Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/01068/2017

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 3 January 2019	**On 8 February 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOUAYED MANMOUN BASHIR

Respondent

Representation:

For the Appellant: Mr C Howells, Senior Home Office Presenting Officer
For the Respondent: Ms M Bayoumi, instructed by Qualified Legal Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against a decision of the First-tier Tribunal (Judge Povey) allowing the appeal of the respondent (hereafter "the claimant") against a decision of the Secretary of State dismissing his human rights claim under Art 8 following a decision to deport the claimant taken on 5 January 2017 on the basis of his criminality.

2. In allowing the claimant's appeal, Judge Povey found that the public interest did not require his deportation because he fell with Exception 1 in

s.117C(4) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002"). Section 117C(3) states that:

> "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".

3. Exception 2, set out in s.117C(5), is not relevant to this appeal. Section 117C(4) sets out Exception 1 in the following terms:

> "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".

4. The claimant, who is a Sudanese national, was born on 7 August 1991. He came to the UK, with entry clearance, on 13 April 2001 when he was 9 years, 8 months and 6 days old. At the date of Judge Povey's determination, namely 27 April 2018, the claimant was 26 years, 8 months and 20 days old.

5. In his determination, Judge Povey accepted that Exception 1 in s.117C(4) applied. His reasons are at paras 23–24 as follows:

> "23. Exception 1 (section 1117C(4) (*sic*) of the NIA Act 2002 and reflected in Paragraph 399A of the Immigration Rules) is, in my judgment, met by the Appellant. He has been lawfully resident in the UK (save for a period of three months in 2005) since the age of nine. He is now 26. In my judgment, his criminal convictions do not undermine his social and cultural integration into UK society, a society he has grown up in, been educated in, worked in and spent his whole adult life to date in. He works, cares for his mother and volunteers in the community. His recent criminal behaviour was, in part, caused by his own drug addiction, an addiction which he has now ended. It is that length of time in the UK, the lack of any background in or knowledge of Sudan (as confirmed by Dr Bekalo), the lack of a common language and his cultural integration into UK society that constitute very significant obstacles to his integration into Sudan.
>
> 24. For that reason, the public interest does not require the Appellant's deportation. That weighs very heavily in his favour. His 2016 convictions were for serious offences. However, as evidenced by the various criminal justice reports, the roots of his behaviour lay in his addiction and the financial cost of maintaining his drug habit. The risk of further related offending has been significantly lessened by the Appellant's drug use rehabilitation whilst in prison. As no other basis for his deportation was advanced, I conclude that the Respondent's decision to deport the Appellant is a disproportionate interference when weighed against his private life in the UK".

6. The Secretary of State appealed against Judge Povey's decision challenging each of his findings under the three limbs in s.117C(4)(a)–(c).

7. In summary, Mr Howells (adopting the grounds of appeal) submitted that the judge had miscalculated the claimant's period of "lawful residence" in the UK and that he had not spent "most of [his] life" in the UK. Mr Howells relied upon a chronology which he produced at the hearing. He submitted that, at the date of Judge Povey's decision, the claimant was 26 years, 8 months and 20 days old. In order to meet the requirement in s.117C(4)(a) he had to have been lawfully resident in the UK for at least thirteen years, four months and ten days. On a calculation of his lawful residence in the UK, he had only been lawfully resident for thirteen years, three months and fourteen days. The judge had, therefore, been wrong to find that the claimant had spent "most of [his] life" (i.e. more than half his life) lawfully in the UK.

8. In addition, Mr Howells submitted that in concluding that the requirement in s.117C(4)(b) that the claimant was "socially and culturally integrated in the United Kingdom", the judge had failed properly to take into account his five convictions for nine offences between 2010 and 2016 which were the antithesis, he submitted, of "integration" into the UK.

9. Finally, Mr Howells submitted that in finding that there would be "very significant obstacles" to the claimant's integration into Sudan, so that s.117C(4)(c) applied, the judge had failed to give clear reasons and properly taken into account that the claimant had previously lived there, visited Sudan to attend his grandfather's funeral when he was 17, and had an uncle there with whom he was in contact. He also submitted that the judge failed to take into account that, in accepting that the claimant did not speak Arabic, he claimed to be the carer of his mother in the UK and that she had given her evidence at the hearing in Arabic. Mr Howells accepted, however, that there was no evidence before the judge as to why she chose to give evidence through an interpreter. Mr Howells readily acknowledged that the expert, Dr Bekalo, had stated in his expert report that the claimant "barely speaks and understands Arabic". He did not pursue this point with any force, as a consequence.

