been "*exploited by one other or others*" which is very different from a finding that he may have been pressurised by threats of violence into behaving as he did. That finding by the sentencing judge was a judicial determination of fact for the purposes of sentence and should only be displaced by a tribunal acting judicially by clear and acceptable evidence. The assessment of the seriousness of the offence is central to the decision in two ways: (1) it goes to its seriousness and to the public interest in deportation by virtue of the clear terms of s.117C(2) to which the judge did not refer; (2) it directly affects the risk to the public of offending in the future. It might be though that it is very unlikely that any group of criminals would recruit an accomplice to carry their gun who was unknown to them by threatening his mother. That such circumstances might be repeated more than once in a lifetime may seem very improbable and so, if that was the motive for the offence, the risk may indeed be low. On the other hand, if he decided to join in voluntarily because his associates knew of his willingness to please and exploited it that would suggest that the risk may be quite high.

27. In the same context, the judge recorded, and presumably did so because she placed some weight on it, the opinion of the Offender Manager that the offence did not involve any "*direct victim and it was unclear if anyone was targeted*." Mr. Ward was convicted of intending to endanger life with the loaded handgun he was carrying. Neither he nor any accomplice ever divulged the true reason why he was doing this which is why the identity of the person or persons whose life was to be endangered is unclear. This makes his position worse not better.

28. For these reasons we consider that the judge's treatment of the public interest in deportation was flawed. She placed too much weight on rehabilitation and in any event reached her conclusions about it on a flawed understanding of the findings

of the Crown Court and without adequate regard to her own findings about the vulnerability of Mr. Ward to abuse and manipulation by others.

29. That being so, we have concluded that there was an error of law in the determination which must be set aside. The appeal of the SSHD is allowed.

30. The question remains, however, whether the judge's findings summarised in the passage quoted at [22] above amount to very compelling circumstances over and above those identified in Exceptions 1 and 2 in s.117C of the 2002 Act. This is not an easy question. There is no challenge to the findings on which this conclusion was based and it resolves really into a very short point: Mr. Ward's learning difficulties and consequent dependency on others are the "very significant obstacles" to integration in Jamaica. For a 30 year old single man the lack of family support or ties in Jamaica would not otherwise count for anything in the balancing exercise required by the 2002 Act. As explained above, the statutory scheme expressly contemplates that foreign criminals will be deported even when they will suffer significant hardship. s.117C(2) requires the tribunal to have regard to the seriousness of the offence. In the present case, that is very high. Even for this offender, who was not the ringleader and who may have been exploited by others, it warranted a term of imprisonment of 7 years. It involved a group travelling for a criminal purpose on the streets of London with a loaded handgun. The Crown alleged and proved against this offender that he intended to endanger life.

31. Although we share the difficulty of the judge at a human level in contemplating the deportation of Mr. Ward, it appears to us that our public duty as imposed on us by the 2002 Act in its present form requires us to dismiss his appeal. This offence is simply too serious to allow the personal hardship to Mr. Ward to outweigh the public interest. This includes, as we explain above, the importance in retaining public confidence in the determination of these issues. We are fully aware of the consequences of this decision, in particular for Mr. Ward's mother and sister, as well as for him. After the most anxious consideration, nevertheless we have concluded that we must allow the appeal and set aside the decision of the

judge. We remake the determination adopting the findings of the judge except where we have already indicated otherwise. For the reasons set out above we dismiss the appeal of Erroll Rochester Ward.

Notice of Decision

The appeal of the Secretary of State is allowed. The appeal against the decision of the Secretary of State by Erroll Rochester Ward is dismissed.

No anonymity direction is made.

Signed Date

Mr Justice Edis

TO THE RESPONDENT

FEE AWARD

We have dismissed the appeal of Erroll Rochester Ward and therefore there can be no fee award.

Signed Date

Mr Justice Edis