10. It is plain that Judge Povey allowed the claimant's appeal on the basis that the claimant fell within Exception 1 in s.117C(4) of the NIA Act 2002. In para 23, he made the relevant factual findings under the three limbs of Exception 1. At para 24 he stated that: "[f]or that reason, the public interest does not require the appellant's deportation".

11. Ms Bayoumi, who represented the claimant, accepted the chronology, setting out the claimant's immigration status over time, prepared by Mr Howells, was accurate. It is clear that the claimant entered the UK on 13 April 2001 with valid entry clearance and, following its subsequent extension and unsuccessful appeal, that leave (continued by s.3C of the Immigration Act 1971) ended on 6 April 2004. That is a period of two years, ten months and 23 days. The claimant thereafter did not have

leave to remain until he was granted indefinite leave to remain on 6 December 2007. That leave continued until Judge Povey's decision on 27 April 2018 (which it was accepted before me was the correct date to determine the period of the claimant's 'lawful residence'). That is a further period of ten years, four months and 21 days. That makes in total a period of 'lawful residence' of thirteen years, three months and fourteen days. For completeness, I should add that it was accepted before me that, in the light of the Upper Tribunal's decision in Tirabi (Deportation: "lawfully resident: s.5(1)) [2018] UKUT 199 (IAC), in calculating the claimant's period of 'lawful residence' under s.117C(4)(a) the invalidation provisions of s.5(1) of the Immigration Act 1971 were to be ignored even though a deportation order was made on 5 January 2017.

12. The phrase "most of C's life" in s.117C(4)(a) means that the claimant, in order to fall within its terms, must establish that he has been in "lawful residence" for "more than half" of his life (see SSHD v SC (Jamaica) [2017] EWCA Civ 2112). As Mr Howells' chronology demonstrates, the claimant could not establish that. His total period of lawful residence was only thirteen years, three months and fourteen days which fell short of at least half of his age at the date of the judge's decision, namely 26 years, 8 months and 20 days. It is not clear why Judge Povey accepted that he had been lawfully resident in the UK for the entirety of his residence, apart from a three month period in 2005. The true position, now accepted by both parties' representatives, demonstrates otherwise.

13. For that reason alone, the judge erred in law in concluding that the claimant met the requirements of Exception 1 in s.117C(4) and, as the judge stated in para 24 of his determination, therefore "the public interest does not require the appellant's deportation".

14. At least initially, Ms Bayoumi sought to persuade me that the judge had, nevertheless, properly considered the only basis upon which the claimant's appeal could succeed, namely that he met the requirement in s.117C(6) that: "the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2".

15. Section 117C(6) is, in fact, the sole basis upon which a foreign criminal can succeed if they have been sentenced to a period of imprisonment of "at least four years". That is not the claimant's circumstances. However, in NA (Pakistan) v SSHD [2016] EWCA Civ 662, the Court of Appeal accepted that, in the case of a "foreign criminal" who had not been sentenced to a period of imprisonment of "at least four years" but who could not succeed in establishing Exception 1 or 2, nevertheless, they could succeed if they established that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2" (see [24]–[27]). Despite Ms Bayoumi's spirited attempt to persuade me otherwise, it is clear that Judge Povey allowed the claimant's appeal solely on the basis that Exception 1 applied. That is plain from a reading of his determination. Section 117C(6) is nowhere mentioned in the determination and is explicitly not

included in para 11 where he sets out 117C(1)–(4). Further, his reasoning and conclusion in paras [23]–[24] is solely concerned with Exception 1.

16. Both representatives accept that if my conclusion was that Judge Povey had wrongly found that the requirement in s.117C(4)(a) was met, the proper disposal of the appeal was to set aside the judge's decision and remit it to the First-tier Tribunal for a *de novo* rehearing. Both representatives acknowledged that none of the judge's findings should stand including those in respect of s.117C(4)(b) and (c) and that it was not necessary for me to reach any conclusion on Mr Howells' submissions on limbs two and three of s.117C(4).

17. In the light of that, I am satisfied that the judge materially erred in law in allowing the claimant's appeal on the basis that Exception 1 in s.117C(4) of the NIA Act 2002 applied.

18. The First-tier Tribunal's decision cannot, as a consequence, stand and I set it aside.

19. The appeal is remitted to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Povey.

Signed

A Grubb
Judge of the Upper Tribunal

16 January 2019